

(4) Finally, as to the "spirit of confidentiality" of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case; here again, it should be noticed that the articles published in Indonesia provided the readers with more details on the arbitral procedure than the one published in *The Hong Kong Business Standard*.

(5) All these remarks do by no means weaken the good and fair practical rule, according to which both parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult. However, in the circumstances of the case, the Tribunal does not find any symptom of an intention of the one or the other party to take steps that could have such consequences; accordingly, the Tribunal does not deem it appropriate to issue a recommendation to the parties – which, moreover, is not requested by Claimants – such recommendation not seeming to be presently needed.

(6) For the above stated reasons, the Tribunal rejects the Respondent's Request for Recommendation of Provisional Measures.

[Source: This decision is published in full in English in 89 *International Law Reports* 402.]

AWARD, 20 NOVEMBER 1984

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PART I - PROCEDURE AND FACTS

CHAPTER I – 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 (hereinafter called "the Respondent").

Paragraph 1 of the said Request stated 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, a "Proposal ... for disqualification of an arbitrator", filed by the Respondent on June 21, 1982, was rejected by the two unchallenged arbitrators 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 their Request for Arbitration which concluded that the Claimants "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 Counter-Memorial (hereinafter called "CM") on December 30, 1982, which besides opposing the merits of the Claimants' claim, raised objections to jurisdiction which were the subject matter of an award on jurisdiction by the Tribunal.

4. Details of the procedures which were followed on the jurisdictional questions are given in the Award on Jurisdiction of September 25, 1983 to which reference is hereby made in this respect. In said award, the Tribunal decided 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.

As to the description of the subject-matter of the dispute, thus mentioned, reference is hereby made to the excerpts of Claimants' conclusions in their Reply to Indonesia's Counter-Memorial and in their Rejoinder to Indonesia's Observations on Jurisdiction, reproduced in the Award on Jurisdiction, and in particular to the conclusion of Claimants' Rejoinder which read 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 Claimant's causes of action.

The definition of said causes of action, as presented by the Claimants and discussed by the Respondent during the procedure on the merits is to be found hereunder (see para. 142).

5. After the Request for Arbitration was filed with the ICSID, the parties filed the following briefs on the merits (some of which dealt with jurisdiction as well, but they are mentioned hereunder only in respect of the allegations and contentions they contain on the merits):

- Claimants' Statement of Facts and Law, dated June 21, 1982;
- Respondent's Counter-Memorial, dated December 30, 1982;
- Claimants' Reply to Indonesia's Counter-Memorial, dated February 28, 1983;
- Indonesia's Rejoinder on the Merits, dated October 31, 1983.

6. Two sessions of hearings were held to hear witnesses and oral argument, namely:

- in Washington DC, from December 19 to December 23, 1983;
- in Copenhagen (Denmark) from March 19 to March 23, 1984.

During the first session, the following witnesses testified:

Mr Antonius Josephus Schussel,
Major X,
Mr. Y. Z.,
Mr Tan Tiin Koon.

called by Claimants;

General Soeryo Wirjohadipoetro,
Sergeant Sugiono,
Mr Soewardhi,
Mr Rachmat Harsono,
Mr John Nikijuluw,
Mr Mahmud Usman,
Mr Nick J. D. Oroh,
Mr W. Max Machfud, called by Respondent.

However, Mr Machfud was withdrawn by Respondent as a witness; accordingly, no reference will be made in this award to his testimony.

During the second session, the following witnesses testified:

Mr Gerald Nemeth,
Mr Albert J. Gomes, called by Claimants;

Mr Thomas Binting,
Mr Peter Purcell, called by Respondent.

During this same session, Mr William Rand and Mr Robert N. Hornick presented final oral argument for Claimants; Mr Charles N. Brower and Mr David J. Branson presented final oral argument for Respondent. Also appearing were Mr Paul D. Friedland for Claimants, Ms Carolyn B. Lamm, Mr W. Michael Tupman and Professor S. Gautama for Respondent.

CHAPTER II — FACTS

Section I – Setting up of Investment

A. 1968 Lease and Management Agreement

7. The dispute before the Tribunal has for its genesis an investment in Indonesia contemplated in 1968 by a US citizen, Mr Max E. Moore. Mr Moore thought, in 1967, that as a result of the economic situation then pertaining in Indonesia, there would be opportunities for venturesome private foreign investors who could, at the same time, provide considerable assistance to the economic recovery of the host country.

8. Mr Moore undertook one or two projects in Jakarta in 1967 and 1968, which were evidently successful, and as a result of this experience was approached by an Indonesian company, PT Wisma Kartika (hereinafter referred to as "PT Wisma"), which had the rights to some land at Jalan M. H. Thamrin, No. 10, in Jakarta, Indonesia, to see whether Mr Moore, or one of the companies he controlled, would be interested in participating in a hotel project on the site.

9. PT Wisma was established in October, 1964, under the same PT Pembangunan and Pengurus Flat Bluntas, commonly known as PT Bluntas,

by the Bank of Indonesia and an Indonesian private investor to acquire the Jalan Thamrin site and to develop thereon an apartment/hotel complex. The project progressed to the stage where the structural framework of the basement and the first two floors of the proposed building had been erected when construction stopped in 1965 due to lack of funds. In 1967, at the order of the new Indonesian Government, both the Indonesian private investor and the Bank of Indonesia, who together owned all of the issued and outstanding shares of PT Bluntas, sold such shares to Induk Koperasi Angkatan Darat, Indonesian army personnel (sic). Inkopad was formed under Law No. 12 of 1967, which is the Law on the Basic Regulation for Cooperatives in Indonesia. According to its Amended Articles of Association, amended on June 29, 1979, Inkopad is a cooperative of various other "Central Cooperatives in the sphere of the Indonesian Army" and is "functional in nature" (Resp. Legal Appendices vol. IX. Tab A-3). Its purpose is "to administer the organization and methods of work of its members in an effort to achieve the well-being of soldiers and their families", and a "vehicle for helping Army Leadership" in connection with the welfare of military personnel and their dependents. Some of the tasks assigned to Inkopad, according to its Amended Articles of Association, are to encourage savings by its members, organizing activities in, among other things, general travel, low-cost housing, the hotel industry, tourism, consulting and construction, providing guidance to members in their various ventures, providing education to "members of the Indonesian army and society in general to increase their knowledge" of cooperatives. Among other things, each member of Inkopad is entitled to be elected to the Board of Directors "provided Army Leadership has not decided otherwise". Only a person who, "in the estimate of the Army Leadership, is capable of taking on the responsibilities of a Director" can act as a Director and in the performance of his tasks, a Director must be "mindful of the decisions of (the) Army Leadership". According to Article 19 of the Amended Articles of Association, Inkopad "is under the government's guidance and supervision which is carried out by the Government Official and Army Leadership". In testimony presented to the Tribunal, it was stated that the Chairman of Inkopad is an active army officer and is nominated by the army-Chief-of-Staff, but that the Chairman reports to the Welfare Officer of the army (see Washington Testimony of General Soerjo at 634-5). Likewise the budget and certain other matters concerning Inkopad are sent to the Indonesian army staff. Inkopad caused the name PT Bluntas to be changed to that of PT Pembangunan dan Pengurusan Wisma "Kartika" or PT Wisma "Kartika" (Cl. Doc. 2 and Resp. CM, pp. 20-1 and Resp. Exh. to CM, vol. I Nos 10 and 11). PT Wisma was reorganized (Resp. Exh. to CM, vol. VII No. 12), and began to seek ways to develop the Jalan Thamrin site to which it had rights into a hotel, because at that time, Jakarta needed hotels of international standards which could be used by international businessmen and investors who wished to visit Indonesia.

10. After Mr Moore was approached by PT Wisma about the hotel Project, serious negotiations ensued and a lease and management agreement (hereinafter referred to as the "1968 Lease and Management

Agreement") was made and entered into on April 22, 1968 by and between (a) Amco Asia Corporation (hereinafter referred to as "Amco"), a company incorporated in the State of Delaware, USA, and represented for the purpose by Mr Moore, who was described as the President of Amco and its South East Asian representative, and (b) PT Wisma, represented for the purpose by Lieu Col. (Ret.) H. Suetjipto (Cl. Doc. 3).

11. The 1968 Lease and Management Agreement called for Amco to complete, at Amco's cost, the construction of the structure on the Jalan Thamrin site which had been abandoned since 1965, namely the basement and two stories of what the 1968 Lease and Management Agreement called, "the Annex". Moreover, Amco undertook to build another six storey high rise section of the building. The Annex was intended for shops and offices, whereas the high rise was to be for a "hotel and/or apartments". Amco undertook to invest "up to the sum of US \$4,000,000 (four million dollars US) both for the completion of the Annex and for the construction of the High Rise", of which "up to US \$1,000,000", (divided into "up to US \$800,000" as "Equity Capital Investment" and "up to US \$200,000" as "Loan Capital Investment" was to be used for the Annex and "up to US \$3,000,000" (divided into "up to US \$2,200,000" as "Equity Capital Investment" and "up to US \$800,000" as "Loan Capital Investment") was destined for the high rise. PT Wisma was to contribute five million (5,000,000) rupiahs "for use by Amco Asia and to furnish certain existing air conditioning equipment". The Annex was to be completed no later than fifteen months from the date the Indonesian Foreign Capital Investment Committee granted its approval for Amco's investment in Indonesia, and the high rise was to be finished no later than twenty-four months after completion of the Annex (in both cases delays caused by *force majeure* were to be considered permissible delays and thus the completion dates set by the parties could be extended accordingly). The construction was to be "in accordance with accepted standards and practices" and the fittings, materials and equipment were to be of "a reasonable standard". In consideration of the financing and the carrying out by Amco of the construction and outfitting of the structures, PT Wisma agreed to grant Amco a nineteen year lease for both structures commencing on the date of the completion of the Annex. A profit-sharing agreement was specified as follows:

- for the first five years of the lease term:
Amco = 90%, PT Wisma = 10%
- for the next five years:
Amco = 85%, PT Wisma = 15%
- for the five years thereafter:
Amco = 75%, PT Wisma = 25%
- and for the remainder:
Amco = 50%, PT Wisma = 50%.

There was a provision in the 1968 Lease and Management Agreement to the effect that Amco had the option of either establishing a wholly owned Indonesian subsidiary in the framework of the Foreign Capital Investment Act No. 1 of 1967 or establishing a joint venture company with PT Wisma. It

was agreed that all disputes would be settled first, "by means of direct communication and negotiation", and then, if this approach did not bear fruit, "impartial arbitration" would be the vehicle for the settlement of disputes, and if the parties could not agree on an arbitrator, reference would be made to the President of the International Chamber of Commerce in Paris.

B. Foreign Capital Investment Law – Act No. 111967

12. Following the establishment of the "New Order", both politically and economically in Indonesia, it became apparent to the Indonesian Government that in order to build up the economy, foreign capital would have to be attracted to invest in the country, and in order to accomplish this goal, certain tax and other concessions would have to be granted to foreign investors. Thus, in January 1967, Act No. 111967 entitled "Re: Foreign Capital Investment" was enacted (hereinafter referred to as the "1967 Foreign Investment Law").

13. The 1967 Foreign Investment Law stated by its terms that it applied to 'direct investment of foreign capital', which was defined as:

- a. foreign exchange which does not form a part of the foreign exchange resources of Indonesia, and which with the approval of the Government is utilized for financing and enterprise in Indonesia,
- b. equipment for an undertaking, including rights to technological developments and materials imported into Indonesia, provided that said equipment is not financed from Indonesian foreign exchange resources,
- c. that part of the profits which in accordance with this law is permitted to be transferred, is instead reinvested in Indonesia.

14. According to the 1967 Foreign Investment Law, a foreign enterprise in order to benefit from its provisions had to be constituted as "a legal entity organized under Indonesian law and have its domicile in Indonesia". Such entities could not have a duration of longer than thirty years.

15. The Indonesian Government was empowered to determine which fields of activity were open to foreign investors and to establish on a case by case basis the conditions a foreign investor had to meet in order for such investor's application to receive approval. The foreign investor, once his investment application was approved, had the full right to appoint management for its Indonesian operations but was required to employ Indonesian nationals whenever possible.

16. To meet the requirements of the foreign enterprises it was possible that "land with the right of construction, the right of exploitation, and the right of use" could be obtained.

17. As mentioned above, one of the main attractions to foreign investors of making an approved investment in Indonesia in the context of the 1967 Foreign Investment Law was the tax concessions which were available, namely:

- a) exemption from corporation tax on profits for a period to be negotiated but not in any event greater than five years from date of production started;

- b) exemption from dividend tax on accrued profits paid to foreign shareholders on profits earned during "a period not exceeding five years from" the date of production started;
- c) exemption on accrued profits after deduction of taxes and other financial obligations in Indonesia, which the foreign investor was entitled to remit outside of Indonesia but which if it did not remit but reinvested in Indonesia, for a period not to exceed five years from the date of reinvestment;
- d) exemption from import duties at the time of entry of machinery, equipment, materials and supplies needed to operate the foreign investor's business;
- e) exemption from capital stamp tax "on the movement of capital originating from foreign capital investment";
- f) reduction of corporation tax to "a proportional rate" of not more than 50%, for a period not exceeding five years after the expiry of the exemption referred to in a) above;
- g) any loss incurred during the tax-exempt period referred to in a) above could be carried forward indefinitely after the expiry of the said tax-exempt period;
- h) allowance for accelerated depreciation of fixed assets; and
- i) other concessions which may be granted on a case by case basis.

18. Indonesian companies established by foreign investors under the aegis of the 1967 Foreign Investment Law had the right under the said law to transfer out of Indonesia in the currency of the original investment, the following:

- a) accrued profits "after deduction of taxes and other financial obligations in Indonesia";
- b) costs relating to the employment of foreign personnel working in Indonesia;
- c) other costs determined from time to time by the Government;
- d) "depreciation of capital assets";
- e) "compensation in case of nationalization"

Transfer permits or capital repatriation were not to be granted as long as the tax concessions referred to in paragraph 11 above were still in effect.

19. It should be noted that the 1967 Foreign Investment Law did not consider loans, even those from foreign sources, as constituting "foreign capital" for purposes of the law. Nor did the said law set out any sanction in the event a foreign investor breached the terms of its foreign investment approval or licence. However, sanctions were provided for by other regulations (see hereunder, para. 193).

C. Application by Amco for a Foreign Investment Licence

20. On May 6, 1968 (even though it is stated as being May 6, 1967) Amco submitted to the Government of the Republic of Indonesia an "Application

to Establish PT Amco Indonesia" (hereinafter referred to as the "Investment Application" (Cl. Doc. No. 5, Resp. Exh. to CM, vol. I No. 4) in which, among other things, Amco, citing the provisions of the 1967 Foreign Investment Law, sought permission to carry out business in the field of real estate "in the broadest meaning of the word, without limitation, among other things involving the acquisition, purchase, leasing, rental, construction, rehabilitation management and other such actions on all types and forms of real estate property such as buildings, hotels, offices, recreation places and so on" in Indonesia, and to establish PT Amco Indonesia (hereinafter referred to as "PT Amco") as the vehicle through which such business was to be carried on. PT Amco was to have a thirty year existence.

21. The capital of PT Amco, as set out in the Investment Application, was to be US \$3,000,000 "all of which represents share capital divided into three hundred (300) shares with a nominal value of US \$10,000 each", and all of which "represents foreign capital". The capital was to be "deposited stage by stage and may take the form of cash, capital goods or both". Reference was made in the Foreign Investment Application to an "Attachment V", which was evidently annexed to the Investment Application and which apparently was entitled "Deposit Schedule and Form of Capital" and which supposedly set out the schedule according to which the foreign investment was to be made and the manner of form in which it was to be contributed by Amco. This important piece of evidence apparently could not be located by any of the parties and thus was not made available to the Tribunal.

22. Inward and outward remittances of funds in respect of the Amco foreign investment "insofar as Government Regulations permit and make possible", were to be effected through "the Supplementary Foreign Exchange Account (D. P. Account)".

23. In its original Investment Application (which was subsequently amended, see para. 28 below), Amco sought the following concessions from the Indonesian Government:

- a) the right to transfer profits;
- b) the right to transfer business personnel costs, such as a portion of salary, pension funds and others;
- c) depreciation on fixed capital;
- d) costs/fees for the payment of foreign contractors and others;
- e) exemption from corporate tax for five years;
- f) exemption from dividend tax for five years;
- g) exemption for stamp duty on capital at the time of the establishment of PT Amco;
- h) exemption from import duties on the import of capital;
- i) exemption from import duties for two years with the possibility of the extension of such exemptions for the import of spare and replacement parts.

24. The Investment Application contained an arbitration clause which stated that if a dispute arose between PT Amco and the Government of

Indonesia, the dispute would be put before the International Centre for Settlement of Investment Disputes.

25. It appears that six attachments, including the Annual Report and other information, references, bonafides, and proof of financial strength of Amco, the Deposit and Form of Capital Schedule, a copy of the 1968 Lease and Management Agreement and a Power of Attorney were annexed to the Investment Application. Of the six, only the 1968 Lease and Management Agreement was produced to the Tribunal (see para. 21 above).

26. On May 11, 1968 the Indonesian Foreign Investment Board, the body charged with preliminary examination of foreign investment proposals, conveyed to Mr Moore certain changes in the Investment Application which the Board would like to see. It seems that the Board also advised Mr Moore that if he accepted the suggested changes to the Investment Application, the Board would recommend approval of the Investment Application immediately.

27. Apparently Mr Moore agreed verbally to the Foreign Investment Board's recommended amendments to the Investment Application because on May 11, 1968 the Chairman of the Indonesian Foreign Investment Board wrote on behalf of the Board to the Chairman of the Foreign Investment Evaluation Body of Indonesia, to the effect that the amended Investment Application "has been studied ... and agreed upon in principle" by the Board. In addition, the Board proposed "that permission to invest be left to the power of the Minister of Public Works" (Cl. Doc. vol. I No. 6).

28. On May 13, 1968 Amco Asia, based on its previous discussions with the Foreign Investment Board (see para. 26 ff. above), filed an Amendment to its Investment Application (Resp. Exh. to CM, vol. II No. 16). According to the Amendment, the purpose for which Amco sought permission to establish PT Amco was redefined and narrowed to: "to be active in the field of real estate business, namely to construct new buildings, rehabilitate existing business, and control, sell and rent out these buildings". The authorized share capital of PT Amco was to remain the same as that set out in the original Investment Application, namely US \$3,000,000 but was to be composed differently: whereas originally the US \$3,000,000 was to be divided into three hundred (300) shares with a nominal value of US \$10,000.00 each, it was, according to the Amendment, to be changed to US \$3,000,000 divided into thirty thousand (30,000) shares with a nominal value of US \$100.00 per share.

29. In the Amendment the tax concessions sought by Amco for PT Amco were amended as follows:

- a) the right sought to transfer the costs/fees for the payment for persons other than foreign contractors was deleted;
- b) the exemption sought from corporate taxes was reduced from five years to three years;
- c) the exemption sought from dividend tax was reduced from five years to three years;
- d) the exemption sought from import duties on the import of capital w

- e) the exemption from import duties originally sought for only two years with the possibility of extending such exemption to the import of spare and replacement parts, was amended by eliminating any time frame for the exemption of import duties with respect to the import of capital goods and extending same to parts for such capital goods, but this exemption was only to apply if PT Amco used "its own foreign exchange or supplemental foreign exchange in the limits set in the Government regulations in force".

30. In addition, Amco agreed that any methods it might use for calculating profits or losses in its private business relationships and dealings in Indonesia would not be binding on the Government which, for the purposes of taxes, would be entitled to determine PT Amco's profits/losses in accordance with the Government's prevailing laws and regulations.

31. On May 13, 1968, the President of the Republic of Indonesia wrote to the Minister of Public Works that, based on the letter of May 11, 1968, from the Foreign Investment Board (see para. 27 above), the President agreed "in principle" to Amco's Amended Investment Application (Cl. Doc. vol. I No. 7).

32. On July 29, 1968, the Minister of Public Works of Indonesia granted permission to Amco to establish PT Amco within the framework of the 1967 Foreign Investment Law and in accordance with the Investment Application, as amended, and ordered that PT Amco be established within two months of his grant of permission.

D. Establishment of PT Amco

33. The Articles of Incorporation of PT Amco were set out in Notarial Document No. 106 of Notary Abdul Latief on September 27, 1968 (Cl. Doc. No. 10). The said Deed establishing the Articles of Incorporation was signed by Mr Max Eugene Moore, as representative of Amco and Mr Zoelkarnain Ali, acting pursuant to a Power of Attorney as representative of Mr Tan Tjin Kuan (hereinafter referred to as "Mr Tan"), described as a "businessman, dwelling in Vancouver, Canada, Dutch Citizen".

34. The Articles stated that the purpose and objectives of PT Amco was to:

be active in the field of real estate business, that is managing: the construction of new buildings, the rehabilitation of existing buildings, management, sales and rentals of said buildings; with the understanding that the meaning of said real estate business does not include construction contracting in any form whatsoever.

35. The Articles stated that PT Amco was to "begin operations on the day these Articles of Incorporation have been approved and validated by those who have authority to do so", which in the circumstances was the Minister of Justice of Indonesia.

36. Furthermore, according to Deed No. 106, PT Amco was to "be

established for a period of seventy-five years" (this provision, as it will be seen later, was not acceptable to the Minister of Justice because it did not conform with the amended Investment Application and was subsequently amended: see para. 39 below).

37. The authorized capital of PT Amco was to be US \$3,000,000 divided into 30,000 shares, with a par value of US \$100.00 each. Of the authorized capital, 20% or 6,000 shares of a par value of US \$600.00 were declared as issued, with 10% having been paid up, half of which were issued to and paid for by Amco and the other half of which were issued to and paid for by Mr Tan. Later, it was confirmed that this amount was paid in cash. No mention was made in Deed No. 106 as to when the balance of the authorized capital had to be paid except a provision to the effect that additional issue of shares was to "be at times determined by the Board of Directors, giving consideration to the regulations of the Government, which require that each party concerned be notified in writing". (The question as to when the balance of the authorized capital was to be paid up was also subsequently clarified at the request of the Minister of Justice, see para. 39 below).

38. The Articles of Incorporation were submitted on November 8, 1968 to the Minister of Justice for approval in accordance with Indonesian law but evidently his Ministry raised certain issues with which it was not satisfied, including those referred to in paragraphs 36 and 37 above, among others, and accordingly on December 13, 1968, Notary Abdul Latief before whom Notarial Doc. No. 106, which contained the PT Amco Articles of Incorporation was signed, executed Notarial Document No. 49, for the purpose, as it was put, "to avoid differences with the party responsible for approval" of the Articles of Incorporation. Notarial Document No. 49 amended the duration of PT Amco's existence from the seventy-five years contemplated in Notarial Document No. 106 to "a period of thirty years under authority of Law No. 1 of the year 1967, regarding Foreign Capital Investment, except if said permission for Foreign Capital Investment is renewed" (Cl. Doc. 10). This amendment brought the Articles of Incorporation into line with the amended Investment Application and the approval of the Minister of Public Works.

39. Notarial Doc. No. 49 also added a new provision to the Articles of Incorporation, namely, that "the entire unissued portion of shares must be issued within a period of ten years, beginning today, unless this time period should be extended by those responsible, or if required at the request of the Board of Directors". The Tribunal does not know whether or not this text was added in order to bring the Articles of Incorporation of PT Amco into conformity with the amended Investment Application, because, as alluded to earlier (see para. 21 above), the Tribunal was not furnished with the Attachment V to the amended Investment Application which contained the time schedule and form according to which Amco was to pay up the US \$3,000,000 it undertook to invest in PT Amco. At any event, no evidence of any decision to extend the time period of ten years was put before the Tribunal.

40. On January 25, 1969, the Minister of Justice approved the said Articles of Incorporation of PT Amco, which were then registered at the

Central Jakarta District Court on January 29, 1969. On April 4, 1969, the Articles of Association of PT Amco were published in Supplement No. 27 to the State Gazette of Indonesia No. 41 of 1969 (Cl. Doc. 10).

Section 11 - Implementation of the Investment

A. Participation of Pan American Development Limited in PT Amco

41. On October 26, 1968, Amco Asia entered into an "Agreement of Appointment" with Pan American Development Limited (hereinafter referred as "Pan American"), a limited liability company incorporated on May 8, 1968, under the laws of Hong Kong, having its registered office at Room 312, Chartered Bank Building, Des Voeux Road, Honk Kong (Resp. Exh. to CM vol. II No. 20).

42. The Agreement of Appointment, which was described as being governed by the law of Hong Kong, and which was never made available to the Government of Indonesia, stated that Amco "in fact entered into" the 1968 Lease and Management Agreement with PT Wisma "as agent and nominee for and on behalf of "Pan American", and that Amco held its interest in the 1968 Lease and Management Agreement for and on behalf of Pan American.

43. On April 13, 1971, a written report was submitted to the Minister of Public Works, stating that "since the beginning (sic) Amco Asia Corporation and Pan American Development Co. Ltd have jointly invested their capital in the Hotel Kartika Plaza Project", and that Pan American was a foreign company incorporated in Hong Kong. The request, signed by the then General Manager of PT Amco, was then made seeking that Pan American be recognized as a "capital investor in the Hotel Kartika Plaza Project, together with Amco Asia Corporation" (Cl. Request for Arb. Exh. II; Resp. Exh. to CM, vol. II No. 23).

44. On April 25, 1972, the Secretary-General of the Ministry of Public Works, on behalf of the Minister of Public Works, wrote to the Subcommittee Chairman for Foreign Investment of the Foreign Investment Board, referring to the PT Amco letter of April 13, 1972 and stated that "permission is requested to transfer a portion of the shares held by Amco Asia Corporation to Pan American Development Co Ltd (sic)", and that the Department of Public Works "for the time being" had "no objection in principle" to the transfer (Cl. Doc. No. 34).

45. On May 1, 1972, the Vice-chairman of the Sub-Committee for Foreign Investment of the Foreign Investment Board wrote to the Secretary-General of the Department of Public Works to the effect that the Board had "principally no objection" to the partial transfer of shares of PT Amco by Amco to Pan American.

46. Based on this approved transfer, the Tribunal decided, in its Award on Jurisdiction, that it had jurisdiction in respect of Pan American. Accordingly, the present Award on the Merits concerns Pan American as one of the investors.

B. Evolution of Events Regarding the Leasing, Construction, Managing and Financing of the Kartika Plaza Project

a) Phase I

47. As seen earlier (see para. 11 above), the 1968 Lease and Management Agreement entered into on April 22, 1968 between Amco and PT Wisma, envisaged a two-phase project with regard to the Kartika Plaza: Phase I which was to be a low-rise structure, that is a basement and two floors of what was known as the Annex, which essentially entailed the completion of the structure which the previous owners and developers of the property had started but then abandoned (see para. 9 above); and Phase II was to be a high-rise structure, that is six storeys. Phase I which was to be used for shops and offices and was to be commenced within three months of the approval of Amco's Investment Application, was to be completed within twelve months of the start of work. Phase II was to be utilized as a "a hotel and/or apartments", but would only go ahead if Amco chose to do so, and if Amco did choose to proceed with Phase II, construction thereon was to commence no later than twenty-four months after the completion of Phase I and work on Phase II was to be finished within twenty-four months from the date of the start of work on such second phase (delays due to *force majeure* were to be considered as acceptable delays, thus permitting extensions to the agreed-upon deadlines).

48. As it turned out, Amco's amended Investment Application was approved by the Indonesian Minister of Public Works on July 29, 1968, and accordingly, pursuant to the terms of the 1968 Lease and Management Agreement, Amco was obligated to commence work on Phase I no later than October 29, 1968 and to complete such phase no later than October 29, 1969, permissible delays excepted.

49. Phase I was completed before October 29, 1969, and in fact this phase, which was redesigned to include 83 hotel rooms, was officially opened on October 6, 1969 (Cl. Doc. No. 2, at 33).

50. In the meantime, in view of the fact that PT Amco was officially and legally established on January 25, 1969 (see para. 40 above), Amco apparently transferred all its rights under the 1968 Lease and Management Agreement to PT Amco in January 1969 (Cl. Statement of Fact and Law, at para. 5a; and Cl. Doc. No. 14, 3rd whereas clause and signature page). While the Tribunal has not seen any direct evidence of such transfer, the point was not disputed by Respondent, and thus the Tribunal, for the purpose of this Award, accepts that such transfer did indeed take place in January, 1969, after PT Amco legally came into existence.

b) Commencement and enlargement of Phase II

51. It seems that although the Amco Group contractually had twenty-four months from October, 1969 to decide whether to proceed with Phase II of the Wisma Kartika Project, that is, the six storey high-rise building, they

determined much earlier to proceed with this part of the project since, apparently, on November 13, 1968, the Amco Group wrote to PT Wisma reporting that the structural work on the high-rise had already started (Cl. Doc. 4). Moreover, the Amco Group advised PT Wisma, in the same letter of November 13, 1968, that it planned to extend the high-rise to eight storeys instead of building just the six storeys envisaged by the 1968 Lease and Management Agreement. The letter of November 13, 1968, itself was not presented in evidence but was referred to in a letter dated January 24, 1969, from PT Wisma to PT Amco acknowledging receipt thereof and the report of the early commencement of the structural work on the high-rise building and accepting that the new structure would be eight storeys, that is two storeys higher than originally contracted for (Cl. Doc. No. 4).

c) Extension of the term of the 1968 Lease and Management Agreement to thirty years

52. Moreover, in the letter of January 24, 1969, from PT Wisma to PT Amco referred to in para. 51 above, PT Wisma agreed to extend the term of the 1968 Lease and Management Agreement to thirty years from the twenty year term which had previously been agreed upon (Cl. Doc. No. 4).

d) Relationship with Pulitzer, Garuda, KLM and Aeropacific

53. On August 22, 1969, PT Amco entered into an Agreement (hereinafter referred to as the "Sub-Lease Agreement of Intent"), with Mr Herbert Pulitzer Jr (hereinafter referred to as "Pulitzer"), a United States businessman, Koninklijke Luchtvaart Maatschappij NV, the Royal Dutch Airline, commonly known as KLM (hereinafter referred to as "KLM") and P. M. Garuda Indonesian Airways (hereinafter referred to as "Garuda"), the Indonesian national air carrier. For the purpose of the Sub-Lease Agreement of Intent, Pulitzer, Garuda and KLM were acting jointly.

54. The Sub-Lease Agreement of Intent stated that Pulitzer had obtained the franchise right to operate hotels in Indonesia from Howard Johnson Motor Lodges, Inc, a company well known in the United States at that time for its food outlets and its hotel and motel chain which it operated under the name of "Howard Johnson's Motor Lodges", and Pulitzer, Garuda and KLM expressed their common intent to establish a company in Indonesia, to acquire from Pulitzer the Howard Johnson hotel franchise. The Indonesian company to be established would be owned 51% by Pulitzer, and 49% by Garuda and KLM between them (Resp. Exh. to CM, vol. II No. 24).

55. It should be noted that in a post-script to the Sub-lease Agreement of Intent, both PT Wisma and Amco approved of and agreed to "respect" the terms of the document.

56. In view of the fact that as a result of the proposed arrangement between PT Amco and the Pulitzer Group, as envisaged in the Sub-Lease and Management Agreement of Intent, PT Amco was not going to manage the hotel as foreseen in the 1968 Lease and Management Agreement, Amco

and PT Wisma signed an addendum to the 1968 Lease and Management Agreement (which addendum was undated but which it seems was signed sometime after the First Sub-Lease Agreement of Intent, as hereinafter defined) setting forth how the profits from the property were to be shared between PT Wisma and Amco (and later PT Amco).

57. On October 15, 1969, a Sub-Lease Agreement (hereinafter referred to as the "First Sub-Lease Agreement") was entered into between PT Amco, on the one part, and Pulitzer, Garuda and KLM, jointly, on the other hand (with Pulitzer/Garuda/KLM "having the right to assign the rights and obligations" of the First Sub-Lease Agreement "to a limited company to be established by these three ...") (Resp. Exh. to CM, vol. II No. 25).

58 In the First Sub-Lease Agreement, Pulitzer, Garuda and KLM expressed their desire "to manage and to operate the Hotel", that is the Kartika Plaza Hotel, which was then partially completed with the rest being built by PT Amco, "under a licence from Howard Johnson's Motor Lodges, Inc (in the USA)", and accordingly Pulitzer/Garuda/KLM agreed to sub-lease the hotel from PT Amco on a net basis (that is, maintenance, repairs, including structural repairs, alterations, certain insurance and taxes were to be for the account of Pulitzer/Garuda/KLM) for a period of thirty years expiring October 1, 1999.

59. Under the First Sub-Lease Agreement, Pulitzer/Garuda/KLM were to have "absolute control and discretion in the use and operation of the hotel, which operation" was to "include all activities which are customarily and usually connected with such operation". The hotel was to bear the name "Howard Johnson's Hotel", although the entire project was to be known as "Kartika Plaza".

60. Pulitzer/Garuda/KLM further agreed to guarantee "credit facilities to any first class bank ... in the amount of One million US Dollars as security for a loan in the amount of One million US Dollars to be granted" by such bank to PT Amco "in order to enable" PT Amco "to complete the construction of the Hotel" upon the terms and conditions called for in the First Sub-Lease Agreement.

61. As with the Sub-Lease Agreement of Intent, PT Wisma and Amco noted in writing their respective approvals of the First Sub-Lease Agreement and their respective agreements to "respect" same.

62. On October 30, 1969, PT Amco borrowed US \$1,000,000 from Algemene Bank Nederland NV, London, England Branch (hereinafter referred to as the "1969 ABN Loan") (Resp. Exh. to CM, vol. II No. 29). The said loan was to bear interest at 10.5% per annum, and the principal was to be repaid on October 30, 1974. This loan was guaranteed by Pulitzer, Garuda and KLM and was made "in order to enable" PT Amco "to complete the construction of the Hotel" (Resp. Exh. to CM, vol. II No. 26 at p. 27). This arrangement was in fulfilment of the obligation of Pulitzer, Garuda and KLM contained in the First Sub-Lease Agreement (see para. 60 above).

63. A new Sub-Lease Agreement (hereinafter referred to as the "Second Sub-Lease Agreement") was signed on October 13, 1970, just under one year from the date of the First Sub-Lease Agreement, because as the Second Sub-Lease Agreement stated: "disputes and differences have repeatedly

arisen ... particularly as to whether the standards set by Howard Johnson's Motor Lodges, Inc have been observed in the erection of the hotel and such disputes have become so acrimonious and time-consuming that it would be impractical to continue with" the First Sub-Lease Agreement as same was structured and written (Resp. Exh. to CM, vol. II No. 26).

64. The parties to the Second Sub-Lease Agreement were PT Amco, on the one hand, and Aeropacific Hotel Association (hereinafter referred to as "Aeropacific", on the other hand. Aeropacific was described as "a partnership organized and existing under the laws of Indonesia, established and domiciled in Djakarta", whose partners were stated as being Pulitzer, Garuda and KLM, with the said partnership having "the right and obligation" to assign and transfer all of its rights and obligations contained in the Second Sublease Agreement to a Persarom Tarbatas (PT), an Indonesian limited liability company, to be established by the three partners.

It was intended that the Second Sub-Lease Agreement was to supersede and replace all earlier agreements between PT Amco and the Pulitzer/Garuda/KLM Group in respect to the "lease and operation" of the hotel, but the duration of the term was the same as that of the First Sub-Lease Agreement.

65. As opposed to the previous arrangements between Amco and the Pulitzer/Garuda/KLM Group according to which Amco was supposed to complete the construction of the hotel, the Second Sub-Lease Agreement called for Aeropacific to "complete the construction of the Hotel and furnish, equip and fit the same in all respects in accordance with Howard Johnson's standards ..." and it was to be the responsibility of Aeropacific "not only to complete the said Hotel but to remedy all defects and defaults therein". Moreover, Aeropacific agreed that at its own expense it would "pay all costs, expenses, charges, wages and outgoings of whatever nature incurred ... in completing the said Hotel" to meet the said Howard Johnson's standards. PT Amco agreed not to interfere with the work of completing the hotel.

66. The rental to be paid by Aeropacific was to be much the same as that called for in the First Sub-Lease except that to the gross receipts alternative computation of the rental payable contained in the First Sub-Lease Agreement, 15% of gross receipts from laundry charges, and 25% of gross receipts of swimming pool user charges were to be added.

67. In addition, Aeropacific agreed to assume and repay the US \$1,000,000 1969 ABN Loan with interest thereon and to obtain a full and complete discharge of PT Amco in connection with same. Indeed Aeropacific did do this and PT Amco was discharged from its liabilities under the 1969 Loan on March 3, 1971 (see attachment to Cl. Exh. 64).

68. In consideration of Aeropacific agreeing to undertake the cost of all the further construction and furnishing of the hotel and to fully assume and repay the 1969 ABN Loan, Aeropacific was entitled by the Second Sub-Lease Agreement to deduct and withhold from the annual rental payable by it to Amco 50% of such amount for a period of ten years, commencing on October 1, 1970, and ending September 30, 1980.

69. Because Aeropacific was not an entity approved under the Foreign

Investment Law, it could not import duty free goods, materials, equipment, machinery, furnishing, etc., necessary for the completion of the construction and furnishing of the hotel and thus Annex I to the Second Sub-Lease Agreement contained a description of a mechanism pursuant to which the parties agreed such items would be imported into Indonesia in PT Amco's name but with Aeropacific acting as PT Amco's agent under a Power of Attorney. Likewise, PT Amco agreed to open a bank account in its name, as permitted by the Indonesian Foreign Exchange regulations concerning entities which have been established pursuant to the 1967 Foreign Investment, which account was to be separate from PT Amco's other accounts, "and all foreign currency brought into the Republic of Indonesia" by Aeropacific "for the completion of the Hotel was to be paid into this account". However, as it will be shown hereunder (see para. 226) this clause was not actually implemented, since only small deposits were made into this account.

70. Once more, as in the Sub-Lease Agreement of Intent and the First Sub-Lease Agreement, PT Wisma and Amco approved and agreed in writing to "respect" the terms of the Second Sub-Lease Agreement.

71. The Indonesian Limited Company, or PT, which Pulitzer, Garuda, KLM and Aeropacific had stated in the Sub-Lease Agreement of Intent, and the First and Second Sub-Lease Agreements they were going to establish was finally constituted under the name PT Aeropacific Hotel Corporation (hereinafter referred to as "PT Aeropacific") by Notarial Document on January 27, 1971 and approved by the Indonesian Minister of Justice on November 5, 1971. At the time of incorporation, the stockholders of PT Aeropacific were: Pulitzer—51%, KLM—24.5%, and E. Suherman (as nominee of Garuda)—24.5% (Resp. Exh. to CM, vol. II No. 27). On May 15, 1975, PT Amco and PT Aeropacific agreed to "consider all rights and obligations of 'Aeropacific' as from the date of 'PT Aeropacific's official recognition' were 'transferred' to PT Aeropacific" (Resp. Exh. to CM, vol. II No. 27).

72. Within ten months after the date of the Second Sub-Lease Agreement, PT Aeropacific wrote to PT Amco stating that Howard Johnson's Motor Lodges, Inc, had informed PT Aeropacific that the former "will withdraw from South East Asia", and thus, "there is not much use in continuing the Licence Agreement" (between the Aeropacific Group and Howard Johnson's Motor Lodges, Inc) and accordingly PT Aeropacific was "compelled to agree with Howard Johnson's Motor Lodges, Inc to terminate the Licence Agreement as per September 1, 1971" (Resp. Exh. to CM, vol. II No. 28).

73. PT Aeropacific stated in the letter referred to in paragraph 66 above, which was dated August 23, 1971, that PT Aeropacific "shall continue to maintain and operate the Hotel in accordance with standards which are at least as good as Howard Johnson's standards" (Res. Exh. to CM, vol. II No. 28). A copy of this letter was sent to PT Wisma.

74. Construction of the hotel, which was undertaken since October 13, 1970 by Aeropacific Group continued and by the end of 1971 or early 1972, all eleven floors were built and 331 hotel rooms were available for use (Cl.

Doc. 2, p. 34 trans. and Resp. Jones Lang Wootton Report, p. 9). However, the "Record of Legal Completion of Kartika Plaza Building" was not signed between PT Wisma, PT Amco and "Aeropacific Hotel Association (PT Aeropacific Hotel Corporation)" (sic) until January 7, 1974 and November 24, 1974" (Cl. Doc. 12). As between PT Amco and PT Wisma a "Certificate of Completion of Kartika Plaza Building" was signed on March 23, 1977 (Cl. Doc. 13). This document was also signed by Amco, which was represented for the purpose by Mr Max E. Moore.

75. From the evidence to the Tribunal, it appears that PT Amco complained from time to time about the maintenance standards with respect to the hotel under PT Aeropacific's management and that rental payments were increasingly late and overdue (Resp. Exh. to CM, vol. II No. 38, pp. 5-6).

76. The uneasy relations between PT Amco and the Aeropacific Group were expanded to affect the PT Wisma/Inkopad Group after meetings between the then Chairman of Inkopad and President-Director of PT Aeropacific on April 5 and 7, 1978 (Cl. Doc. 43).

77. Legal skirmishing continued in the first few months of 1978 between PT Amco and the Aeropacific Group (Resp. Exh. to CM, vol. III Nos 34, 35, 36, 37, Cl. Doc. 45) and finally the matter was put to arbitration (Cl. Reply to CM, p. 71 and Resp. Exh. to CM, vol. II No. 38), and eventually solved by mutual agreement on March 29, 1980 (Resp. Exh. to CM, vol. II No. 39) but not before Inkopad itself took over possession and control of the Wisma Kartika property on June 1, 1978 (Cl. Doc. 46, 47 and 48).

78. From June 1, 1978, Inkopad undertook the management of the property. Faced, however, with the difficulties of actually carrying out the management functions with respect to the hotel, shops and offices of the property, without the assistance of professional managers, and with a certain unhappiness with the situation on the part of the Board of Directors of PT Wisma with the manner in which Inkopad took over the management of the property in June, 1978, and Inkopad's apparent inability to sustain an acceptable standard of management in addition to some lobbying on the part of Messrs Moore and Tan, Inkopad authorized PT Wisma to enter into with PT Amco a "Profit Sharing Agreement for the Management of the Kartika Plaza Land and Building with All Its Contents at Jalan M. H. Thamrin 10, Jakarta" (hereinafter referred to as the "1978 Profit Sharing Agreement") (Resp. Exh. to CM, vol. II No. 42) (see para. 81 and following below).

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

79. The Claimants allege that, on March 31/April 1, 1980, the Indonesian Government "wrongfully seized" control and management of the hotel from PT Amco in what was described by Claimants as "an armed, military action" (Cl. Request for Arbitration, p. 12, para. 30, and Cl. Statement of Fact and Law, p. 7, para. 11).

80. Without, at this point, going into the merits of this allegation, the Tribunal believes it useful to set out what the Tribunal considers to be the series of events leading up to March 31/April 1, 1980 and the occurrences of

those dates and following, which give rise to the Claimants' above-mentioned allegation.

81. The 1978 Profit Sharing Agreement (see para. 72 above) changed the terms set out in the 1968 Lease and Management Agreement between PT Wisma and Amco (subsequently transferred to PT Amco). Among other things, the 1978 Profit Sharing Agreement related in paragraph 2 thereof that "the management of the Kartika Plaza Land and Building with all its contents shall be carried out, implemented and the full responsibility" of PT Amco. In addition, the parties agreed that there would no longer be "the Excluded Areas and that PT Amco was to be charged with the management of the entire property" that is, the hotel, the offices and shops. A new profit sharing formula was envisaged for the period October 1, 1978 through September 30, 1984 pursuant to which "the net income" (as defined in the 1978 Profit Sharing Agreement) of the property was to be shared 65% for PT Amco and 35% for PT Wisma. For the period October 1, 1984 through September 30, 1999, the parties were to share the said net income on a 50/50 basis. Paragraph 4 of the 1978 Profit Sharing Agreement called for the establishment of a "Management Consulting Committee" (hereinafter referred to as the "MCC"), to consist of six members, being two representatives each of PT Wisma, PT Amco and Inkopad.

82. The MCC was mandated to "give advice and suggestions" to PT Amco with respect to the management of the property. On the other hand, PT Amco was to furnish information to the MCC "regularly" and was obliged to "take cognizance of and consider all advice and suggestions". The parties undertook that an effort should be made so that all disputes are settled "directly ... between the parties holding high the principle of "deliberation consensus" and mutual respect and the goal of secure and orderly business success". Moreover, the parties stated themselves as being fully cognizant of the obligations which arose from the 1978 Profit Sharing Agreement and pledged themselves to work hard to implement it successfully.

83. Upon resuming the management control of the property, PT Amco looked about to engage professional management for the hotel and in November 1978, hired Mr Richard Horan as General Manager of the hotel (Cl. Reply to CM, p. 66, para. M-1). Mr Horan at one time worked for the Hyatt Hotel in Chicago. He was assisted by one of Mr Tan's daughters.

84. Around the same time, that is November or December 1978, PT Amco, through Mr Tan and Mr Moore, began negotiations with the Ramada International Hotel Chain (Cl. Doc. 52), and on July 4, 1979, PT Amco entered into a management agreement and a licence agreement (hereinafter collectively referred to as the "Ramada Management Agreements") with Ramada International Inc and Ramada Inns Inc respectively, both companies being members of the Ramada International Hotel Management Group (hereinafter referred to as "Ramada") (Resp. Exh. to CM vol. II No. 43). The Tribunal does not consider it necessary to describe in detail the contents of the Ramada Management Agreements, but suffice it to say that the said Agreements provided for Ramada to furnish to PT Amco management services, including supervision, direction and control of the management and operations of the hotel for a ten year period. Ramada was to select and assign

(subject to PT Amco's prior approval) a general manager for the hotel, although his salary was to be paid by PT Amco.

85. No direct evidence was produced to the Tribunal as to what PT Wisma's reaction was to the Ramada Management Agreements, although it appears that PT Wisma was well aware of this development and did not object to it. Indeed General Karim and Mr Zoelkarnain Ali, both PT Wisma appointees to the MCC, attended the signing of the Ramada Management Agreements in Brussels, Belgium on July 4, 1979 (Cl. Reply to CM at 69).

86. Mr Horan resigned as General Manager of the hotel in April 1979, and was replaced by Mr Ali, who carried the title of Acting General Manager (Cl. Reply to CM at 68). Mr Ali himself was replaced in July 1979 by Mr Albertus Salindeho, previously Acting Sales Manager of the hotel (Cl. Reply to CM at 69 and Cl. Doc. 53), but Mr Ali upon learning of his removal, lobbied for his reappointment and effective July 31, 1979, he was appointed (and Mr Ali, in a curious handwritten note written on a notice of his reinstatement, undertook that "the case to give over (K)artika Plaza to the Army is herewith withdrawn" (Cl. Reply to CP p. 70 and Cl. Doc. 53). Mr A. J. Schussel, who was selected by Ramada to be the General Manager of the hotel, arrived in Jakarta in November, 1979 (Washington testimony p. 32). His appointment as General Manager was approved by the MCC "with effect from December 11, 1979" at a meeting of the MCC held on December 20, 1979 (Resp. Exh. to CM, vol. III No. 44), and he received his Indonesian work permit with effect from November 29, 1979 on February 9, 1980 (Cl. Doc. 56).

87. Except for their mutual agreement with respect to the Ramada Management Agreements, the Tribunal was not made aware as to what the exact state of the relationship was between PT Wisma and PT Amco during the period October, 1978 through October, 1979. On the other hand, the Tribunal does know that for the period November, 1979 to March 31, 1980, there were a number of matters over which the parties disagreed. These included (i) a desire by PT Wisma to obtain from PT Amco details pertaining to a proposed Rp. 200 million renovation of the hotel; (ii) a desire by PT Wisma to obtain from PT Amco a breakdown regarding the income and expenses for the excluded area of the property and the profit sharing figures in connection therewith; and (iii) (from December, 1979) a desire by PT Wisma for information from PT Amco with regard to the calculation of the profits of the hotel for 1978 and 1979 as well as profit projections for the year 1980 and the amount of the parties respective profit shares for such years; and (iv) the amounts actually distributed to PT Wisma by PT Amco.

88. It appears that there were serious disagreements on these issues, particularly item (iii), that is the amounts which the respective parties thought were due by PT Amco to PT Wisma. These issues were raised at the MCC meetings in November and December 1979 (Resp. Exh. to CM, vol. IV No. 44) and were the subject of correspondence back and forth between the Parties on February 14, 1980 (PT Amco to PT Wisma), March 11, 1980 (PT Wisma to PT Amco), March 12, 1980 (PT Amco to PT Wisma), March 12, 1980 (PT Wisma to PT Amco), March 15, 1980 (PT Amco to PT Wisma), March 19, 1980 (PT Amco to PT Wisma), March 25, 1980 (PT Wisma to PT

Amco) (Resp. Exh. to CM, vol. III Nos 45-52 and Cl. Doc. 57). The immediate matter upon which there was a failure to agree was the amount of the profit share for the year 1978 and 1979 to which PT Wisma thought it was entitled, PT Wisma taking the position that a balance of Rp. 34,312,175 (US \$54,609) was still due to it by PT Amco, and PT Amco, basing itself on its own calculations, maintaining that such sum was not due, although on March 15, 1980, PT Amco cited "certain problems with accounting technicalities" for not being in a position to finalize all figures. Moreover, PT Amco acknowledged that it was aware that PT Wisma and Inkopad had the "impression that there is a certain vagueness with regard to the implementation of the October, 1978 Agreement", that is, the 1978 Profit Sharing Agreement.

89. Accordingly, in its letter of March 11, 1980 (Resp. Exh. to CM, vol. III No. 47) PT Wisma specifically stated that should there be "no realization (by March 15, 1978) concerning PT Wisma Kartika's property, we (i.e. PT Wisma) shall consider PT Amco Indonesia to be in default, so that the cooperation contract between us will be null and void and the management of the Hotel Kartika Plaza will be taken over by PT Wisma as the owner". Then on March 25, 1980, PT Wisma again writing to PT Amco, stated "... and if there has not yet been realization by the date that has been set (i.e. March 30, 1980), then the management of the land and all the Kartika Plaza Building ... along with all the contents, will be conducted by PT Wisma Kartika as the owner" (Resp. Exh. to CM, vol. III No. 51). These warnings were made notwithstanding the fact that the Profit Sharing Agreement called for the settlement of disputes "holding high the principles of deliberation to reach consensus and mutual respect" (Resp. Exh. to CM, vol. II No. 42).

90. In the event, PT Amco did not make the full payment of Rp. 34,312,175 (US \$54,609) to PT Wisma by the March 30, 1980 deadline imposed by PT Wisma, although making an "advance payment" of Rp. 10,000,000 (see Cl. Doc. 57). On March 31, 1980, the latter wrote to PT Amco noting that PT Amco had not paid the amount PT Wisma expected from "the proceeds of the management of the Kartika Plaza Hotel and Building" since "we (i.e. PT Wisma) handed over to you (PT Amco) the responsibility of management" of the property, and that PT Amco "did not seriously and honestly manage the Hotel/Building well, so that we (i.e. PT Wisma) are very worried whether we will be able to accept the Hotel/Building later if this cooperative relationship ends". PT Wisma went on to say that it "very much doubted" PT Amco's "ability and sincerity to deliver on the responsibility for managing the Kartika Plaza Hotel and Building". "Therefore", concluded PT Wisma, "we as owner of the Kartika Plaza Hotel/Building and land, hereby respectfully inform you (i.e. PT Amco) that as of March 31, 1980 the responsibility for the Kartika Plaza Hotel and Building management will return to PT Wisma Kartika and in order to implement management of Kartika Plaza Hotel and Building, the management has formed and appointed a Kartika Plaza Hotel and Building Management Council, which is chaired by Lt. General (Ret.) R. Soerjo" (Resp. Exh. to CM, vol. III No. 52).

91. It seems that PT Wisma had not anticipated receiving the sum it had demanded for payment no later than March 30, 1980 by such date, because according to the testimony of Major (Ret.) X who at various times was the security coordinator at the hotel and Mr Y. Z., Major X's sometimes assistant in security matters, they were present at a meeting held on that date (i.e. March 30, 1980) at the private home in Jakarta of Colonel Soejipto, the Chief Executive Officer of PT Wisma at which meeting the matter of a plan for the retaking of the control of the property by PT Wisma from PT Amco on or about March 31, 1980, was discussed, as were certain related security and management aspects of the plan including the "backing" and involvement of certain Indonesian army and police units in the planned take-over (Cl. Docs 96 and 97; Washington testimony at 310-15 and 504-8). Moreover, apparently by at least March 28, 1980, the PT Wisma people were preparing their moves, because Major X testified that he was invited to the meeting at Colonel Soejipto's home on March 30, 1980, referred to above "one or two days" before the meeting actually took place, such invitations having been extended by Mr Zoelkarnain Ali and a PT Wisma lawyer, Mr Anis (Washington testimony, p. 478). Moreover, General Soerjo, a Director of PT Wisma, testified before the Tribunal that it was on the evening of March 28, 1980 that he signed the letter from PT Wisma to PT Amco which letter was subsequently dated March 31, 1980, in which PT Wisma informed PT Amco that PT Wisma was taking back control of the Wisma Kartika property (see para. 90 above) (Washington Testimony, at 571-2, 590-1).

92. On March 31, 1980, coinciding with its letter of the same date to PT Amco, which letter is referred to above, Colonel Soejipto, Chief Executive of PT Wisma, issued a "Decree or Letter of Decision" which had as its subject matter "Re: Formation and Appointment of Management Council of Building/Hotel Kartika Plaza ..." (Cl. Documentary Submissions in Support of Rejoinder to Resp. Observations on Jurisdiction No. 89). This document citing the necessity to provide for the management of the Kartika Plaza facility in "a healthy and honest manner" announced the creation of a Management Council of six persons, to be chaired by Lt. General R. Soerjo. The Council, according to the Decree/Letter of Decision, was to be given the "fullest authorization to manage (the property) and to achieve the best Possible result" in such endeavour. This decision became effective, in accordance with its terms, on March 31, 1980 at 8 a.m.

93. Accordingly, it appears that from March 31, 1980, PT Wisma considered that it had taken the control and management of the hotel from PT Amco, with the latter not having any further role to play in connection with the property. On that date a notice was issued by the Directors of PT Wisma, to "All Manager and Department Heads of Hotel Kartika Plaza and the Excluded Areas", regarding the question of "Responsibility for Management of the Kartika Plaza Hotel and Building", in which the Directors of PT Wisma stated:

Herewith we notify you that as of March 31, 1980 the responsibility for the management of the Kartika Plaza Hotel and Building, including the Excluded

Area, is to be carried out by PT Wisma Kartika. To this effect, the Directors (of PT Wisma) have formed and appointed the Management Council of the Kartika Plaza Hotel and Building, which is headed by Lt. General (Ret.) R Soerjo.

The staff was requested "to work as usual and to be responsible to the Management Council".

94. There is some contradictory evidence as to when certain events occurred on March 31 and/or April 1, 1980. For example, it seems that a meeting of the managers and the department heads of the hotel took place at 9 a.m. in the Tiara Room of the hotel on 31 March, 1980. This meeting was apparently called by Colonel Soejipto of PT Wisma and was chaired by General Soerjo. Colonel Soejipto was present. Mr A. J. Schussel, the then General Manager of the hotel was not present because, according to General Soerjo, "he did not show up". Mr Schussel in his testimony stated he never received a notice of such meeting and was not aware of its occurrence. In any event, the said meeting was apparently very brief with the new PT Wisma-appointed Management Council representatives reiterating what was already set out in the Decree or Letter of Decision referred to earlier (see para. 92 above).

95. There is further ambiguity regarding Mr Schussel's activities on either March 31 or April 1. In his testimony before the Tribunal, Mr Schussel stated that he knew nothing about any PT Wisma activities regarding the take-over of the hotel until the morning of April 1, yet there was placed in evidence a copy of a memorandum dated April 2, 1980, signed by Djamaan Gumay, then Chief of Security of the hotel, which stated that at a meeting of the Senior Managers of the hotel held in the afternoon of March 31, 1980, Mr Schussel, who chaired the meeting according to the memorandum, asked his staff to cooperate with the PT Wisma newly appointed Management Council, in the interest of the continued smooth operation of the hotel (Resp. Exh. vol. VI No. 135). Mr Schussel himself recalled that the meeting at which he made such an appeal to his staff (and he further testified that he made such an appeal only once), took place in the afternoon of April 1, 1980. The Tribunal gives weight to this latter version of events because Mr Schussel in his testimony concerning this meeting testified that during the course of the meeting at which he asked his staff to cooperate with the M— Mr Tjengri, an employee of PT Amco "came in to deliver a notice that the meeting was illegal" (Washington testimony, at 102). A copy of this notice, which was signed by E. M. Tomodok, Vice-chairman of PT Amco was submitted to the Tribunal as an exhibit (Resp. Exh. vol. VI No. 124). It was dated April 1, 1980 and addressed to "all employees of Kartika Plaza Hotel with respect to the invitation to attend a briefing by those calling themselves the Management Committee of Wisma Kartika today April 1, 1980, to be held in the Tiara Room at 15:00 ...". The notice went on to state that PT Amco was entitled to manage the hotel, and accordingly the PT Wisma-appointed Management Committee was not entitled to exercise any management function. Moreover, the notice went on, no permission to utilize the Tiara Room had been given by PT Amco and that all employees

should not attend the briefing to be held that day, which according to the notice was "an illegal action". Mr Yan Apul, attorney to PT Amco during this period of time, in an Affidavit presented to the Tribunal (Cl. Doc. 98) claims that he went to the hotel at 11:00 a.m. on April 1, 1980 "at the request of Mr Tjengri" who told him that "the Armed Forces had seized the Hotel".

96. The same kind of contradiction arises as to when Mr Schussel met with General Soerjo, the Chairman of the PT Wisma-appointed Management Council. According to General Soerjo, he first met with Mr Schussel in General Soerjo's office at PT Wisma in the afternoon of March 31, 1980. According to General Soerjo, it was at this time that the General made an offer to Mr Schussel to remain as General Manager of the hotel, but was told by Mr Schussel that the latter would have to check the situation first with Ramada headquarters in Brussels. The next morning, according to General Soerjo, after having met with Mr Schussel a second time and Mr Schussel having advised him that he had had no news, one way or another, from Ramada in Brussels, General Soerjo told Mr Schussel that he would dismiss him from his post as General Manager until such time that Mr Schussel could give the General a definitive answer on the post of General Manager.

97. The testimony of Mr Schussel, on the other hand, was that it was only when he went down to the lobby of the hotel at about 9.00 a.m. on April 1, 1980, did he learn and become aware of the take-over. Then, after first visiting the offices of PT Amco in the Wisma Kartika to determine what was going on, and where he learned of PT Wisma's take-over of the property, he i.e. Mr Schussel, proceeded to General Soerjo's private office in the building for what according to Mr Schussel was his first meeting with the General. In fact, Mr Schussel's description of what was said at the meeting did not vary materially with that given by General Soerjo.

98. In any event, Mr Schussel was "relieved of his duties as General Manager of Hotel Kartika Plaza", and replaced as "Caretaker General Manager" by Mr H. Soejipto "effective April 1, 1980" according to an inter-office memorandum signed by General Soerjo on April 1, 1980 (Resp. Exh. vol. VI No. 124).

99. When and how Mr Schussel, the General Manager of the hotel actually first found out about the take-over of the hotel by PT Wisma also points up certain differences in the factual picture presented to the Tribunal of events surrounding the presence of and the role played by members of the Indonesia armed forces on April 1, 1980 and following.

100. As stated above, Mr Schussel testified that when he went down from his living quarters on the seventh floor of the hotel at about 9:00 a.m. on April 1, 1980, he had no idea of the events which were in train. When the elevator in which he was riding from his living quarters opened into the lobby of the hotel on that morning, he saw a number ("up to perhaps two dozen") of Indonesian armed forces personnel in and about the building. Some were, according to him, army personnel and some police personnel. Some were dressed in "green uniforms" and at least one was wearing a "red beret". All were armed, although none of the arms were unholstered, and thus were not "at the ready". According to Mr Schussel, the armed forces

personnel were located in various positions in the hotel including the lobby, various corridors and guarding certain stairways and offices. There were also uniformed armed forces personnel present, according to Mr Schussel when he met with General Soerjo, on the morning of April 1, 1980 (although this was denied by the General in his own testimony before the Tribunal). Mr Schussel concluded that the armed forces personnel were in the hotel in support of the take-over.

101. The fact that there were members of the Indonesian armed forces was corroborated by police Major (Ret.) X, who at one time was the Chief of Security at the hotel and who, after having been laid off from the hotel in January 1980, was asked by the PT Wisma-appointed Management Council to return to the hotel on April 1, 1980, as Security Coordinator, and by Mr Y. Z., his assistant. Both filed affidavits in this case and provided oral testimony before the Tribunal that they were aware that even before the events of March 31/April 1, there were approximately ten armed forces personnel already living in rooms in the hotel in anticipation of the events of March 31/April 1. These people, according to Messrs X and Y. Z. were given rooms in the hotel by Colonel Soejipto of PT Wisma a day or two before the take-over of the hotel. Both Messrs X and Y. Z. testified that on the morning of April 1, 1980, they saw approximately ten Indonesian armed forces personnel present in the hotel, all armed and functioning as "pacifiers" of the situation as it was put in testimony. Personnel belonging to a police unit (Kodak) were identified and named, as were members of a military police unit and members of an army unit (Kodim). According to Respondent's Exhibit 237, a "Letter of Order to Duty", five members of the City of Jakarta Metropolitan Police Resort Command Metro 71 were dispatched "to carry out security at Hotel Kartika Plaza in connection to (sic) the dispute which has occurred". Major Jaffar, an active army Red Beret Unit officer, who was in a pre-retirement phase-down period, was visible in uniform in the lobby of the hotel. Major Djamaani, an active officer, subject to Inkopad command, and who had acted for some months as the hotel's security officer, was also present. On the other hand, Witnesses Sgt Sugiono, Harsuno, Nikijusu and Orah, presented by Respondent, all testified that they saw no armed forces personnel in uniform in the hotel, and some said they saw no armed forces personnel at all on the hotel premises, whereas Mr Apul, attorney for Claimants, stated in the Affidavit that when he arrived at the hotel at about 11.00 a.m. April 1, 1980, there were uniformed armed forces personnel present (Cl. Doc. 98). However, the Tribunal notices that Counsel for Respondent admitted in oral argument that there were military and police personnel on the premises of the hotel, while stating that said personnel were there in order to keep peace.

102. The PT Wisma-appointed Management of the property was busy consolidating its position during this time. Mr Tjengri, the PT Amco employee who had distributed PT Amco's circular decrying the alleged illegality of PT Wisma's activities on April 1, 1980, was told he could only continue to occupy his room if he paid for it (allowing for a 30% discount) (Resp. Exh. vol. VI No. 122). The hotel comptroller was ordered to hand

over the key to the hotel safe deposit (Resp. Exh. vol. VI No. 123). The general cashier of the hotel was instructed to turn over funds in the hotel safe to the comptroller (Resp. Exh. vol. VI No. 126). The front office cashier was changed (Resp. Exh. vol. VI No. 128). Employees concerned with the excluded areas were taken under the control and supervision of PT Wisma (Resp. Exh. vol. VI No. 129).

103. PT Amco took also certain actions; it sent notices to all office tenants to continue to pay rent to PT Amco. PT Amco's lawyer, Mr Yan Apul, visited the hotel on April 1, 1980 and after conferring with his clients, wrote a letter of protest to the armed forces and Ministry of Defence (see para. 95 above; Cl. Doc. 98 and Resp. Exh. to CM, No. 53). These letters prompted counter-letters from PT Wisma.

104. There then ensued a period of what might be described as a kind of cold war which reigned between the parties. From time to time, a PT Amco (which incidentally kept its offices in the building throughout the period of the dispute until October, 1980, although the Claimants alleged that most, if not all, of its records appear to have been taken and never accounted for) employee would carry out a harassing manoeuvre or two, the front appeared to move to the negotiating table. On or about April 12, 1980, Inkopad tried to bring about a reconciliation of the parties but the die had been cast, and reconciliation could not be achieved.

105. In the meantime, PT Wisma, on April 11 and 14, 1980, made certain allegations about PT Amco's investment licence obligations to the Foreign Investment Board (see paras 110-30 below) and on April 24, 1980, commenced a court action in the Central Jakarta District Court to sanction with respect of its activities of March 31/April 1 and thereafter (see paras 110-30 and paras 131-41 below).

106. Throughout this period, Indonesian armed forces personnel continued to be present at the hotel.

107. This state of affairs continued until May 24, 1980, when in what appears to have been an attempt by PT Amco to regain physical control of the hotel, Mr Tjengri, the PT Amco employee and loyalist, burst into the hotel's front office, sometime around 1:00 p.m. and took possession of the hotel master key, proclaiming to one and all that PT Amco had thus regained possession, control and management of the hotel.

108. At about the same time, notices signed by Mr Tomodock, the interim General Manager of the hotel appointed by PT Amco, and also PT Amco's Vice-chairman, announcing PT Amco's redemption of the hotel from PT Wisma, were posted in various departments of the hotel. This action obviously alarmed PT Wisma and after having attempted through Major X the security coordinator, to negotiate a peaceful settlement of the incident, PT Wisma called upon the armed forces for assistance, and who according to all accounts arrived at the hotel in the late afternoon of May 24, 1980, in numbers and in uniform. They then took representatives of both parties to headquarters where the issues were thrashed out and with finally Mr Tjengri surrendering the master key to the armed forces, which in turn passed them to PT Wisma. A couple of days later, officers of PT Amco, Mr and Mrs Gumillag, were put under control of an army intelligence unit while

the latter investigated what had happened at the hotel during the period March 30/April 1 – May 24, 1980.

109. It should be noted that some members of the armed forces remained in the hotel until October, 1980, at which time it was decided that they were no longer required and they were returned to their respective units.

D. *Revocation of the Licence*

110. As stated earlier (see para. 105 above), one of the steps taken by PT Wisma, after it took over control and management of the Kartika Plaza property on March 31/April 1, 1980, was to report certain information to the Indonesian Capital Investment Coordinating Board, commonly known in Indonesia as "BKPM" after the first initials of each of the words of its name in Indonesian, that is **Bodan** Koordinasi Penanaman Modal, (hereinafter referred to as "BKPM" or "Capital Investment Coordinating Board". BKPM is the body in Indonesia which is responsible for, among other things, first examining applications by foreign investors in Indonesia and making recommendations to the Indonesian Government in regard to such applications, as well as the supervision and surveillance of the implementation of such foreign investments after they have been approved.

111. Shortly after April 1, 1980, General Soerjo, as mentioned earlier, a director of PT Wisma, and the Chairman of the then newly constituted PT Wisma-appointed Management Council of the Wisma Kartika property, accompanied by Mr Zoelkarnain Ali visited the offices of BKPM (Washington testimony, at 600).

112. The first meeting at BKPM held by the PT Wisma representatives was with the Chairman of BKPM. It was held in the morning of April 12, 1980 (Washington testimony of Mr Usman, p. 1228). They, that is the PT Wisma representatives, reported to the BKPM that they suspected that there were certain "irregularities" with the Amco Group's investment in Indonesia (Washington testimony of General Soerjo, at 602, 614). Among the allegations made was that funds which were supposed to be invested in the hotel were transferred by the Amco Group out of Indonesia to Hong Kong. Likewise, photos of the then physical state of the Kartika Plaza property were shown to the Chairman of BKPM (Washington testimony of General Soerjo, at 615).

113. The second meeting at BKPM held by the PT Wisma representatives was with the Bureau Chief of the Directing, Implementation and Control Bureau of BKPM, Mr Ridho Harun, and Mr Usman, who was Chief of the Divisions of Mining and Service Industries at BKPM and Mr Harun's subordinate. At this second meeting which was held in the afternoon of April 12, 1980, PT Wisma was represented by Mr Zoelkarnain Ali and a lawyer, Mr Azwar Karim (Washington testimony, at 1228).

114. At the meeting Messrs Ali and Karim described some of the allegations against Amco/PT Amco and submitted a letter dated April 11, 1980, from the Board of Directors of PT Wisma putting in writing some of said allegations (Washington testimony of Mr Usman, pp. 1229-30 and

Resp. Exh. to CM, vol. IV No. 87, para. 1). Apparently, this letter, which was not produced as evidence before the Tribunal, was not considered to be sufficient because on April 14, 1980, PT Wisma addressed another letter to the Chairman of BKPM headed "Re: PT Amco Indonesia" (Washington testimony of Mr Usman, pp. 1229-30 and Resp. Exh. to CM, vol. IV No. 87) (see para. 117 below).

115. Following the meeting in the afternoon of April 12, 1980 between Messrs Ali and Karim, representing PT Wisma, and Messrs Harun and Usman of BKPM, Mr Usman did some checking with Bank of Indonesia and the Indonesian tax authorities (Washington testimony of Mr Usman, pp. 1270-75). One could also deduct from this testimony, although not very clearly, that both of these institutions at some time sent documents to Mr Usman, but in the case of the tax department, Mr Usman testified that his subsequent report was based on a personal visit on April 12 or 13, 1980 to the tax department and his sighting PT Amco's file there (Washington testimony of Mr Usman, at 1273). There was no evidence that Mr Usman visited Bank Indonesia.

116. On April 13, 1980, representatives of PT Amco, Mr Tomodock and Mr Gumillag met Messrs Harun and Usman of BKPM at the BKPM offices. During the meeting, which lasted about one hour the PT Amco representatives showed certain documents to the BKPM officials. These documents were not presented as evidence before the Tribunal nor described to it (Washington testimony of Mr Usman, at 1230).

117. As mentioned above (see para. 114 above), on April 14, 1980, PT Wisma addressed a letter to BKPM on the subject of "Re: PT Amco Indonesia". This six page letter in Indonesian was accompanied by twelve enclosures each of which was referred to in the text of the letter. The letter reviewed what PT Wisma saw as the chain of events and relevant documents regarding the 1968 Lease and Management Agreement, the involvement of the Aeropacific Group, including the US \$1,000,000 1969 Loan arrangement, the manner in which goods and equipment were allegedly bought, paid for and brought into the country, the accounting treatment of such transactions in the PT Amco financial statements, and concluded that (a) PT Amco had failed to meet its investment obligations under the Investment Licence and the 1968 Lease and Management Agreement; (b) the accounting treatment in PT Amco's financial statements of the US \$1,000,000 1969 ABN Loan was misleading insofar as it purported to represent "fresh capital abroad"; (c) payments for imported goods came from Indonesian operations and not from overseas funds; (d) significant sums were transferred abroad and "never reported and without the knowledge" of Bank Indonesia, BKPM and PT Wisma; (e) PT Amco was "unwilling to submit to PT Wisma its periodical reports concerning the proceeds of lease of rooms and shops"; (f) goods imported by PT Amco from Hong Kong were inflated; (g) PT Amco in 1973 participated in a fictitious loan from Pan American, and treated same in PT Amco's books in such a way as "to deceive the Government"; (h) certain payments by PT Amco to Yee On Hong, a Hong Kong company, were really payments of debts due by Pan American to Yee On Hong, and other allegations of a similar nature. PT Wisma concluded that:

Management Contract was taken over by PT Amco Indonesia". The obligations of the Amco Group, according to the Request were to complete construction of the project within the fixed time schedule; to provide hotel equipment; (and) to invest capital amounting to US \$4,000,000 consisting of own capital (equity)—US \$3,000,000 and loan capital from abroad—US \$1,000,000. (Again, no reference was made to Amco's investment obligations according to its Investment Licence, reference only being made to the 1968 Lease and Management Agreement, which references were not accurate). The Request reiterated an allegation contained in Mr Usman's Summary (see para. 119 above) that "PT Amco Indonesia was not able to fulfil its obligation" under the 1968 Lease and Management Agreement and for this reason entered into the second Sub-Lease Agreement with the Aeropacific Group (no mention being made of the fact that this Agreement was made with the full knowledge, acknowledgement and approval of PT Wisma). Reference was also made to the "March 31, 1980" take-over by PT Wisma of the management of the hotel from PT Amco:

since PT Amco Indonesia has violated the capital investment administrative regulations/provisions in the form of: a. it did not meet the capital deposit approved by the Government; b. the condition of the hotel became more deteriorated and the amount of room dwindled ... thus indicating that PT Amco did not make a 'replacement' of those rooms, which means that it did not fulfil its obligations as provided in the Lease and Management Contract; c. acknowledgement of loan as equity (own capital); d. did not forward financial report to Bank Indonesia concerning transfer (of funds) abroad; e. within the last five years, did not forward a report concerning the realization of capital investment (Report A) to the BKPM on the execution of a Sub-Lease Agreement, and this also means that PT Amco Indonesia did not manage the building/hotel Kartika Plaza by itself, besides that, PT Amco Indonesia also committed violation(s) with criminal elements, i.e. in the form of: committing tax manipulations in the sense that it did not pay taxes as it has been assessed; b. to extend as guarantee the property of the hotel in order to obtain a loan, without approval of the owner (PT Wisma Kartika).

These allegations were a combination of those contained in the Usman and Ridho Reports. Lastly, the Request to the President, which requested approval for BKPM to revoke PT Amco's licence, echoing a phrase in Mr Usman's Report stated that by committing the "legal violations" referred to above, "the presence of PT Amco Indonesia in the framework of foreign capital investment does not seem to be profitable any more for national development".

127. The President of the Republic of Indonesia approved the revocation/termination of PT Amco's Investment Licence and this was conveyed in a letter of the Minister/State Secretary dated May 30, 1980 (Resp. Exh. to CM, vol. IV No. 91, para. 6).

128. On July 9, 1980, the acting Chairman of BKPM issued a decision "concerning Revocation of Approval/Termination of Capital Investment Business in the Name of PT Amco Indonesia in the Framework of Law No. 1 of 1967 Concerning Foreign Capital Investment (PMA)"

(hereinafter referred to as the "Revocation" (Resp. Exh. to CM, vol. IV No. 91).

129. The Revocation began by first taking into consideration that PT Amco was "established ... in the framework of Law No. 1 concerning Foreign Capital Investment to execute a Lease and Management Contract in the field of operating Hotel Kartika Plaza between PT Wisma Kartika and Amco Corporation, USA, dated April 22, 1968". The Revocation went on to say that because PT Amco "delivered the management of Hotel Kartika Plaza to PT Aeropacific Hotel Corp." pursuant to the First and Second Sub-Lease Agreements, "therefore it is not PT Amco Indonesia which fulfilled the obligations as stipulated" in the 1968 Lease and Management Agreement. Also, the Revocation stated that the audited financial statements of PT Amco showed that the company had only:

deposit(ed) its capital ... in the amount of US \$1,399,000 which consisted of (a) loan for the amount of US \$1,000,000 and own capital (equity) for the sum of US \$399,000, whereas according to the Lease and Management Contract and its Foreign Capital Investment Application, PT Amco is obliged to invest its capital in the amount of US \$4,000,000, which consisted of own capital (equity) at the sum of \$3,000,000 and (a) loan for US \$1,000,000, and that the fulfilment of the remainder of the capital was executed by PT Aeropacific Hotel Corporation, an Indonesia Company, therefore the said capital is not foreign capital (fresh capital) is stipulated in Article 2, Law No. 1, Year 1967.

130. The Revocation then pronounced the "Revocation/Annulment" of the approval given by the President of the Republic of Indonesia "dated May 18, 1968" (sic) (see paras 31 and 32 above) which according to the Revocation "was granted to PT Amco Indonesia in the field of management of Hotel Kartika Plaza in the framework of Law No. 1 Year 1967 concerning Foreign Capital Investment". The Revocation then went on to say that as a result of the revocation/annulment referred to in the previous sentence, the "revocation/annulment of licences and tax facilities" also resulted, and "all facilities which have been granted (enjoyed)" in the Foreign Capital Investment Law framework had "to be returned to the Government". The Revocation came into force on July 9, 1980.

E. The Indonesian Court Proceedings

131. On April 24, 1980, PT Wisma, as Plaintiff, filed a suit against PT Amco, as Defendant, making reference to the 1968 Lease and Management Agreement of April 22, 1968, the amendment thereto of May 19, 1968 and the 1978 Profit Sharing Agreement of October 6, 1978, between PT Wisma and PT Amco as well as to the amended Foreign Investment Application of PT Amco and the Investment Licence issued pursuant thereto. The suit alleged that according to the 1968 Lease and Management Agreement, the "Overseas Partner", as therein defined, undertook to "invest up to the sum of US \$4,000,000" in the Wisma Kartika project, with "up to US \$1,000,000 being invested for completion of the Annex" that is the first phase and "up to the sum of US \$3,000,000" for the second phase. Moreover, according to the

suit, in the "Defendant's application to the Government for a foreign capital investment permit", Defendant declared that the entire capital of Defendant constituted assets which were specifically allocated and/or set aside for the requirement of establishing Defendant's Company in Indonesia. (One should notice that it was Amco which was the Applicant for the "foreign investment permit", not the Defendant, PT Amco).

132. The suit alleged that "it is evident that since the Foreign Capital Investment permit was issued ... Defendant (i.e. PT Amco) has neglected to perform its obligations, having deposited on (sic) US \$1,399,000 ..." and "it is evident Defendant introduced capital of only US \$983,992.65 ..." Moreover, according to the complaint, "it is evident that Defendant transferred money abroad from June 1969 through the end of 1978 in the amount of US \$2,677,636.22 ... without the knowledge of Plaintiff or the approval of the Government" in breach of BKPM Decree of August 1, 1974 and Defendant allegedly "never carried ... out" certain alleged periodic reporting requirements "to the BKPM and Bank of Indonesia concerning the Realization of Foreign Capital Investment ... thus", according to PT Wisma "violating the provisions set down by the Government" for the regulation of foreign investment in Indonesia "according to which Defendant's operating licence can be revoked by the Government" (emphasis not added). In addition, according to PT Wisma's allegations, "it is clear that through March 31, 1980 Defendant did not fulfil its promises" (i.e. of making "hundreds of millions of Rupiahs" of repairs to the hotel), so Plaintiff (i.e. PT Wisma) took back the management of the Hotel Kartika Plaza. One other specific allegation made by PT Wisma was that PT Amco "without the approval or knowledge of Plaintiff, put up Plaintiff's property (a generator set) as collateral without the approval of Plaintiff", citing as evidence a letter dated November 29, 1979 from PT Amco to Bank Bali (Resp. Exh. to CM, vol. III No. 55). In summary, the Plaintiff alleged that PT Amco (1) committed "violation(s) of the Foreign Capital Investment Law"; (2) committed "embezzlement of Plaintiff's property, i.e. the generating set worth Rp. 60,000,000.00" and (3) "did not fulfil the promises agreed to ...".

133. The suit then concluded by asking the Central Jakarta District Court to (1) rescind the 1968 Management and Lease Agreement, its amendment of May 19, 1968 and the 1978 Profit Sharing Agreement; (2) condemn PT Amco to pay "compensation in the amount of Rp. 6,030,661,657.18" or US \$9,726,873.64 (rate US \$1.00 / Rp. 620) (calculated as follows: Rp. 799,341,657.18 which was grossed-up for inflation by 23% figure of a Rp. 649,871,266 estimated by First National Adjust Company of Jakarta on May 16, 1979 as an amount which was required to put the hotel "in good condition" (Resp. Exh. to CM, vol. II No. 41), plus Rp. 1,231,320,000 in respect of rent "which should have been received for 10 more years, if the hotel were in good condition", plus Rp. 1,000,000,000 for "rent which should have been received for 10 more years if the shops/offices were in good condition", plus Rp. 3,000,000 "because Kartika Plaza has been defamed at ... because of mismanagement". In addition, PT Wisma

PT Wisma Kartika's management of Hotel Kartika Plaza is sanctioned under the law and can be priorly executed, even though there is an appeal or some other legal action. This is to avoid greater loss to Plaintiff. It is requested that while the case is in process, the management currently being carried out by the Plaintiff be legalized or at least approved by the court.

134. This suit was not notified or served upon PT Amco until May 30, 1980. But on May 28, 1980, that is, more than one month after the suit was originally filed and two days before PT Amco received first word of the case, the Central Jakarta District Court granted *ex parte* PT Wisma's request for an interlocutory decree giving PT Wisma permission to manage the Kartika Plaza property pending the final outcome of the suit, but ordered PT Wisma to make a monthly accounting of its management.

135. On June 2, 1980, PT Amco filed a Request for Postponement of Implementation of the Interlocutory Decree, and on July 8, 1980, the greater Jakarta Court, the Appellate Court, granted PT Amco's Request. PT Wisma on July 28, 1980 stating that "on 9 July, 1980, the BKPM revoked the agreement/ended the capital investment venture in the name of PT Amco Indonesia" appealed this judgment asking the Indonesian Supreme Court "not to implement the July 8, 1980 Appellate Court decision" and thus in effect asking for reinstatement of the interlocutory permission granted to PT Wisma to manage the hotel pending the outcome of the case on the merits. On August 4, 1980 the Supreme Court reversed the Appeal Court's judgment and reinstated the latter. The Supreme Court cited two reasons for its judgment: one, at the time of PT Wisma's filing the suit i.e. April 24, 1980, PT Amco "was no longer managing the Kartika Plaza Hotel and Building" and "therefore (the) interlocutory decree ... in fact strengthened temporarily the legal condition in which PT Wisma Kartika had been managing the Kartika Plaza Hotel and Building"; and the second reason was that BKPM had on July 9, 1980 cancelled PT Amco's Foreign Investment Licence so that PT Amco "may no longer manage the Kartika Plaza Hotel and Building, unless the Court decides otherwise in the main case".

136. In the meantime, on July 16, 1980, counsels for PT Amco filed an Exception to the Jurisdiction of the Indonesian Courts to hear any dispute arising out of the 1968 Lease and Management Agreement because Clause 12 of such Agreement stated that the parties must settle any dispute arising therefrom by International Chamber of Commerce arbitration in Paris. On October 8, 1980, the Jakarta Court rejected said Exception to Jurisdiction. Evidently, this judgment was not rendered in writing.

137. On November 12, 1980, PT Amco filed a Reply on the merits of PT Wisma's suit in which its arguments against the same were fully developed.

On December 10, 1980, PT Wisma filed a Replication answering PT Amco's Reply.

PT Amco filed a Rejoinder and Conclusions on January 21, 1981 and May 15, 1981 respectively.

PT Wisma filed its Conclusions on April 3, 1981 and

138. The attorney for PT Amco then submitted a written brief summarizing the points evidently made by two witnesses which apparently testified on July 3, 1981. According to PT Amco's attorney, the witnesses in question "supported Defendant's arguments that Hotel Kartika Plaza was taken over physically by PT Wisma Kartika on March 31, 1980". PT Wisma, on September 4, 1981, filed a "Reaction Against Defendant's Witnesses and its Arguments", which did not really add anything new to its position and emphasized that PT Amco and not Amco Asia was the proper party to defend its suit. On September 18, 1981, PT Amco submitted its "Final Reply/Conclusions" which repeated once more its position with respect to jurisdiction, procedure and the merits of the case.

139. On January 12, 1982 the Central Jakarta District Court, sitting in first instance, rendered its judgment with respect to PT Wisma's suit and PT Amco's counterclaim. The Court found that:

- a) PT Amco itself invested only US \$1,399,000 whereas its obligations under the 1968 Lease and Management Agreement was to invest US \$4,000,000 and that in claiming to have invested more, PT Amco "went through PT Aeropacific, which constitutes national capital" and, in so doing, breached its investment application and licence.
- b) PT Amco "acknowledged as true that it never made periodic reports on its activities to BKPM" and that it did not deny having transferred money abroad which transfers were "not with the government's permission" in breach of a 1973 BKPM Letter of Decision.
- c) PT Amco did, as alleged by PT Wisma, secure PT Wisma's generator as security for a loan from Bank Bali in breach of the 1978 Profit Sharing Agreement.
- d) The Government had on July 8, 1980 revoked PT Amco's investment licence and thus PT Amco could not carry out any agreement with PT Wisma because such a situation would conflict with the law and therefore would be null and void.
- e) The 1968 Lease and Management Agreement, its amendment of May 19, 1968 and the 1978 Profit Sharing Agreement were rescinded and PT Amco ordered to pay Rp. 799,341,657.18 compensation to PT Wisma, this being based on the PT First National Adjustment Company report of May 16, 1979.
- f) The defamation claim was rejected.
- g) PT Amco's counterclaim was rejected as were its arguments with respect to jurisdiction and the interlocutory decree.

140. On January 21, 1982, PT Amco filed an appeal and on February 10, 1982, the Central District Court ruled that the execution of its judgment of January 12, 1982 was suspended pending the outcome of PT Amco's appeal.

141. On November 28, 1983, the Jakarta Appellate Court rendered its judgment on PT Amco's appeal. It ruled that:

- a) with respect to the interlocutory decree that because of BKPM's Decision of July 9, 1980 to revoke PT Amco's investment licence and

in view of the August 4, 1980 Supreme Court ruling, "the Central Jakarta District Court's interlocutory decree can be upheld";

- b) with respect to PT Amco's Exception to Jurisdiction, the Appellate Court ruled as follows:
 - (i) in connection with PT Amco's allegation that due process had not been observed when the interlocutory judgment was rendered because PT Amco had not been summoned or heard before the Interlocutory Decree was granted, the Appellate Court stated that PT Amco's exception had to be rejected. Its reasoning for this was that since the take-over of March 31, 1980, PT Wisma was in fact in control of the property; PT Amco had not itself managed the property during the time it had sub-leased its rights to PT Aeropacific; PT Amco had not met its obligations under the 1968 Lease and Management Agreement particularly "concerning foreign investment, etc..."; PT Amco may not any longer manage the hotel because on July 9, 1980, BKPM revoked PT Amco's investment licence and the Interlocutory Decree "only upheld the state of law in which PT Wisma had conducted the daily management" of the property;
 - (ii) with respect to the argument that the dispute between PT Amco and PT Wisma should have been settled by International Chamber of Commerce arbitration as supposedly referred to in the 1968 Lease and Management Contract, the Appellate Court ruled that the terms of the 1978 Profit Sharing Agreement and its reference to the fact that the parties chose their permanent domicile for purposes thereof at the Central Jakarta District Court, plus the reference that all previous provisions of the 1968 Lease and Management Agreement which were contrary thereto were null, rendered the question of International Chamber of Commerce arbitration no longer operable;
 - (iii) the argument that Amco also had to be made a defendant in the case was also rejected on the grounds that PT Amco when it was formed had succeeded to Amco's rights and obligations under the 1968 Lease and Management Agreement.
 - c) On the merits of PT Wisma's suit, the Appellate Court ruled that the ruling of the Court of first instance was correct and proper according to law and must be upheld.
 - d) On the counterclaim, the Appellate Court likewise made the judgment of the court of first instance its own.
- Accordingly, PT Amco's counterclaim was rejected.

PART II – PRELIMINARY MATTERS

CHAPTER I — THE CLAIMS, DEFENCES AND COUNTERCLAIM

Section I – The Claims and Defences

142. The first description of the claims put before the Tribunal was given by Claimants in paragraph 1 of the Request for Arbitration, here above cited (see para. 1). It appears, from this short description, that the Claimants were invoking two causes of action, namely the alleged seizure of the investment and cancellation of the investment licence.

Then, in the "Claimants' Statement of Facts and Law", the Claimants invoked again, as the basis of their claim, the *taking over* of the Kartika Plaza Hotel from PT Amco and the *premature revocation* of the investment licence.

In their Reply to Indonesia's Counter-Memorial, Claimants contended (conclusions, para. 2) that:

(t)he Tribunal's jurisdiction extends to all of Indonesia's 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 Lease and Management contracts by its courts, because such actions deprived Claimants of their investment without compensation.

In addition, Claimants stated (Reply to Indonesia's Counter-Memorial, conclusions, para. 4) that they:

... would be entitled to compensation even if the cancellation of the investment licence had been justified to the extent that the value conferred on Indonesia exceeds Indonesia's damages.

In this respect, Claimants contend (Reply, at 111) that:

(they) are entitled to restitution for the benefit conferred on Indonesia, under the doctrine of unjust enrichment, even if they committed breaches.

In its Counter-Memorial, the Respondent denied the seizure of the Hotel Kartika Plaza by the Government, as alleged by Claimants (III, A.9) and contended that the revocation of PT Amco's investment licence was lawful (III, B and C).

Then, in the Rejoinder on the Merits, Respondent contended (at 51 ff.) that Claimants cannot recover on any theory of unjust enrichment.

Finally, as again stated by Mr Hornick, counsel for Claimants, in its final oral argument (see Minutes of the hearings in Copenhagen, at 941), Claimants contend:

... with respect to causes of action ... that there are three distinct theories of recovery in this case. And that each of these theories is recognized by both Indonesian and international law. That is to say, *expropriation, breach of contract and unjust enrichment* (emphasis provided).

The same causes of action were discussed and denied by the Respondent, in its briefs hereabove mentioned, and in the final oral argument presented on its behalf at the hearings in Copenhagen.

143. As to the amount claimed by Claimants, Claimants stated in the final stage of the proceedings that the amount of their claim was US \$15,428,000, the hotel having been valued at this amount on December 1, 1983 (Copenhagen transcript, at 1484 ff.).

In addition, Claimants requested that interest on the amount claimed, from March 31, 1980, costs and disbursements of this arbitration and counsel fees be awarded (Request for Arbitration, at 14). Said claims were reaffirmed in Claimants' Reply to Indonesia's Counter-Memorial, dated February 28, 1983 (at 125) and in the final oral argument (see Minutes, at 1484). However, according to Mr Hornick's statement in oral argument, interest up to December 31, 1983 having been included in the valuation of the hotel at this date, additional interest should run only from such date to the date of effective payment.

144. Denying all the claims, on whatever basis, Respondent requested the Tribunal to decide that no compensation at all is to be awarded to Claimants.

However, discussing subsidiarily the maximum amount of damages that could be alleged by Claimants, Respondent contended that the figure should be placed at between US \$720,000 and \$1,110,000 (Resp. Rejoinder on the Merits at 59).

In addition, Respondent contended that the interest rate should not be higher than 6%, and that all monetary awards should be made in Indonesian rupiahs.

Section II – The Counterclaim

145. In its Counter-Memorial of December 30, 1982, the Republic of Indonesia asked the Tribunal (Submissions, para. 5, at 108-9):

- (a) To adjudge and declare
 - (i) That Indonesia was fully justified in revoking PT Amco's investment licence because of violations of its obligations under the licence and other violations of Indonesian law and applicable rules of international law, and that PT Amco is obliged to return to Indonesia the amount of all tax and other concessions which Indonesia granted to PT Amco;
 - (ii) That, accordingly, PT Amco's claims are dismissed and Indonesia's counterclaim is granted.

The same counterclaim was presented in the Respondent's Rejoinder on the Merits, dated October 31, 1983 (at 60-1, and submissions, at 62, iii). The total amount of the counterclaim, as indicated in the Rejoinder (at 61) is US \$583,591,000, the exchange rate used for all computations in this respect was the then current average rate of US \$1 / Rp. 975. In oral argument (see Copenhagen transcript, at 1551), Mr Brower stated that in this respect as well, an award in rupiahs would be "appropriate".

In the final oral argument, counsel for the Respondent simply referred to

the pleadings on the counterclaim; accordingly, the counterclaim remained unchanged, as to its causes as well as to its amount.

In addition, the Respondent asked the Tribunal (Rejoinder on the Merits, at 63):

To adjudge and declare pursuant to Article 61(2) of the Convention that Claimants shall pay all costs of the present proceedings, including the fees and expenses of the members of this Tribunal, the charges for use of the facilities of the Centre, and the expenses incurred by Indonesia in connection with these proceedings.

146. Claimant concluded that the Tribunal should reject the counterclaim (see Cl. Reply to CM, at 125).

CHAPTER II — THE APPLICABLE LAW

147. The present dispute is to be decided according to the applicable rules of law, since the parties did not agree to entrust the Tribunal with the power to decide it *ex aequo et bono*, like they could have done according to Article 42, para. 3 of the Washington Convention.

Article 42, paragraph 1 of said Convention provides as follows:

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

148. The parties having not expressed an agreement as to the rules of law according to which the disputes between them should be decided, the Tribunal has to apply Indonesian law, which is the law of the Contracting State Party to the dispute, and such rules of international law as the Tribunal deems to be applicable, considering the matters and issues in dispute.

As to Indonesian law, there is no need to enter into a discussion of its conflicts of laws' rules. Indeed, Claimants as well as Respondent were constantly referring, in their discussion on the merits to the substantive law of Indonesia. Moreover, the dispute before the Tribunal relating to an investment in Indonesia, there is no doubt that the substantive municipal rules of law to be applied by the Tribunal are to drawn from Indonesian law.

Similarly, by virtue of Article 42 of the Convention, the appropriate rules of international law are to be applied by the Tribunal; here again, it can be mentioned that the parties not only did not deny their applicability, but constantly referred to them in their pleadings and in the final oral arguments (see, in particular, as to the Respondent; Resp. Rejoinder on the Merits, at 47, footnote xx; and as to the Claimant; oral argument, Mr Rand, Copenhagen transcript, at 939; Mr Hornick, Copenhagen transcript, at 941 ff., 943).

CHAPTER III — ISSUES TO BE DISCUSSED

149. As stated earlier, Claimants invoke three bases of claims:

- expropriation;
- breach of contract, that respondent allegedly committed by revoking the application's to invest approval (in other words, the "revocation of the licence");
- unjust enrichment.

The two first bases of claims will be discussed hereunder (Sections C and D). On the other hand, there will not be need to discuss whether, considering the applicable law and the circumstances of the case, the theory of unjust enrichment may provide a basis of claim. Indeed, for the reasons stated below, the Tribunal will admit the State's responsibility in the framework of the two first bases of claims relied upon by Claimants, however not adhering to all the interpretations and arguments related to said bases of claims, as developed by the Claimants. Consequently, the unjust enrichment claim will become unnecessary.

150. The Claimants contend that three facts and/or acts deprived them of the rights they acquired when they received the authorization of Indonesia to invest, namely:

- the "seizure" of the hotel;
- the revocation of the licence;
- the Jakarta Court decisions, which rescinded the Lease and Management Agreement.

While discussing the two first facts and/or acts, the Tribunal will not enter into the detailed discussion of the third one.

Indeed, it is common ground in international law that the international responsibility of a State is not committed by the acts of its municipal courts, except where such acts amount to *denial of justice* (see in general: D. P. O'Connell, *International Law*, vol. 2, at 1024 ff.; Charles Rousseau, *Droit International Public*, tome V, 1983, at 66 ff.).

Now, however broadly the concept of denial of justice may be construed and applied (see Rousseau, *ibid.*) the Tribunal is of the view that the proceedings in the Jakarta Courts (see above, paras 131-41) do not lead us to consider that there was one in the instant case. This does not mean, of course, that the findings of the Jakarta Courts are binding on this Tribunal: indeed, in oral argument, counsel for Respondent expressly admitted they are not. But the fact that the Tribunal will not adhere to such findings does not mean that by expressing a different opinion, the Jakarta Courts committed a denial of justice, for which the Republic of Indonesia could be held internationally responsible.

151. Moreover, the dispute in the Jakarta Courts was not one between the parties in the present arbitration, but rather one between PT Wisma Kartika and PT Amco, and the Tribunal has already decided, in the award on jurisdiction, that while having jurisdiction over the parties before it, it would not enter into the litigation between the parties to the Lease and Management Agreement.

Finally, it should be noted that it was not the Jakarta Courts which

revoked the investment licence; such courts merely took into account the fact that the revocation had been decided by the proper administrative authority. Therefore, it is not to the courts to which an infringement of the State's obligations, flowing from the licence previously granted, could be imputed.

152. Accordingly, in the Discussion (Part III) the Tribunal will first consider two bases of claim relied upon by Claimants, namely:

- expropriation (Chapter I),
- breach of contract (Chapter II).

Then, it will examine the prejudice caused to Claimants by Respondent's acts and the damages to be awarded in order to compensate for same (Chapter III); the counterclaim (Chapter IV); the costs (Chapter V).

PART III – DISCUSSION

CHAPTER I — THE ISSUE OF EXPROPRIATION

153. As mentioned above (para. 1) the Claimants in paragraph 1 of the Request for Arbitration stated *inter alia*:

The Republic seized the investment in an armed military action ... The parties dispute the right of the Republic to seize the investment ...

As likewise mentioned above counsel for Claimants contended that one of the causes for action and thereby for recovery is *expropriation* as allegedly realized by the "seizure" or "take-over" of the hotel during the events of March 30/April 1, 1980.

In the Claimants' Statement of Facts and Law they further alleged that the Respondent violated Articles 21 and 22 of Indonesia's Foreign Investment Law No. 111967 which expressly guarantees that the Government shall not expropriate any foreign capital except under certain conditions which were not fulfilled in this case (see the provisions hereunder, para. 157).

In its Counter-Memorial (at 78) the Respondent denied that the rights of the Claimants were seized by an expropriation. The Respondent further denies in its Rejoinder on the Merits (at 3-20) that the loss of PT Amco's hotel management rights resulted from an "Army take-over" as there was "no armed, military action on April 1, 1980" and as "the allegation of an armed, military action cannot be supported by attributing acts of PT Wisma to Indonesia".

155 [sic]. The events on which the Claimants base their claim are described above in paras 79-109. Even if some of the testimony of certain witnesses contradict each other, and even if some of the documentary evidences can be interpreted in different ways, the Tribunal is satisfied that on or about the critical period there was a taking of Claimants rights to the control and management of the land and all the Kartika Plaza building. Such a take-over was clearly intended in the letter of March 31, 1980 from PT Wisma (see paras 90-1 above) and subsequently carried out and finalized.

The Tribunal is further satisfied that a number of army and police personnel were present at the hotel premises on April 1, 1980 and by their very presence assisted in the successful seizure from PT Amco of the exercise of its lease and management rights (see paras 93-103).

156. The question now is whether this taking is or amounts to an expropriation which according to Indonesian law and to international law can give rise to a claim for compensation.

157. In Article 21 of the Indonesian Law of Foreign Investment No. 1/1967 it is stated:

The Government shall not undertake a total nationalization/revocation of ownership rights of foreign capital enterprises nor take steps to restrict the rights of control and/or management of the enterprises concerned, except when declared by Act of Parliament that the interest of the State requires such a step.

Article 22 states:

1. In the case of the measures referred to in Article 21, the Government has the obligation to provide compensation, the amount, type and payment-procedure of which shall have been agreed upon by both parties in accordance with the principles valid in international law ...

The law further states that if no agreement between the parties can be reached the question shall be settled by an arbitration which shall be binding for both parties.

158. In the extensive legal literature which exists on the question of expropriation in international law, the problem of definition that is to say a clear statement of what is understood by expropriation in international law, has not received great attention. There have, however, been authorities who have tried to make a legal distinction between different kinds of interference in private property based on differences in motive, object, extent, form and/or purpose.

Especially important in this respect is, however, that it is generally accepted in international law, that a case of expropriation exists not only when a state takes over private property but also when the expropriating state transfers ownership to another legal or natural person. Expropriation in international law also exists merely by the state withdrawing the protection of its courts from the owner expropriated, and tacitly allowing a *de facto* possessor to remain in possession of the thing seized, as did the Roman praetor in allowing *longi temporis praescriptio*, (cf. B. A. Wortley, *Expropriation in Public International Law*, 1959)

Even if there are many different opinions as to the concept of expropriation in international law (cf. also the discussion held at the *Institut de Droit International* in 1952, *Annuaire* (1952), vol. 44. II. p. 283) it emerges, however, as a *conditio sine qua non* that there shall exist a taking of Private property and that such taking shall have been executed or instigated by a government, on behalf of a government or by an act which otherwise is attributable to a government.

159. The take-over of Kartika Plaza consequently raises the following questions:

- a) Did the taking occur on behalf of or on the instigation of the Republic?
- b) Did the taking occur on behalf of or on the instigation of the army, Inkopad or PT Wisma, and if so can such be attributed to the Republic?

The taking was instigated by PT Wisma and was carried out for the benefit of the same. As it appears from paragraph 91 above, the decision to carry it out was taken by General Soerjo, a director of PT Wisma who acted as stated in the letter of March 31, 1980 on the ground that PT Wisma was the owner of the Kartika Plaza Hotel/building and land.

160. The Tribunal was not provided with any evidence that the take-over of the hotel and thereby the taking of the Claimants' exercise of their rights to control and management was due to a governmental decision.

161. In the Claimants' Rejoinder on Jurisdiction (page 24), the Claimants contend that PT Wisma was merely the "alter ego" of the Respondent. In supporting this view the Claimants refer to several statements made by the Chief of Staff of the Indonesian National Army in the *PT Wisma Kartika 10th Anniversary Book* (October 1974), where he expressed the view that:

(t)en years ago, the Indonesian Army Command ... establish(ed) an organization (which) owing to the determination and courage ... in every individual member of the Indonesian Army ... has grown up and developed into the present PT Wisma Kartika.

and further:

(t)he pioneers and members of the board (of PT Wisma Kartika) ... have added up to the good reputation of the Indonesian National Army during all these years.

The Claimants further referred to a letter dated April 14, 1980 (Resp Exh. to CM, vol. IV No. 87) from PT Wisma and BKPM, stating that:

the Defense Minister/Commander and Chief of the Armed Forces (is) our highest authority.

The Respondent admitted (Resp. CM, p. 21) the fact that Inkopad owned all of PT Wisma's outstanding shares in 1967 and that it selected PT Wisma's management. The Respondent further contended that:

Inkopad was established to provide certain social welfare services to Indonesian Army Personnel.

In its Rejoinder (at 25) Claimants draw the conclusions that:

PT Wisma Kartika has never been a private commercial enterprise, or operated for the benefit of anyone other than the Army.

Therefore – in the opinion of the Claimants – the acts of PT Wisma should be attributed to the Respondent.

162. The Tribunal cannot accept this point of view of the Claimants. The Tribunal finds that although it is proven that a close relationship exists between PT Wisma and Inkopad, and between the latter and the armed forces (see above, para. 9) this fact in itself does not attribute the acts of PT Wisma or its leadership to the Government of Indonesia.

163. By reaching this conclusion the Tribunal accepts that PT Wisma is registered as a limited liability company and that the acts of such entities are not normally to be attributed to their shareholders.

The Tribunal accepts that in a country like the Republic of Indonesia the military establishment has a dual task: 1) to take care of the external and internal security of the State and "2) to build – rebuild the nation" (see Cl. Doc. 102).

The second task means that some economic activities which in some countries are taken care of by private or public owned companies are run in Indonesia by people who belong to or are retired from the military establishment. This fact cannot in the opinion of the Tribunal change the legal evaluation that PT Wisma is an economic entity which has its own profit-seeking goal. This goal is by nature not different from the objective of other private economic entities, but is certainly very different from the normal purpose of a government: i.e. public administration in its widest sense.

On the other hand, this close relationship between some of the leadership of PT Wisma and the active policelarmy establishment was in the opinion of the Tribunal precisely the reason why it had been possible for PT Wisma to call in the policelarmy with the effect that the Investor was intimidated to give up its right to control and management of the property.

But these acts of PT Wisma are not an expropriation or taking neither according to national (Indonesian) nor to international law. Nor are the acts of PT Wisma in any way attributable to the Government of Indonesia.

164. The Tribunal is, however, satisfied that if it was not for the presence of a number of army/police personnel on the hotel premises, which personnel were called into – and as a matter of fact also succeeded to – support the take-over, the Claimant would not – at least at that stage – have had to give up their control and management of the Kartika Plaza Hotel. PT Wisma would therefore not at that date have been in the position to take over the management of the hotel.

165. These findings of the Tribunal, however, raise a question whether the assistance rendered to PT Wisma by the policelarmy personnel as such can involve responsibility for the Government of Indonesia?

166. As stated above (para. 88 ff.) PT Wisma and the Claimants at the end of March 1980 were in dispute concerning the implementation of the agreements between the parties and the amounts which the respective parties thought were due by PT Amco to PT Wisma. It was this dispute which eventually ended – with the assistance of the army/police personnel – in the take-over of the control and management of Kartika Plaza.

167. It follows from the 1978 Profit Sharing Agreement, paragraph 2,

(see para. 81 above) that "the management of the Kartika Plaza Land and Building with all its contents shall be carried out, implemented and the full responsibility of PT Amco".

The take-over was contrary to this agreement.

168. The decision by PT Wisma to take over the hotel was further contrary to Clause 6 in the Profit Sharing Agreement of October 6, 1978 in which PT Wisma and PT Amco agreed that any dispute shall be settled directly by and between the parties by upholding the principle of "consultations to reach agreement", mutual respect and with the aim: successful, peaceful, and orderly business in Jakarta-Indonesia (Cl. Doc. No. 16).

169. By enforcing – with the assistance of army/police personnel – a unilateral decision contrary to contractual undertakings and without having this decision justified either by agreement or by court decision PT Wisma was committing an act of illegal self-help.

To be sure, in civil law systems, like for instance the French law and Indonesian law, in spite of a court decision being in principle required for termination of a contract (see e.g. French Civil Code, Article 1134), there are exceptional instances, where a contract may be unilaterally terminated, provided a Court decision will afterwards legitimize such termination (see Legal Opinion by Professors Terré and Viandier, Resp. Legal Appendices, vol. IX, B-3 at 4 ff.). However, the mere reading of the examples given by these distinguished scholars shows that there was not, in the instance case, such an exceptional situation.

170. The Tribunal does not know of any authority which can legitimize an act of army or police personnel in which the said personnel assist a private party in establishing a situation which deprives another party of its contractual rights unless the internal situation or the upkeeping of law and order makes this absolutely necessary. There is no evidence that such a situation of emergency existed in this case on March 31/April 1, 1980.

171. In this case where the Claimants through their ownership of the shares in PT Amco were foreign investors the army/police personnel had a special duty to assist the Claimants in at least preserving the status quo until the dispute between the parties was settled by means of law.

By not doing this, an act was committed by the army/police against the Claimants whereby the latter – at least for a time – lost their right to management and control.

172. It is a generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, that a State has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens (see e.g. O'Connell, *International Law*, 2nd ed. vol. 2, at 941 ff. and references at 941, footnote 1). If such acts are committed with the active assistance of state-organs a breach of international law occurs. In this respect the Tribunal wants to draw attention to the Draft Articles on State Responsibility formulated in 1979 by the International Law Commission and presented to the General Assembly of the United Nations as an expression of accepted principles of international law:

Art. 3: There is an internationally wrongful act of a State when:

a. Conduct consisting of an action or an omission is attributable to the State under International law.

Art. 5: For the purpose of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under International Law, provided that the organ was acting in that capacity in the case in question.

Art. 10: The conduct of an organ of a State ... such organ having acted in that capacity, shall be considered as an act of the State under International Law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instruction concerning its activity.

On the basis of the proven actions and omissions of the army/police personnel in connection with the take-over the Tribunal cannot but draw the conclusion that an internationally wrongful act was committed and that this act is attributable to the Government of Indonesia which therefore is internationally responsible.

173. The findings of the Tribunal are based on the facts that the take-over of the hotel by PT Wisma – with the assistance of the army/police – and thereby depriving PT Amco of the management and control was an act of illegal self-help. However, the question is raised whether the subsequent legal proceedings instigated by PT Wisma against PT Amco – the Indonesian court and the outcome of these proceedings can with retroactive effect legitimize an act – or omission – which was wrongful when committed?

174. The Indonesian court proceedings are described in paras 131-41. It follows from this description that the Central Jakarta District Court granted *ex parte* PT Wisma's request for an interlocutory decree giving PT Wisma permission to manage the Kartika Plaza property (para. 134). The Greater Jakarta Court granted, however, on July 8, 1980, PT Amco's request for postponement of implementation of the Interlocutory Decree (para. 135).

175. On August 4, 1980, the Indonesian Supreme Court reversed the ruling of the Greater Jakarta Court. One of its reasons for their judgment (see para. 135) was that PT Wisma:

at the time of filing its suit had been managing the Kartika Plaza Hotel and Buildings at Jalan, M. H. Thamrin, No. 10. In other words, the defendant, PT Amco Indonesia, was no longer managing the Kartika Plaza Hotel and Buildings. Therefore interlocutory decree No. 2791/1980/G dated the 28th May 1980 in fact strengthened temporarily the legal condition in which PT Wisma Kartika had been managing the Kartika Plaza Hotel and Buildings.

It follows from this formulation that the Supreme Court did not legitimize the April 1 take-over of the hotel but on the contrary based its decision on the very same factual situation – the seizure – without expressing any legal evaluation of this act. This is not a legitimization of PT Wisma's behaviour in connection with the take-over.

176. The Tribunal notes that the judgments of January 12, 1982 and November 28, 1983, on the merits (paras 139, 141 above) do not purport to legitimize the unilateral acts of PT Wisma in connection with the take-over,

and even less to legitimize the acts or omissions of the army/police personnel.

177. The Tribunal wants to underline that by discussing the Indonesian courts' judgments and decisions, the Tribunal is not departing from its Award on Jurisdiction (para. 39) where it is stressed that the dispute put before this Tribunal is not a dispute between private parties. The Respondent before the Tribunal is not PT Wisma but the Republic of Indonesia.

In any case, an international tribunal is not bound to follow the result of a national court. One of the reasons for instituting an international arbitration procedure is precisely that parties – rightly or wrongly – feel often more confident with a legal institution which is not entirely related to one of the parties. If a national judgment was binding on an international tribunal such a procedure could be rendered meaningless.

Accordingly, no matter how the legal position of a party is described in a national judgment, an international arbitral tribunal enjoys the right to evaluate and examine this position without accepting any *res judicata* effect of a national court. In its evaluation, therefore, the judgments of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal.

178. On this basis the Tribunal can only conclude that the acts of PT Wisma on or about March 30/April 1, 1980, were illegal self-help and the assistance to these acts given to PT Wisma and lack of protection afforded to PT Amco, a foreign investor in Indonesia by the army/police was an international wrong attributable to the Republic.

The legal consequences of this international wrong will be discussed, below (see para. 256 ff. hereunder).

CHAPTER II – THE CLAIM FOR BREACH OF CONTRACT

Section I – The Legal Characterization of the Relationship Between the Republic of Indonesia and the Claimants

179. The first issue to which this claim gives rise is whether there was a contract in the relationship between Claimants and Respondent.

Claimants allege there was such a relationship (see in particular Mr Hornick's oral argument, Copenhagen transcript, at 953 ff.). More precisely, they contend that:

the investment application and approval decree taken together constitute what ... in international law has been called, quasi international contract or economic development agreement, rather than a mere unilateral or administrative act or what ... is called in the French system an administrative contract.

While admitting (Copenhagen transcript, p. 956) that "in calling this contract or an economic development agreement, it may be a little misleading to use the term of contract", Mr Hornick states:

that at least in Indonesia, it is viewed as much more like a contract than like a pure unilateral administrative act, (a) and that as a result, the investment application and the licence taken together give rise to certain rights and obligations on the part of both sides to that contract, which neither side is at liberty to violate unilaterally.

Dealing with the same issue, Mr Brower, counsel to Respondent, stated Copenhagen transcript, p. 1289) that:

the question was raised whether "(the licence)" might somehow be comparable to a *convention d'établissement* in French law, or an administrative act or an administrative contract, or is this a contract in the usual private contract law sense.

Then, to answer this question, Mr Brower relied essentially on a legal opinion delivered to Respondent by Professor Pierre Delvolvé (Resp. Leg. App., vol. VII, Tab I-2), where the distinguished scholar states (at 6) that he was "... requested to establish the principles of French law relating to the decisions adopted by the Indonesian authorities" (i.e. the approval of the investment, and then the revocation of the "investment authorization") "and what consequences they may have on the rights of the parties concerned", concludes (at 47), after a careful analysis of French precedents and authorities, that "the questions raised can be answered as follows, based on the principles of French administrative law (emphasis provided):

1. The authorization granted Amco Asia in 1968 constituted a unilateral administrative act subject to a condition ...
2. The failure of Amco Asia to comply with the conditions to which the authorization was made subject, that is to say, with the content and conditions of the project authorized, justified the withdrawal of the authorization and of the advantages it had provided ...
3. The Indonesian State cannot be held liable either on the ground of liability for fault or on the ground of liability without fault; in particular, the theory of unjust enrichment does not apply.

180. Before going itself into the legal analysis and characterization of the legal complex constituted by the investment application and the approval thereof, the Tribunal deems it necessary to make a preliminary remark.

It is obvious that in the instant case, such characterization can by no means be made on the basis of French law. Not only is French law not applicable as such in this case, but, as far as it embodies the concept of administrative Contracts, to characterize the relationships between the State and persons or entities who participate to economic activities, not even an analogy can be drawn from it in the framework of the large majority of the other legal systems. Indeed, said legal concepts are very specific to French law. To be sure, they may be met in legal systems whose administrative law derives, for historical reasons, from the French one, or has been directly influenced by the latter. However, the other legal systems, be they of civil or of common law, do not embody these particular concepts; and even where they do contain particular rules governing the relationships established by individual acts between State and private enterprises, such rules are not based on the

particular technicalities developed in this field by the French jurisprudence and case law.

Accordingly, while it is acceptable to say, as counsel to Indonesia did (Copenhagen transcript, at 1290) that "an important source of international law" would be a practice or legal provisions common to "a number of nations", the French concepts of administrative unilateral acts or administrative contracts and the French rules on these legal concepts are *not* practices or legal provisions common to all nations.

To characterize the investment application and its approval in the instant case, a "community" of legal concepts is to be sought in the common definition of contract in several legal systems, and in particular in the civil law systems, since Indonesian private law, largely influenced by Dutch law, has a close affinity to said systems; and of course, before even trying to find out such common principles, one has to consider Indonesian law itself, which as previously stated, is applicable as being the law of the country which is a party to the dispute at hand.

181. The relevant provisions of the Indonesian Civil Code define a contract as follows:

Art. 1233—All obligations arise either from a contract or from the law.

Art. 1234—They aim at giving something, to do or not to do something.

Art. 1313—A Contract is an act by which one or several persons bind themselves towards one or several others.

Combining Articles 1234 and 1313, one may set up a definition of contract which is very close to the one that may be found in the French Civil Code.

Article 1101 of the same provides as follows:

Contract is a convention by which one or several persons undertake, towards one or several others, to give, to do or not to do something.

Strictly speaking, the Indonesian and the French definitions mean that the contract is a convention generating obligations; or in other words, a kind of convention, the latter being, more generally, an agreement aimed at producing legal effects (see *e.g.* *Traité de droit civil, sous la direction de Jacques Ghestin, Les obligations, Le contrat, par Jacques Ghestin, 1980, at 3 ff.*). However, for practical purposes, the two terms (contract and convention) are used interchangeably, thus becoming in effect synonymous. Given the similarity between the French and the Indonesian definitions of contract, one may assume that they can be construed in the same way in both legal systems.

182. Now, one may find a similar or at least comparable notion of contract, not only in civil law systems, but at common law as well.

Thus, Articles 1269, 1270 and 1313 of the Dutch Civil Code are respectively identical to Articles 1233, 1234 and 1313 of the Indonesian Civil Code. In Belgian law, contract is an agreement of two or several wills in view of producing legal effects. Article 1321 of the Italian Civil Code provides that "the contract is an agreement between two or several parties to constitute, rule or extinguish between them a legal patrimonial

relationship". In German law, a contract is an agreement between two or several persons on a subject matter of legal interest; it aims to engender, modify or extinguish obligations. In Danish law, the contract is an agreement concluded by two or several persons that creates obligations (see: *Institut de droit comparé de Paris, La formation du contrat sous la direction de René Rodière, Paris 1976, recapitulatory table*).

The concept of contract is not fundamentally different at common law, although it is differently described. Thus, in *Anson's Law of Contract* (25th ed., by A. G. Guest, MA, 1979-83), the author writes (at 2): "We may provisionally describe the law of contract as that branch of the law which determines the circumstances in which a promise shall be legally binding on the person making it", and then states that:

a promise may be defined as a declaration or assurance made to another person, stating that a certain state of affairs exists, or that the maker will do, or refrain from, some specified act, and conferring on that other a right to claim the fulfilment of such declaration or assurance.

The contract itself (at 21):

consists of an actionable promise or promises. Every such promise involves at least two parties, and an outward expression of common intention and of expectation as to the declaration or assurance contained in the promise.

Likewise, in his book on contracts (Boston and Toronto, 1982), under the heading "The Meaning of Contract" (Art. 3), Professor E. Allan Farnsworth explains that books on the law of contracts often use the word "contracts" in a "technical sense to mean a promise, or a set of promises, that the law will enforce or at least recognize in some other way". The author cites the *Restatement Second of Contracts, Sec. 1*, where contract is defined as "a promise or a set of promises of which the law in some way recognizes as a duty" (at 3, footnote), and *Sec. 2(1)*, which defines a promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made".

183. To conclude, it may be said that Indonesian law as well as general principles of law drawn from the main legal systems, which constitute a source of international law applicable together with Indonesian law in the instant case, conceive of the contract as an agreement based on a meeting of minds and wills and creating obligations (or, which is not fundamentally different, creating promises enforceable by law), and in an even broader sense, concerning any legal subject matter.

Such being the general definition of contract, does the legal effect constituted, in the instant case, by the combination of the investment application and the approval thereof, correspond to this definition?

184. A first remark should be here made.

The Investment Application, emanating from a company which not only seeks to invest, but declares it is prepared to undertake several obligations and to perform them if the application is approved, together with the

approval of this application by a host State, which means at least that the latter agrees to the investment as described in the application – leaving aside, for the time being, the question as to whether the State itself undertakes reciprocal obligations – are undoubtedly expressing a meeting of minds and of wills, purporting to produce legal effects in the domain of economic activities. Consequently, if one would apply here the broader concept of contract, the investment application and the approval thereof should together be considered as forming a contract. In particular, in the instant case, the Tribunal notes that according to Article 1 of the application, the applicant undertook the obligation to establish the business "within a period of thirty days".

The objection against such characterization by Professor Devolvé, based on the fact that there is not an *instrumentum* that is to say, that apparently there is not a single document, executed by the applicant and the State which embodies the application and the approval, cannot be sustained.

However, for certain type of contracts (like notarial contracts in civil law, or deeds at common law), neither the Indonesian law, nor any general principle of law, requires that such agreements be set out in a written document executed by both parties in order for such agreements to be characterized as contracts. From the formal viewpoint, offer and acceptance may by themselves constitute a contract, provided they are concordant one with each other; and in fact, the investment application is nothing other than an offer to invest and an undertaking of several obligations relating to the proposed investment, and the approval thereof is, at least, an acceptance of said offer. It should be pointed out that Indonesian law provides that the foreign investment application and the approval thereof be made in given forms, and it is not alleged that these forms were not observed in the present case.

185. However, the Tribunal intends to go into a deeper analysis of this question in order to reach a final characterization of the application-approval combination, as it relates to the concept of contract.

Indeed, as already said, strictly speaking, a contract is an agreement (or an "act" like the Indonesian and Dutch Civil Codes say) aiming to create obligations. Is the investment-approval combination a contract in this sense? Independently of any theoretical definition of contract, the question is obviously relevant in the instant case, because for all practical purposes, behind the claim of breach of contract lies the contention that Indonesia has ceased to fulfil its obligations under the investment licence it granted, and that such termination was not justified by the non-fulfilment by the Claimants of their own obligations.

There is of course no doubt, and it is admitted by all parties that in the investment application (whose precise heading was: "Application to Establish PT Amco, Indonesia") Amco Asia offered to undertake several obligations, and in particular the obligation to establish a foreign business in Indonesia (Article I), whose purpose and aim would be to act in the field of real estate business (Article 11), and whose capital would total US \$3,000,000.00 representing share capital (Article 111), to be deposited stage by stage, and taking the form of cash, capital goods or both (Article IV). In

addition, in his oral argument (see Copenhagen transcript, at 259), Mr Hornick stated that:

it is fair and reasonable to read the application in such a way as to believe that the parties understood and expected that Amco, the foreign investor, was indeed going to build a hotel in Indonesia or cause such a hotel to be built, or at least that that was its intention as of the time.

As a matter of fact, given the undertaking previously mentioned (see para. 184) it was more than a mere intention.

186. As already said, the approval of the application by the Republic of Indonesia expressed the latter's acceptance of the obligations that Amco offered to undertake, and it could be said that by this acceptance, a contract was formed between Indonesia and the company.

However, it remains to be seen whether Indonesia, by approving the application, itself undertook obligations towards the applicant.

There is no doubt, here again, that the applicant company was entitled to expect that its application having been approved, it would be allowed to effectively invest in the business described, to exploit this business for the period mentioned, and to have the benefit of several foreign exchange and fiscal concessions provided for by the Foreign Capital Investment Law (Act No. 1 of 1967) and expressly asked for in the Application (see Exh. A to the Request for Arbitration, Article VIII and above, Sec. I-B, Facts, para. II, 17). But by the acceptance or approval of the Application, did obligations, and more precisely contractual obligations of the State arise which corresponded to this expectation on the part of the applicant, and are these obligations as binding as the undertakings and obligations of the applicant are?

187. The Respondent denies this, relying essentially, in this respect, on Professor Delvolvé's legal opinion. Now, coming back to the non-applicability, in the instant case, of principles that are particular to French administrative law, it is worthwhile to examine whether the basic logic underlying these principles precludes the characterization of the application-approval combination as a contract.

i) The first reason to refuse such characterization seems to be that the "licence" to invest is granted by the public authority under the condition that the recipient will fulfil his undertakings, and that the latter is not granted any right as long as it does not or if it ceases to fulfil them: this is the meaning of the characterization of the licence as an act under condition ("acte sous condition").

The Tribunal does not intend to deny this analysis of French law, and it is even prepared to accept that in countries other than France, and in particular in Indonesia, when an investment application is approved, the Government understands, and the applicant should expect that the approval is granted under such condition. But if that means that the approval is granted under a resolutive condition ("condition résolutoire") namely, the fulfilment by the recipient of his obligations, this would not create a fundamental difference between the application-approval combination and a contract, particularly in French Law. Indeed, Article 1184 of the French

Civil Code provides (para. 1) that "the resolutive condition" (la condition résolutoire) is always implied in a synallagmatic contract, for the case where one of the parties does not fulfil its commitments: thus, the obligation undertaken by each party in such a contract is subject to the performance, by the other party, of its own obligations. Moreover, it should be noticed that the Indonesian Civil Code contains a very similar provision.

ii) The second logical reason for the denial of a contractual characterization is that the authorization to invest and to run the business thus created, as well as the concessions granted to the investor (if any), are not deriving from the State's commitments, but from the law itself: the only meaning and purpose of the licence would be to make the relevant statutory provisions applicable to the individual applicant.

Even admitting this interpretation – which, once again, is peculiar to French law and possibly to a limited number of other legal systems directly influenced by the same – it remains that by granting the licence, the State promises to apply the legal provisions in question for the benefit of a particular applicant, except, as it will be seen hereunder (para. 188 ff.) where the withdrawal of this promise is justified, and provided the conditions of such withdrawal are satisfied.

188. In the Tribunal's view, here lies the crux of the matter.

Being an agreement aimed at producing legal effects in the economic field, creating obligations for the applicant and obligations for the State, even if in the latter case they are conditional, the legal combination formed by the application and by the approval thereof is not alien to the general concept of contract according to Indonesian law. Nor is it alien to general principles of law.

However, it is not *identical* to a private law contract, due to the fact that the State is entitled to withdraw the approval it granted *for reasons which could not be invoked by a private contracting entity, and/or to decide and implement the withdrawal by utilizing procedures which are different from those which can and have to be utilized by a private entity.*

i) First of all, the State is the natural protector of the nation's public interest and welfare. Accordingly, except when the State acts like a private person, that is not exercising in any way its sovereign powers, the State is to be and indeed, is effectively, granted the right to alter, and even to suppress, where the public interest so requires, a situation or a relationship it created by a previous act, even if this act is the source of the State's commitment and obligations.

This is the fundamental principle of the right of a sovereign State to nationalize or expropriate property, including contractual rights previously granted by itself, even if they belong to aliens, by now clearly admitted in national legal systems as well as in international law; as to the latter, the principle is embodied in resolutions of the General Assembly of the United Nations (in particular, resolution 1803/XVII, of 14 December 1962) and in a number of international judicial and arbitral decisions.

However, the right to nationalize supposes that the act by which the State purports to have exercised it, is a true nationalization, namely a taking of property or contractual rights which aims to protect or to promote the public interest.

It is here important to underscore that Indonesian law clearly abides by this principle. Indeed, Article 21 of "Act No. 111967 Re Foreign Capital Investment" (Claim. Statement of Facts Doc., Doc. 1) provides as follows:

Art. 21—The Government shall not undertake a total nationalization or revocation of ownership rights of foreign capital enterprises, nor take steps to restrict the rights of control and/or management of the enterprises concerned, except when declared by Act of Parliament that the interest of the State requires such a step.

In addition, it is also clearly admitted in international law, as well as in Indonesian law, that the State which nationalizes has to provide compensation for the property and/or contractual rights thus taken from their owner or holder. In international law, the principle is embodied in the resolutions and decisions previously mentioned, which set out the principle of the State's right to nationalize. As to Indonesian law, it is consecrated in Article 22 of Law No. 111967, according to which (para. 1) "in case of the measures referred to in Article 21, the Government has the obligation to provide compensation, the amount, type and payment-procedure of which shall have been agreed upon by both parties, in accordance with the principles valid in international law"; or, failing such agreement, by international arbitration (paras 2 and 3), which likewise would obviously have to take into account the principles of international law.

ii) Secondly, the State is entitled to withdraw the approval of an investment application, where the applicant does not fulfil, once the approval was granted, the obligations the applicant offered to undertake.

In this respect, *there is substantially no fundamental difference between the position of the State and that of a party to a synallagmatic contract.* Indeed, a contracting party may, in almost all legal systems, terminate the contract where the other party does not perform its obligations.

The difference lies – or may lie – in the procedure. While in some systems (like, for example, the Indonesian and the French ones) termination of a private law contract is to be, in principle, ordered by a court (notwithstanding exceptions described by Professors Terré and Viandier in the legal opinion, they delivered to Respondent: see Resp. Legal App. vol. IX – B 83), the procedure of withdrawal of a "licence" is set out in administrative regulations which do not provide for a prior court decision. In other words, in respect of procedure, the State may be free from the requirement of a court decision when it decides to withdraw the application's approval; but *it has to abide by the rules of procedure of such withdrawal it has itself set up*, not to speak about the general principle of *due Process* to which the recipient of the licence is entitled, which will be brought up and discussed later (see hereunder, para. 193 ff.).

189. The foregoing are the specific features which would allow consideration of the notion that the relationship established between foreign enterprise and a State by an investment application on the one hand and the approval of the same on the second is not identical to a private law contract, so that such relationship should not be characterized as a contract as such, but rather as a *sui generis* legal relationship, comparable to a contract.

Indeed, in the Tribunal's view, such a relationship does not draw its source from a unilateral act of the State, but from a bilateral agreement between the State and the foreign applicant whose application is approved by the State.

The specific features of this relationship lead to the conclusion that a State may terminate such a relationship either for reasons of public interest and welfare – which is inconceivable in the case of a private law contract – or for reasons of non-fulfilment by the foreign applicant of its obligations, which is substantially identical to the parallel rule concerning contracts, but in some legal systems is implemented in other ways.

190. In the instant case, Respondent does not effectively base its claims on the characterization of the revocation of the application's approval as a measure of nationalization. The Republic alleges that such revocation was based on failure by Claimants to fulfil the obligations undertaken by the latter according to the Application, and justified by such failure. On their side, Claimants deny any failure of that kind.

The Tribunal will not enter into a discussion of the licence's revocation viewed as a nationalization. It should just be said here that should the revocation in the present case be thus characterized, it would at any event be totally irregular, since no Act of Parliament of Indonesia declared that this measure was required by the interests of the State. Moreover, would it have been a nationalization, compensation should have been provided to cover the damages suffered by the investor. Therefore, the consequences of a nationalization would have been the same as that of the unjustified "breach of contract" alleged by the Claimants.

191. Consequently, the Tribunal will now examine whether the withdrawal of the application's approval was in the circumstances of the case justified by the failures of the applicant as alleged by the Republic.

Beforehand, one remark is in order.

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, the same is not substantially justified. To consider such claim while not characterizing the relationship in question exactly like a contract is not to enter into a different case, because the consequences of an unjustified revocation would be the same as those resulting from the breach of a contract. Moreover, while not accepting, in principle, the characterization of the application-approval combination as a contract, Respondent has put forward the reasons which, in its view, justified the licence revocation in this case, implicitly, but clearly, accepted – as stated, moreover, by Professor Delvolvé – that lacking such reasons, the application's approval could not have been lawfully withdrawn.

Section 11– The Issue of the Lawfulness of the Withdrawal of the Investment Application's Approval

192. The Tribunal has previously described the several steps taken by representatives of PT Wisma Kartika, by Mr Usman and Mr Ridho Harun, of BKPM, and ultimately by the Chairman of BKPM, which resulted, after approval by the President of the Republic, in the decision of July 9, 1980 "concerning Revocation of Approval Termination of Capital Investment Business in the Name of PT Amco Indonesia ..." (see above, para. 110 ff.).

Based on the facts and the documents thus described, to which reference is hereby made, the Tribunal will now proceed to evaluate the *procedure* followed in pronouncing the revocation, and the *grounds* on which the same was based. Such double evaluation is necessary in order for the Tribunal to find whether the revocation was decided in accordance with Indonesian law and with general principles of international law. Indeed, to be lawful, the withdrawal of an administrative act which terminates a bilateral relationship between a State and a private party, which relationship has created reciprocal legal obligations on both sides, has to satisfy two requisites:

- in the first place, procedural ones, as set up by the applicable law and which are to be in accord with the fundamental principle of *due process*, which are to assure to any person or entity whose rights are affected by a revocation the right to discuss the grievances alleged against him and to defend himself against the same;
- and second, the substantial requirement that the revocation be based on grounds that justify it legally.

A. The Procedure of the Revocation

193. On July 9, 1980, the day where the decision "concerning Revocation, etc ..." was issued, as well as on May 30, 1980, the day on which the approval of the same by the President of the Republic was conveyed to BKPM, the basic provisions dealing with the implementation thereof were – and apparently, still are today – set up by Article 6 of Presidential Decree No. 54 of 1977 "stipulated" on October 3, 1977, and Article 13 of the Decree of Chairman of BKPM, No. 01 of 1977, dated November 3, 1977.

Under the heading "*Sanction Provisions*", Article 6 of Decree No. 54/1977 provides as follows:

In case the implementation of a capital investment is not in accordance with the approval and provisions as stipulated by the Government, and/or the capital investor does not fulfil the obligation to submit reports on capital investment implementation as referred to in Article 4, then the capital investor can be imposed with sanctions in accordance with the effective legislation regulations, including the revocation of the undertaking permit and/or fiscal facilities reliefs already granted.

As to Article 13 of the Chairman of BKPM's Decree 01/1977, the wording of its relevant provision (namely paras 2 and 3) is the following:

Sanctions

...

2. If investors in executing the capital investment are not in conformity with the approval and provisions which have been given by the Government and/or investors do not fulfil the obligation to submit report on the realization of capital investment as stipulated under Article 8 of the Decree, the said case may result in charging legal sanction against the investors in comply with the effective regulation until the revocation of all approval and permit that are issued by the Government. [sic]

3. The charging of the sanction as explained under paragraph 1 above shall be informed in advance by the Capital Investment Coordination Board to the investors concerned. Whereas the charging of the sanction as stipulated under paragraph 2 above shall be preceded by the warning by the Capital Investment Coordination Board to the investors concerned maximally 3 (three) times with the 1 (one) month interim period respectively.

194. It cannot be seriously denied that these regulations were applicable to the revocation decided in the instant case. To be sure, it has been suggested by the Claimants – if not firmly contended – that the application of said regulations to the investment approval in question would be retroactive, and for this reason, unlawful. To answer this objection, counsel to Respondent relied on Decree No. 63 of 1969, dated August 5, 1969, which counsel stated "promulgated identical express revocation authority (Copenhagen transcript, at 1219-C).

This answer is not convincing, since the approval in this case was granted on July 29, 1968, that is to say prior to the decree of August 5, 1969. But the fact of the matter is that from the point of view of substance, the State's right to withdraw the approval where the recipient does not fulfil its obligations (provided, as it will be shown hereunder, the failure is material) derives from the very nature of the legal relationship established by the application and the approval thereof; accordingly, such right of justifiable revocation existed even before the promulgation of the decree of 1969, which merely affirmed it.

As to the procedure of revocation, where it is established by regulation, it becomes applicable, like procedural provisions in general, to any revocation of a licence which comes after its promulgation, even if the approval was granted previous to the enabling regulation.

195. Now, Article 13, paragraph 3 of BKPM Chairman's Decree 0111977, cited above, provides that "the charging of the sanction as stipulated under paragraph 2" (that is to say in cases where the investors do not observe "the approval and provision given by the Government and/or do not fulfil the obligations to submit report on the realization of capital investment") ... "shall be preceded by the warning by the Capital Investment Coordination Board to the investors concerned maximally 3 (three) times with the 1 (one) month interim period respectively".

As a matter of fact, the import of this provision is not perfectly clear. Does it mean that the revocation can be decided only after three warnings, or that this number of warnings is a maximum, which would imply that on a revocation could be decided just after one single or two warnings? Literally

read, the second interpretation could be supported. However, where the sanction to be applied is a revocation, that is to say the most serious sanction to construe the provision according to its aim and purpose leads to the view that three warnings are indeed required. Moreover, such construction would better fit with the first sentence of Article 13, paragraph 3, which in respect of the sanction to be applied according to paragraph 1 (in case of intentionally misstated statements in the application or falsification of documents attached to the same) simply provides that the investor "shall be informed in advance", not mentioning that such information should be given more than one time.

196. Be that as it may, in the instant case, *there were no warning or warnings at all*. To be sure, Respondent contends that such warnings were given by Bank Indonesia, relying in this respect on several letters from the bank to PT Amco (Resp. Exh. to CM Nos 76, 78, 79, 80, 83 to 86). The first of these letters (Exh. 76) is dated November 9, 1971, and the last but one (Exh. 85), May 31, 1978. None of them contains any formula that could possibly be interpreted as a warning; moreover, how could even the letter of May 31, 1978, be considered as a warning on which a licence revocation could be based more than two years later?

Could a "warning" be found in the last letter, of September 3, 1979 (Exh. 86)? There, the bank, after having recalled two previous letters of 1978, where Report on Foreign Capital Investment realization was asked for, and stated that the same was still not received, concluded as follows:

Furthermore, we need to explain here that the capital investors who do not fulfil the obligations in conveying the financial reports intended, can *incur sanctions* in accordance with Article 13 of the Capital Investment Coordinating Board's Decree No. 0111977 dated 3 November 1977.

Thus, for your information.

197. "Information" is far from "warning". Moreover, beside the fact that even this letter preceded the revocation by more than ten months, it can by no means be considered that it was a warning, lawfully preparing the revocation, in the sense of Article 13 of the Decree 0111977. There are, indeed, three reasons to reject such an interpretation: the so-called "warning" was not given by the BKPM, as provided for in Article 13; it did not indicate the sanction envisaged, which is easy to understand, since Bank Indonesia was not the authority competent to impose such sanction; and it did not indicate the reasons for which the revocation was finally decided, as it will be shown hereunder (see para. 204 ff.).

198. Accordingly, this letter from Bank Indonesia could not fulfil the purpose and function of the warning, or warnings, provided for by Decree 0111977. The purpose and function of these warnings are to give the addressee of the warnings the opportunity to remedy the failures (if any) mentioned therein; and even in cases where such remedy could not be offered or made, in fact or in law (a point which will be discussed hereunder, see paras 219, 241), to give him the opportunity to discuss the administration's grievances and to defend himself against the same.

Thus, the warning (or warnings) are an element of due process, rightly in

the opinion of the Tribunal, established by Indonesian law to protect the investor, in particular where a sanction as heavy – and indeed, irremediable – as a revocation is envisaged against him. In the instant case, this protection was not made available to the Claimants, who were thus deprived of due process, contrary to Indonesian law as well as contrary to general principles of law.

199. Moreover, infringement of the due process principle is met again when examining the manner in which the revocation was prepared, quite apart from the issue of the absence of any warning.

The meetings and documents which preceded the revocation were previously described (see above, paras 110, 115). Suffice it to recall here that the starting point of the process which resulted finally in the revocation of the licence was a letter of PT Wisma Kartika, dated April 11, 1980, which was handed over to Messrs Harun and Usman, of BKPM during a meeting held in the afternoon of April 12 (a first meeting had been held in the morning of the same day). According to Mr Usman's testimony (see above, para, 115) some checking was made by him, the same or the next day, with Bank Indonesia and the tax authorities; on April 13, 1980, a meeting which lasted about one hour was held at the BKPM offices between Messrs Tomodok and Gumillag, of PT Amco, and Messrs Harun and Usman of BKPM. The next day, April 14, PT Wisma addressed to BKPM the letter described above (see above, para. 117), which it concluded by a request to BKPM:

to revoke immediately PT Amco's licence, because (they) have suffered so many losses because of it and feel it is very difficult to cooperate with them and besides that, considering also that their very small capital has been retransferred double to abroad.

Then again just one day after, on April 15, Mr Usman handed over to Mr Harun the "Summary of PT Amco Indonesia – PT Wisma Kartika" (see above, para. 118), stating the "violations" (committed, in his view, by PT Amco Indonesia) "towards the administrative provisions of the capital investment (law)", and in addition, "violations which have criminal characteristics" and suggesting that it is necessary to review the Foreign Capital Investment which had been granted to PT Amco Indonesia.

Thus, three days during which one hour had been devoted to a discussion with PT Amco's representatives, seemed sufficient to Mr Usman for him to present this suggestion, which finally resulted, after a memorandum was sent on May 10, 1980, by Mr Harun to the Deputy Chairman of BKPM (see above, para. 124) and a letter was sent two days later by the Chairman of BKPM (see above, paras 125-6) in the approval of the revocation by the President and the decision of revocation of July 9, 1980 (see above, paras 127-8).

200. Certainly, the delay that elapsed in reaching this decision, after Mr Usman handed over of his "Summary" was somewhat more reasonable than the practically instantaneous delay between his first meeting with the representatives of PT Wisma Kartika and the preparation and forwarding of the said document. However, it does not appear that during this second

period, any supplementary investigations were made by the BKPM or by the President's staff; in any event, no evidence has been offered of such investigations. In particular, it was not even alleged that PT Amco Asia, or any other Claimant, was offered the opportunity to discuss the matter again, to produce documents and/or to defend themselves; nothing more, in this respect, than the one-hour meeting with Mr Usman on April 13, 1980.

201. Leaving alone the fact that the initiative for this "procedure" of revocation was taken by PT Wisma, a company which the Respondent maintained was independent from the State, and therefore not entrusted with any governmental or administrative competence or power, and a company which had a severe dispute with PT Amco (this not being the best guarantee of its objectivity), the Tribunal is bound to conclude that said "procedure" did not grant to the Claimants due process of law.

Accordingly, this procedure was contrary, not only to the Indonesian regulations concerning the warning or warnings to be given before a revocation of an investment authorization, 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.

202. However, the Tribunal believes it is necessary to examine and evaluate these reasons, and it will do so hereunder (see para. 204 ff.).

Beforehand, two objections presented by the Respondent against the consequences thus drawn from the procedure of revocation are to be examined.

i) The Respondent has argued that warning or warnings would have been useless in the circumstances of this case and consequently, that even if admitted, the lack of warning would be irrelevant – since no remedy could have been brought by the Claimants to their alleged failures, which led to the revocation.

Whether this is so in fact, and whether or to what extent such remedy was needed will be seen when examining hereunder the alleged failures on which the revocation was based. Suffice it to recall here that the purpose of the warning, or warnings, is not only to allow such remedies, but also to offer to the investor the opportunity to discuss the alleged failures, in order to demonstrate either that they do not exist, or that they do not justify the revocation. It could not be argued, in this respect, that discussion and defence would not have changed the administration's mind; because such argument would mean that the administration had decided in advance not to take into account any argument of the investor whatsoever, which would itself amount to a refusal of due process.

ii) Secondly, the Respondent argued that due process is now granted to Claimants by this very arbitral procedure of the ICSID. Such argument cannot be sustained. It is obvious that this Tribunal cannot substitute itself for the Indonesian Government, in order to cancel the revocation and restore the licence; such actions are not even claimed, and it is more than doubtful that this kind of *restitutio in integrum* could be ordered against a sovereign State

Accordingly, the revocation has been definitively decided, and the investor has been definitively deprived of its right to operate and to exploit the enterprise that it had been authorized to set up. Whatever compensation the investor can hope to get, that means at the least that the nature of its rights was changed against its will, and such change has been decided upon without its being granted due process *and the decision to withdraw the authorization* cannot be remedied by the arbitral procedure.

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

The Tribunal will now examine whether the reasons on which the revocation was based *could* have justified it.

B. The Reasons of the Investment Application's Withdrawal

204. The decision of the Chairman of BKPM "concerning Revocation of Approval/Termination of Capital Investment Business in the name of PT Amco Indonesia in the framework of Law Number 1 Year 1967 concerning foreign capital investment (PMA)" (Resp. Exh. to CM, vol. IV No. 91) was previously described (see above, para. 129). It is here recalled that this decision was based on two grounds, namely:

- that by the Sub-Lease Agreements dated October 15, 1969 and October 13, 1970, PT Amco Indonesia delivered the management of Hotel Kartika Plaza to PT Aeropacific, thus not fulfilling itself the obligations as stipulated in the Lease and Management Contract concluded with PT Wisma Kartika on April 22, 1968;
- that PT Amco Indonesia:

has only deposit (sic) its capital as much as US \$1,399,000, which consisted of loan for the amount of US \$1,000,000 and own capital (equity) for the sum of US \$399,000 is obligated to invest its capital the amount of US \$4,000,000, which consisted of own capital (equity) at the sum of US \$3,000,000—and loan for US \$1,000,000;

while:

the fulfilment of the remainder of the capital was executed by PT Aeropacific ..., a national company, therefore the said capital is not foreign capital (fresh capital), as stipulated in Article 2 Law No. 1 Year 1967.

205. Thus, the other grounds for a suggested "review" of the authorization put forward in Mr Usman's Summary (namely: the failure to report to Bank Indonesia concerning transfers abroad; the failure to report BKPM concerning the realization of Amco's capital investment; alleged tax manipulation; assets owned by the hotel allegedly given in guarantee for obtaining a loan, without the approval of the owner, PT Wisma Kartika; see above, paras 118-23), are not mentioned in the Decision of July 9, 1980, in spite of said grounds having been, in essence, repeated in Mr Harun's Memorandum of May 10, 1980 (Resp. Exh. to CM vol. IV No. 89; see above, para. 14), and in the Request for Guidance presented on May 12,

1980 by the Chairman of BKPM to the President of the Republic (Resp. Exh. to CM, No. 90; see above, para. 126).

Accordingly, the Tribunal does not have to consider these grounds, since they have not been relied upon in the legal act which pronounced the

It might be that the Chairman of BKPM considered that it was not necessary to refer to them, because he may have thought that the two grounds ultimately invoked (i.e. the transfer of the management to Aeropacific and the non fulfilment of the obligation to invest in the amount promised) were sufficient to justify the revocation. However, it might also be that the Chairman considered that in the circumstances of the case, the other grievances would not have justified the revocation.

Be that as it may, it is not for the Tribunal to build hypotheses, nor to try to guess thoughts which the author of the revocation did not express. The Tribunal has to evaluate the lawfulness of a legal decision and the Tribunal can do so by evaluating it as it is, and as it has been drafted by the Indonesian authority that issued it; the Tribunal has not to supplement the decision in question by adding to it grounds which it does not contain, although they were invoked in the preparatory documents of the decision.

Accordingly, the Tribunal will consider only the two grounds of revocation on which the decision is expressly based.

a) Transfer to PT Aeropacific of the management of the hotel

206. It has been recited previously (see above, paras 53-77) that by the "First Sub-Lease Agreement" of October 15, 1969, which succeeded to the "Sub-Lease Agreement of Intent" of August 22, 1969, and was subsequently replaced by the "Second Sub-Lease Agreement" of October 13, 1970, PT Amco Indonesia entrusted first the group Pulitzer-Garuda-KLM then PT Aeropacific with the management and operation of the hotel; in addition, the "Second Sub-Lease Agreement" called for Aeropacific to "complete the construction of the hotel and furnish, equip and fit the same in all respects in accordance with Howard Johnson's standards ...".

It was also recalled that PT Amco and PT Wisma Kartika approved and signed these three successive agreements; and that the management and operation of the Hotel by PT Aeropacific ceased definitively on June 1, 1978, when Inkopad took over possession and control of the Wisma Kartika property and undertook its management.

207. The Decision of Revocation of July 9, 1980 deals in the following terms with the issue of these agreements:

2. that based on the Sub-Lease Agreement dated October 15, 1969 jo (sic) October 13, 1970 (obviously, the two successive sub-lease agreements previously mentioned are thus referred to) PT Amco Indonesia (Lessor) delivered the management of Hotel Kartika Plaza to PT Aeropacific Hotel Corp. (Lessee), therefore it is not PT Amco Indonesia which fulfilled the obligations as stipulated in the said Lease and Management Contract as stated in dictum 1 above (i.e., "Lease and Management Contract in the field of

operating hotel Kartika Plaza between PT Wisma Kartika and Amco Corporation, U.S.A. dated April 22, 1968").

208. There is some ambiguity in this wording. Indeed, it is not perfectly clear, at least in the English translation, whether the term "as stipulated" in the quoted sentence of the revocation refers to the personal fulfilment by PT Amco of the obligations resulting from the Lease and Management Agreement, or simply to these obligations.

In any event, the conclusion by PT Amco Indonesia of the two successive sub-lease agreements could by no means be considered as an infringement of the initial Lease and Management Agreement, for a very simple reason: as previously recalled (see above, paras 61-70), PT Wisma Kartika and Amco Asia Corporation approved in writing and signed, on the last page of the contractual documents themselves, both sub-lease agreements (see Resp. Exh. to CM at 13; and 26 at 29). In both instances, the approval is expressed in terms which could not be clearer, and without any restriction or reservation ("approve and will respect", in the first sub-lease agreement; "approve of and agree to be bound by" on the second one). Moreover, it is worthwhile to underscore that both "approvals" are expressly given "also in case PT Amco Indonesia's interest would be transferred to a third party"; such clause would be incompatible with a *de jure* prohibition, by the Indonesian law of contract, of a transfer of the rights, interests and obligations deriving from the initial Lease and Management Agreement; as a matter of fact, no evidence of such prohibition has been offered nor brought. In addition, it would be difficult to imagine such a prohibition by the law of contract, whereas in the instant case, the lessor agrees to the sub-leases.

Accordingly, no violation of the Lease and Management Agreement in respect of the contractual obligations deriving of the same existed; thus, the revocation could not be justified on this basis.

209. It remains however to find whether the obligation for the investor to fulfil personally its obligations results from the law and regulations governing the investment; and if so, whether in the factual situation that prevailed at the date of the revocation, the sub-lease agreements could be invoked to justify the same, on the basis of principles or provisions concerning the licence and prohibiting, ex-hypothesis, the transfer of the investor's rights, interests and obligations deriving from the same.

210. Respondent relies, in this respect, on Decree of the President of the Republic No. 6311969, dated August 5, 1969 (Resp. Fact. App. C, Att. 3), No. 2111973, dated May 26, 1973, and (ibid) No. 5411977, dated October 3, 1977 (Resp. Fact. App. C, Att. 1, at 55).

Article 4 of Decree No. 6311969 in particular provides as follows:

If the capital investment plan is not implemented in accordance with the approval that has been granted, this may result in the withdrawal of the business license that has been issued ...

A similar provision may be found in Article 6 of Decree No. 21/1973. Finally, Article 4 of Decree No. 5411977 (whose translations into English,

as respectively filed by Claimants and by Respondent are slightly different, those differences not changing, however, the substantial meaning of the relevant provision) provides that (para. 1):

each investor in the framework of Act No. 1 of 1967 ... is obliged to carry out his capital investment, in accordance with the regulations agreed upon (or, in the Claimants' translation, in accordance with provisions already approved: see Cl. Doc. No. 32).

and that (para. 2):

each change in the execution of the agreement mentioned in paragraph (1) must be approved beforehand by the Chairman of the BKPM (Respt's translation).

These provisions of Decree No. 5411977 are to be combined with the one already cited (see above, para. 193) of Article 13 of the subsequent Decree No. 0111977 of the Chairman of BKPM, according to which:

if investors in executing the capital investment are not in conformity with the approval and provision which have been given by the Government ... the said case may result in charging legal sanction against the investors ... until the revocation of all approval and permit that are issued by the Government.

211. On the basis of these provisions (not expressly referring, however, to the last one), Respondent contends that the sub-lease agreements having resulted in the non-fulfilment by the investor himself (or rather by the Indonesian PT it established of the obligations undertaken in the approved investment application, the investor changed the implementation or execution of the investment as approved, thus justifying the revocation of the licence.

In essence, Claimants oppose to this the following (see Reply to Indonesia's CM at 78 ff., 96 ff.):

- only the Indonesian Parliament has the power to cancel investment licences;
- the administrative regulations cited by Indonesia as empowering cancellation could not supersede parliamentary authority, and in any event were promulgated after Claimant's investment was approved; moreover, both Decree No. 6311969 and Decree No. 2111973 had been revoked at the time that Indonesia cancelled Claimant's investment licence (namely, Decree No. 6311969 by Decree No. 2111973, and Decree No. 2111973 by Decree No. 5411977);
- the sub-lease agreement between PT Amco and Aeropacific was merely a sub-contract, not a transfer of PT Amco's obligations to Aeropacific;
- finally, PT Wisma Kartika having approved the sub-lease agreements, the Government could not base on the same the revocation of the licence.

212. The Tribunal does not accept the argument based on Article 21 of Law No. 1 of 1967, according to which the Government cannot decide

nationalization or similar measures as long as a law (which in one of the translations filed is called an "Act of Parliament" has not declared that the interest of the State requires such a measure.

As already noted (see above, para. 190), Respondent does not effectively base its claim on the characterization of the licence's revocation as a nationalization. Moreover, the Claimants present this measure as a "breach of contract", which is one of the bases of their claims. Accordingly, they admit necessarily that if the failure to fulfil their obligations, as alleged by Respondent, could be established, the revocation of the licence could be justified, no act of Parliament declaring the interest of the State being required to that effect.

As to the alleged abrogation of Decree No. 6311969 by Decree No. 2111973, the Tribunal does not find in the latter any express provision of that kind. On the other hand, Decree 5411977 does start with the following sentence: "By revoking the Decree of the President Number 21 of 1973 concerning the Principle Rules of Capital Investment Procedure". Accordingly, it seems that at the date of revocation, Decree Nos 6311969 and 5411977 were in force, while Decree No. 2111973 was not.

In any event, even supposing (although no clear evidence has been brought in this respect) that at said date, Decree No. 6311969 was not in force (for instance, because it would be considered as having been tacitly abrogated by Decree No. 5411977) such interpretation would not fundamentally change the contents of Indonesian law on the matter here discussed.

Indeed, as previously shown (see above, paras 210-11), Decree No. 5411977, combined with Decree No. 0111977 of the Chairman of BKPM, would suffice to justify the revocation where the investor is "not in conformity with the approval and provision which have been given by the Government".

213. Nor does the Tribunal accept Claimant's objection, that Decree No. 5411977 (and probably in the same way, the Chairman of BKPM's Decree No. 0111977) should not be applied in the instant case, because the licence had been granted before these regulations were promulgated. It has already been said that the procedural provisions of said regulations were applicable, and the Tribunal expresses the same opinion as to their substantial provisions.

Indeed, to provide that the licence could be withdrawn where the investor does not fulfil the obligations he has undertaken, is but the confirmation of a principle which must be accepted even if there was no express provisions to that effect. Claimants, which contend that the application-approval combination is a contract, cannot deny it, since a contract can be terminated by one of the parties where the other party does not fulfil its obligations. Even if – as the Tribunal does – one refuses to characterize the application and the approval as being identical to a private law contract, it remains that the application-approval combination is closely comparable to a contract; accordingly, even if, strictly speaking, the substantial provisions of the Decrees of 1977 would not be applicable, the lawfulness of a revocation

based on the non-fulfilment by the investor of his obligation must be admitted as a matter of principle.

214. Did such a non-fulfilment result from the sub-lease agreements?

To answer this question, it must be said at the outset that the licence to invest is necessarily granted by the Government in consideration of the industrial, technical, financial and moral attributes of an applicant. Consequently, one could not imagine that once the approval is received, the applicant is free to assign it to another person or entity, without the Government's approval, the same amounting, indeed, to a new licence. Accordingly, a non-authorized transfer of the obligations undertaken by the investor should be considered an infringement by him of his obligations.

In the case at hand, Claimants do not deny this principle, and one may even think that they admit it, at least implicitly. Indeed, they contend that the sub-lease agreements were not transfers to Aeropacific of Amco's and PT Amco's obligations, but merely sub-contracts, which were contemplated in the initial Lease and Management Agreement, annexed to the application, so that the Government had approved such sub-contracts, so to speak, in advance.

215. Such contention meets serious difficulties.

It is true to say that normally a sub-contract is not a transfer or an assignment of the main contract, since the main contractor remains responsible towards the other party for the adequate performance by the sub-contractor of the obligations the latter has undertaken. Moreover a sub-contractor is usually entrusted with the partial, not the total performance of the tasks provided for in the main contract, as it was here the case, in particular by means of the Second Sub-Lease Agreement; and even where the sub-contractor is entrusted with the performance of all the tasks forming the subject matter of the main contract – which may happen in some cases – the main contractor keeps a power of supervision over the sub-contractor, the exercise of which constitutes a guarantee for the benefit of the other party to the main contract.

Furthermore, the principle of personal fulfilment of the investor's obligations is not merely a matter of responsibility towards the host State; it is postulated in order to insure the latter of a realization of the investment to a standard it was entitled to expect, given the industrial, technical, financial and moral characteristics of the applicant, which were taken into account when the State approved the application.

216. Consequently, it could be concluded, in principle, that the total transfer by the investor of the actual performance of his obligations towards the host State, without the latter's consent, amounts to a material failure of the investor's obligations, which might justify the revocation of the licence.

217. Nevertheless, taking into account the whole set of facts and agreements as established in the instant case, the Tribunal does not adhere to this conclusion, for the reasons stated hereunder.

i) As previously stated, PT Wisma expressly agreed to the sublease contracts now criticized by the Government of Indonesia, which shows PT Amco's good faith when executing said contracts.

To be sure, as the Respondent points out, PT Wisma Kartika is a company

having its own legal personality, distinct from the Republic of Indonesia. However, it is hardly credible that the Government was not informed about the two sub-lease agreements, during the long period of their actual implementation (that is to say from October 15, 1969, to June 1, 1978: see above, paras 51-71).

ii) This knowledge by the Government of the non-personal fulfilment by PT Amco of its obligations (which amounted to their non-personal fulfilment by Amco Asia) became obvious when Inkopad took over the possession and the management of the hotel from PT Aeropacific on June 1, 1978. It is hard to imagine that in any event, and at the latest at this date, the Government was not aware of the fact that during the preceding years, the sub-leases were in operation.

iii) Likewise, it cannot be imagined that the army was not aware of the fact that soon after having taken over the possession and management of the hotel, Inkopad authorized PT Wisma and PT Amco to enter into the "Profit Sharing Agreement" (see above, para. 78-C1. ff.) according to which "the management of the Kartika Plaza Land and Building with all its contents shall be carried out, implemented, and the full responsibility of the second party" (i.e. PT Amco Asia). This clause meant that as from the date of this agreement (October 6, 1978), PT Amco recovered the management and the operation of the hotel, and that Inkopad did not consider it was unable to do so, due to the non-personal fulfilment of its obligations during the period of implementation of the Sub-Lease Agreements.

iv) Finally, it is to be stressed that the revocation of the licence was decided *two years* after PT Amco was again personally fulfilling its obligations. Therefore, even admitting, in principle, that the non-personal fulfilment of the investor's obligations can justify the revocation of his licence, it cannot be admitted that such a sanction can be invoked for a failure in the past, that is, which ceased two years earlier, and that ceased not only without any objection by the Government, but due to the initiative of a body (Inkopad) strongly linked with the Government.

218. By taking into account these facts and agreements, the Tribunal does not express any findings on the existence or non-existence, in Indonesian or international law, of waiver or estoppel, which is disputed between the parties.

Indeed, there is no need to say that these facts and agreements constitute a waiver by the Government to rely on the sub-leases in order to justify the revocation, nor that due to these facts the Government was estopped from invoking the sub-leases to that effect. Suffice it to say that due to these facts and agreements, the failure of the investor, during a past period of time, to personally fulfil its obligations, *was not material at the time of the revocation*, so that it did not justify the same.

Indeed, like the termination of a contract by one of the parties, the revocation of the investment application's approval by the host State can be justified only by *material* failures on the part of the investor. In the circumstances of the case, the sub-lease agreements between PT Amco Asia and PT Aeropacific were not, in any event at the date of the revocation, a material failure justifying the same.

219. A last remark is to be made in this respect.

The Tribunal has previously noted (see above, para. 198) that one of the purposes and functions of the warnings before the "charging" of a sanction, provided for by the relevant Indonesian regulations, was to offer the investor the opportunity to remedy the failure alleged against him. Now, how could the investor remedy a failure which has ceased two years before the revocation was decided? At the date of the revocation, remedy had been already brought, and it is in conformity with the spirit of the relevant Indonesian regulations to decide, as the Tribunal does do, that a remedied failure is not a material failure, and therefore, cannot justify the revocation.

b) *Insufficiency of the investment*

220. The second alleged reason for the licence's revocation was the insufficiency of the investment realized by the Claimants, as compared with the investment promised by Amco Asia.

As previously recalled (see above, para. 204) it is stated in this respect in the decision of July 9, 1980, that the amount of the realized investment made by PT Amco Indonesia was US \$1,399,000, out of which US \$1,000,000 consisted of a loan and US \$399,000 of own capital (equity), while the investor was obligated to invest US \$4,000,000, namely US \$3,000,000 consisting in own capital and \$1,000,000 in a loan. As to the investment above of US \$1,399,000, it was realized by PT Aeropacific, which is a national company, so that the capital it invested was not foreign capital.

221. The amount of the investment realized, be it by PT Amco or PT Aeropacific was discussed at length in the pleadings, documents filed, expert testimonies and oral argument.

Before coming to the examination of this controversial amount, it is necessary to make a decision as to the criteria of the investment which corresponds to the requirements of Law No. 1 of 1967 and other relevant Indonesian regulations and to the obligations undertaken by Amco Asia Corporation in its application.

These criteria are of four kinds:

- the origin of the investment;
- its composition;
- its amount;
- the period during which it was to be completed.

222. As to the *origin*, the Decision of Revocation states that the portion of the investment realized by PT Aeropacific cannot be taken into account, said company being an Indonesian one, so that the capital it put into the enterprise was not foreign fresh capital.

The Tribunal will accept the conclusion of this reasoning, if not fully the reasoning itself.

223. As to the "nationality" of PT Aeropacific, it is right to say that the latter was a company organized and existing under the law of Indonesia, established and domiciled in Jakarta; accordingly, would the criterion of a company's nationality, as generally accepted in municipal law and

international law (see, as to the latter, in principle, decision of the International Court of Justice in the *Barcelona Traction* case: ICJ Reports 1964,⁽¹⁾ at 4) be applied, PT Aeropacific should be considered as an Indonesian company.

However, it is not this general criterion to which Indonesian law refers in order to define, in respect of investment, Indonesian and foreign enterprises, nor – what seems to be actually relevant – domestic or foreign capital.

224. Indeed, Article 1 of Law No. 1/1967 – which is the basic text in this respect – provides as follows:

Article 1.

Capital investment in this law denotes only direct investment of foreign capital made in accordance with or based upon the provisions of this law for the purposes of establishing enterprises in Indonesia, with the understanding that the owner of the capital directly bears the risk of the investment.

As a matter of fact, this provision does not define a foreign enterprise; it defines the investment of foreign capital, such definitions being based on the conformity of the investment with the provisions of Law No. 1/1967, and on the establishment by the investor of an enterprise in Indonesia.

The definition of foreign as well as of national enterprises in the field of investment is to be found in Law No. 6 of 1968 (Resp. Exh. vol. V, No. 113). Article 3, Secs 1 and 2 of this law provide as follows:

Article 3.

(1) A national enterprise is an enterprise of which at least 51% of the domestic capital invested therein is owned by the State and/or National Private Enterprise. The percentage shall be increased so that on January 1, 1974, it will amount to not less than 75%.

(2) A foreign enterprise is an enterprise which does not satisfy the condition of Section (1) of this article.

By virtue of this provision, PT Aeropacific was not an Indonesian enterprise; indeed, 51% of its capital was owned by Mr Pulitzer, an American citizen and resident, 25-5% by KLM, a Dutch company, and only 24% by Garuda, an Indonesian company. Accordingly, the capital it invested to complete the construction of the hotel and to temporarily operate it did not form a foreign investment in the sense of Law No. 1/1967 because it had not been invested "in accordance with or based upon the provisions of this law", nor "for the purpose of establishing enterprises in Indonesia", since PT Amco Indonesia was already established, when First Sub-Lease was concluded.

225. There is no contradiction between this characterization of Aeropacific as a foreign company, in respect of the legislation in the investment, and the refusal to characterize the investment it made in the Kartika Plaza as a foreign investment. It results in effect from Article 1 paragraph 1 of Law No. 6 of 1968 that "Domestic Capital" may be owned "either by the State or by National Private or Foreign Private Enterprise".

domiciled in Indonesia" (emphasis provided). Such was here the case, the capital of PT Aeropacific was, in the sense of the investment legislation, domestic capital owned by a foreign private enterprise.

226. As a result, the funds utilized by PT Aeropacific in order to complete the construction and to temporarily operate the Kartika Plaza Hotel did not constitute an investment of foreign capital, as understood by Indonesian law, and consequently cannot be taken into account in the calculation of the foreign capital effectively invested by the Claimants.

Indeed, the Claimants rely on the fact that the Aeropacific funds were to be credited to a special account, opened in the name of PT Amco, so that formally, it was PT Amco that invested them. The Tribunal does not find that even if it had been fully applied, this mechanism of pure accountancy could have changed the legal characterization of the investment made by PT Aeropacific; moreover, it results from the unchallenged affidavit delivered by Mr Ruitar (Cl. Doc. No. 100, st 2), that after first small deposits, the crediting of the PT Aeropacific funds in PT Amco's account did not continue.

227. For the reasons exposed, the Tribunal decided that the funds put into the construction and operation of the hotel by Aeropacific Group cannot be taken into account in order to establish whether the Claimants have fulfilled their obligation to invest foreign capital, as undertaken in the application.

228. The second criterion is the composition of the investment.

In this respect, the disputed issue is whether a loan can be included in the investment of foreign capital as promised by Amco Asia in the application for investment approval.

The Tribunal will answer this question in the negative, for the following reasons.

i) No investment consisting of a loan is mentioned in Amco Asia's application. It has been stated above (see above, para. 21) that in the initial application, dated May 6, 1968, it was required that the capital of PT Amco was to be US \$3,000,000, "all of which (representing) shares capital divided into three hundred (300) shares with a nominal value of US \$10,000 each". The amended application, dated May 13, 1968 (see above, para. 28) did not change the amount of the capital, nor its nature. It was again stated that the same would be share capital; only the nominal value of the shares (US \$100) and their number (30,000) were changed.

In fact, the Decision of Revocation states that Amco was obligated to invest US \$3,000,000 in own capital and US \$1,000,000 in loan capital, thus apparently referring to the Lease and Management Agreement concluded between Amco and PT Wisma, where Amco undertook to invest "up to the sum of US \$3,000,000" as "Equity Capital Investment", and "up to US \$1,000,000" as "Loan Capital Investment" (see above, para. 11). However, it is the application on the basis of which the licence was granted, not the lease agreement, that defines the investor's obligations: indeed, the legal links between the investor and the host State do not derive from the lease agreement, which is a contract between two companies (be it one of them strongly linked with the State) but from the combination formed by the application and the approval thereof.

ii) Moreover, Article 2 of Law No. 1/1967, which defines foreign capital in its framework, does not mention loans among the three elements which compose said capital (Section Facts, para. 7): this would in any event suffice to exclude loans from the foreign capital that the applicant undertook to invest.

In oral argument, Claimants objected that subsequent to the licence being granted in the instant case, the Indonesian administration's practice became more flexible, and admitted that loans could be included in the authorized investment. Not entering into an examination of such allegation in fact, the Tribunal cannot accept this argument, since such an authorization was not granted to Amco. Moreover, would one contend that it has been implicitly granted, because the lease agreement, attached to the application, mentioned "Loan Capital" of US \$1,000,000, the consequence would be that the total investment promised by Amco, not merely towards PT Wisma, but towards the host State as well, would have been of US \$4,000,000, out of which US \$3,000,000 has to be "Equity Capital". The obligation to invest US \$3,000,000 as equity capital would be unchanged.

Such was the only obligation clearly undertaken in the Application, and accepted by the State when granting the authorization. Accordingly, the Tribunal decides that to find whether the investor has fulfilled this obligation, only foreign capital as defined in Article 2 of Law No. 1/1967 is to be taken into account.

229. The *third criterion* for deciding whether this obligation has been fulfilled is precisely the amount that the applicant undertook to invest.

The discussion concerned here the meaning of the words "up to" preceding, in the lease agreement, the total amount of the investment to be made by Amco, as well as the "Equity Capital" portion and the "Loan Capital" one. Do these words mean that the amounts indicated were ceilings, rather than the subject-matter of the investor's obligation?

The question is not relevant. Indeed, the investor's obligation towards the State is not defined by the lease agreement, but by the approved application. Now, the same does not contain the words "up to". It simply states, as already mentioned, that the share capital of the Indonesian company to be established will be of US \$3,000,000.

230. Thus, the applicant undertook to invest the sum of US \$3,000,000.

Accordingly, the Tribunal has to find whether this sum was effectively invested, and if such finding is in the negative, whether the difference between the promised and the realized investment was sufficiently material to justify the revocation, in the circumstances of the case.

231. Beforehand, the *fourth* (and last) *criterion* of examination is to be defined: how long was the period of time before the end of which the applicant undertook to realize the investment?

232. It has been set out in the recital of facts (see para. 21) that according to the Application, the capital of the Indonesian company to be established (i.e. PT Amco Indonesia) was to be "deposited stage by stage ..." Attachment V to which reference was made in the Application, but which was not filed with the Tribunal by Claimants, nor by Respondent, probably indicate these "stages" as well as the total period of time during which the investment was to be realized.

However, as also recalled in the recital of facts (see above, para. 32) in their final version, executed before Notary Abdul Latief in Notarial Document No. 106, dated December 13, 1968 (see Cl. Doc. No. 10), and approved by the Minister of Justice on January 29, 1969, the Articles of Incorporation of PT Amco Indonesia provided that:

the entire unissued portion of shares must be issued within a period of ten years, beginning today, unless this time period should be extended by those responsible, or if required at the request of the Board of Directors.

No evidence of any such extension having been produced, the Tribunal is bound to assume and to admit that the full capital of PT Amco Indonesia (that is to say the investment to be made) was to be paid within ten years from December 13, 1968.

233. To be sure, the direct purpose of Articles of Incorporation is not to define the investor's obligation towards the host State, but the obligations of the shareholders in their mutual relationships. Nonetheless, one may presume that when establishing the time period provided for the shares to be fully paid, those who executed the Articles of Incorporation took into account the time period of realization of the investment, as provided for in Attachment to the Application.

However, it must be added that the Articles of Incorporation having reserved a possible extension of the time period during which the shares were to be issued, and this provision having been approved by the Ministry of Justice, it may be assumed that there was some flexibility in the time period granted for the realization of the investment as well: this remark will be taken into account when deciding whether some delay in said realization, if such delay did in fact occur, was a material failure justifying the revocation of the licence.

234. To conclude this examination of the legal criteria of fulfilment of the obligation to invest, the Tribunal will say that the Claimants were, in principle, obligated to realize themselves an investment of US \$3,000,000, composed by the elements listed in Article 2 of Law No. 111967 (and therefore not including any portion of "loan capital" nor the monies invested by PT Aeropacific) within a period of ten years from January 29, 1969.

235. The two basic documents respectively filed by the parties in order to establish the amount of the investment realized by Claimants (and in addition, as far as the Claimants are concerned, that they allegedly "caused" Aeropacific to realize) are:

- by the Claimants, the report of Mr Gerald S. Nemeth, from Nemeth/Bolton, chartered accountants of 601 West Broadway, Vancouver, BC (Cl. Doc. No. 64);
- by the Respondent, the report of Touche Ross & Co, certified public accountants of 1900 M. Street NW, Washington DC (Resp. Exh. vol. V, No. 113).

Both reports were explained, discussed and in some respects supplemented, during the hearings held in March 1984 in Copenhagen, by the oral testimonies of Messrs Gerald S. Nemeth, called by Claimants, and Thomas Binting, called by Respondent.

Finally, the Tribunal recalls that in their Reply to Counter-Memorial (at 91-5), then in oral argument, Claimants argued that, in their view, there were four methods for calculating the realized investment of US \$3,000,000.

These calculations were contested by Respondent (see in particular Rejoinder on the Merits, at 41) and discussed by Messrs Touche Ross in their report and by Mr Thomas Binting in his oral testimony, as to the methods followed and as to the data utilized.

236. Before coming to the figures, the Tribunal wishes to present some remarks on the legal aspects of the methods of calculation, and on the source and nature of the data.

i) On the first point, the Tribunal shares Respondent's and Messrs Touche Ross' views concerning the monetary contribution of PT Aeropacific to the construction and, as the case might be, the operation of the hotel. The Tribunal refers, in this respect, to its previously presented analysis (see above, para. 233 ff.) which showed that the funds brought by PT Aeropacific cannot be characterized as foreign capital in the sense of Law No. 111967.

Likewise, for the previously stated reasons, loans made to PT Amco are not to be taken into account, notwithstanding the possible characterization of loans as equity capital in the framework of general accountancy theories, as exposed by Mr Nemeth in oral testimony.

However, PT Amco having been discharged from its liabilities under the 1969 ABN loan obtained in this way revenue which was capitalized over a period of time on a deferred basis. This revenue, fully capitalized, is considered as a portion of the investment, as it will be shown hereunder.

To sum up, the Tribunal repeats that the only elements to be taken into account in order to establish the amount of the investment are those which are listed in Article 2 of Law No. 111967 (see above, paras 228,234).

ii) Messrs Touche Ross & Co present in their report general remarks on the "reliability of data" (at 1-3). As to the instant case, these remarks are applied to the financial statements of PT Amco (December 31, 1978), PT Aeropacific (December 31, 1978) and PT Wisma Kartika (December 31, 1977). According to Touche Ross, these documents do not satisfy all the requirements of reliable data; in particular, the expert notes that PT Amco's financial statements as per December 31, 1978 "were apparently prepared by the Company; no accountant's report was included".

As a matter of principle, the Tribunal will not challenge these remarks. However, it has to say it is difficult to strictly share, in the instant case, the *onus probandi* in respect of the amount of the investment realized. The insufficiency of the investment is relied on by Respondent, to justify the revocation of the licence, so that it could be said that it is to it to prove said insufficiency, and indeed, Respondent did its best to assist the Tribunal in this respect.

On their side, Claimants were obligated to invest a certain amount of capital, so that they had to contribute as well to the Tribunal's investigations as to the effective realization of the promised investment, and so they did.

In the circumstances, the Tribunal is bound to utilize documents provided their alleged incorrectness is not established merely by general rules of

accountancy, but by factual evidence directly applicable to them. The Tribunal does not find that such direct evidence of incorrectness was brought by Respondent as to the numbers mentioned in the financial statements and in the Nemeth Bolton report, filed by Claimants.

Accordingly, these numbers will be taken into account hereunder, notwithstanding several adjustments or exclusions which will be indicated in due course.

iii) The Tribunal cannot accept the first, second and fourth methods alternatively proposed by Claimants for calculating the investment.

The first two methods take into account the alleged investment made by PT Aeropacific, which is to be excluded, as previously decided.

The fourth one is based on PT Wisma's balance sheet as per December 31, 1977, which "shows (according to Claimants) that PT Wisma Kartika attributed Rp. 1,499,422,569, or US \$3,613,065 at then applicable rates of exchange, of capital invested in the hotel to its partner PT Amco (Cl. Doc. 58 at 11)". Now, no evidence has been produced as to the elements taken into account by PT Wisma to establish this number, which prevents the Tribunal from checking and verifying whether it corresponds to the legal criteria of calculation previously defined.

237. Accordingly, the Tribunal will base its examination and discussion on the "third" method proposed by Claimants (Reply to CM, at 93-5), which:

is - they explain - to ignore the Aeropacific balance sheet altogether and count as foreign capital only PT Amco's paid-in capital plus retained earnings in the form of (i) rent which PT Amco forbore under the Sub-Lease Agreement in consideration for Aeropacific's part of the hotel and (ii) undistributed profits of PT Amco reported on its balance sheet for 1978 (Counter-Memorial F, App. 8-25).

238. Excluding any computation of PT Aeropacific's investment and KLM's loans, the figures mentioned by Messrs Nemeth/Bolton in their report, which do not take into account PT Wisma's balance sheet (that is to say, the figures corresponding to the "third method" suggested by Claimants) are as follows:

	US \$
1. Issued share capital as shown in December 31, 1978 balance sheet	1,399,000
2. Undistributed profits to December 31, 1977	274,387
3. Undistributed profits for 1978	48,642
4. Undistributed profits for 1979	163,423
5. Undistributed profits for 1980	40,856
6. Unamortized balance of the US \$1,000,000 ABN loan	451,329
7. Accumulated depreciation of the hotel building to December 31, 1978 (which according to Articles 2-C and 19-I-d of Law No. 111967 can be considered as foreign capital since the corresponding amount could have been transferred abroad: Art. 19-I-d, and instead, was reinvested: Art. 2.C)	486,747
Total US \$	2,864,384

239. In their report, Messrs Touche Ross revise Claimants' computations according to two "approaches". The Tribunal will consider merely the second one, since the first keeps a figure of US \$1,357,950 as "forebearance of gross receipts under the sublease agreement", effectively put forward in Claimants' calculation, which in Tribunal's view should not be included since there is no evidentiary basis for it, and it is merely contrived.

According to this "second approach", the revised figures should be as follows (Touche Ross report, at 16):

	US \$
1. Share capital	1,399,000
2. Retained earnings at December 31, 1977	274,387
3. Earnings for 1978	48,642
4. Deferred income December 31, 1978	451,329
5. Taxes imputed thereon at 20%	(90,266)
 Total US \$	 2,083,092

The difference results from the exclusion of undistributed profits for 1979 and 1980 (163,423 + 40,856 = 204,279); from the deduction on taxes on the deferred income (90,266), and from the fact that the depreciation of the building is not taken into account (486,747). Thus, the total difference is:

	US \$
— Undistributed profits for 1979 and 1980	204,279
— Taxes on deferred income	90,266
— Depreciation	486,747
 Total US \$	 781,292

240. In respect of this revised computation, the Tribunal accepts the exclusion of undistributed profits for 1979 and 1980 since both periods are posterior to the end of the ten years during which the investment was to be made (see above, para. 232); moreover, no accounting evidence has been brought as to 1980. The Tribunal will also accept the deduction of 20% taxes on deferred income.

It will keep the accumulated depreciation of the hotel building to December 31, 1978, deducting however from the corresponding number 20 for taxes, i.e. US \$97,349.

Accordingly, from the total reached above on the basis of the Nemeth-Bolton computation (i.e. US \$2,864,384), the following amounts should be deducted:

	US \$
— Undistributed profits 1979	163,423
— Undistributed profits 1980	40,856
— 20% taxes on deferred income to December 31, 1980	90,266
— 20% taxes on accumulated depreciation	97,349
 Total US \$	 391,894

Accordingly, the investment amount which the Tribunal finds that Claimants have produced sufficient evidence of is US \$2,864,384 – 391,894 US \$2,472,490.

To be sure, there is a discrepancy between this figure and the amount of US \$1,657,522 which PT Amco stated, in the Jakarta Court proceedings. However, this latter amount is close to the sum of US \$1,399,000 (share capital) and US \$274,387 representing the undistributed profits to December 31, 1977 (see above, para. 239). The undistributed profits for 1978 were not taken into account for reasons which were not presented to the Tribunal. The Tribunal is bound to include them in its own calculation.

241. It is thus established that the Claimants did not realize an investment of US \$3,000,000 in the framework of Law No. 111967, as promised in Amco's application.

However, there is reasonable evidence that the insufficiency was of slightly more than 116th of the amount Claimants had undertaken to invest (not giving them any credit for the undistributed earnings for 1979 and 1980, while it is highly probable that there were some profits during this period).

As such, this insufficiency is not material enough to justify the revocation of the licence, it is particularly so in the circumstances of the case, where no warnings were given to the investor before the revocation, while such warnings would have allowed it to establish that it had invested a much higher amount than the one on which the revocation is based, and possibly to complete the investment up to the promised amount.

To be sure, such completion would necessarily have been made after the end of the ten-years' delay. But here again, the supplementary delay would not have been a material failure of the investor's obligations, in particular in view of the rather flexible character of the ten-years' delay (see above, para. 233).

242. To conclude, like the sub-lease agreements, the insufficiency of investment does not justify the revocation of the licence. If needed such conclusion would be reinforced by the fact that the hotel was effectively built and is now a part of the travel and touristic facilities of the City of Jakarta.

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 licence was unlawful in this respect, and unjustified as regards the reasons on which it is based.

243. Accordingly, the second basis of the claims before the Tribunal, even if not characterized, strictly speaking, as a breach of contract, but as it is, as a failure of the host State to the obligations it undertook towards the investor, is established.

The Tribunal will now examine the liability of the Republic of Indonesia, as it results from this failure, which the State committed when revoking, by its decision of July 9, 1980, the authorization to invest granted by the decision of July 29, 1968.

Section 111--The Liability of the Republic of Indonesia for the Withdrawal of the Investment Authorization

244. The withdrawal of the investment authorization, decided without due process being granted to the investor, and for reasons which did not justify it in substance, commits the liability of the Republic of Indonesia under Indonesian as well as under international law, that is to say under the two systems of law applicable in the instant case.

A. Indonesian Law

245. The three provisions of the Indonesian regulations apparently in force at the date of the revocation, which provide directly for sanctions that can be decided against the investor, including the revocation of the investment's approval (namely: Art. 4 of Decree No. 6311969, Art. 6 of Decree No. 54/77 and Art. 13 of BKPM Chairman's Decree No. 0111977) have been previously cited (see above, para. 193).

According to all these provisions, sanctions in general, and revocation in particular, can be decided only where the investor does not fulfil his own obligations, and in addition, according to Article 13, paragraph 3 of BKPM Chairman's Decree No. 0111977, after at least one, and possibly three warnings have been given to the investor.

246. Now, in the instant case, no warnings were given, and more generally, due process was not granted to the investor, whereas the right to due process is undoubtedly granted and protected by Indonesian law, like by the laws of all modern countries. Furthermore, no material failures to the investor's obligations justified the revocation. Accordingly, in both respects, the revocation amounted to a violation of a fundamental principle and of relevant particular provisions of Indonesian law; be it only for this reason, it committed the State's liability, in the framework of its own legal system.

247. Moreover, whatever the legal characterization of the application-authorization combination might be, in the circumstances of the case, the revocation of the authorization commits the State's liability under other no less fundamental principles of Indonesian law, and under provisions of same embodying the latter.

i) It has been shown above (para. 85 ff.) that even if the application-authorization combination cannot be, strictly speaking, identified with a private law contract, it is nevertheless close to this legal feature, since it is formed by a meeting of minds and wills engendering reciprocal obligations; indeed, the difference is that where public interest is at stake, the State might alter or withdraw the authorization, not, however, without compensating the recipient of the same for the prejudice the latter suffers.

As a result, where the revocation is not justified by public interest – nor, as in the instant case, by the alleged failures of the investor on which the decision is based – it consists in a violation of obligations undertaken by the State, readily comparable to a violation of contractual obligations.

Therefore, the fundamental principle of *pacta sunt servanda*, embodied in the Indonesian Civil Code by Article 1338 (contracts are the law of the parties), is to be applied; the consequence of said application is that the State's liability is committed in this respect as well.

ii) Moreover, if the assimilation of the application-authorization combination to a contract (still under the reservation of public interest) would be rejected, it should nonetheless be admitted that by deciding that the applicant is granted rights deriving from legal and regulatory provisions, and by then withdrawing said rights without due process nor substantial justification, the State has committed a wrong, for which it is liable, according, here again, to a fundamental principle embodied in Article 1365 of the Indonesian Civil Code:

persons responsible for any act in violation of the law which results in a loss to another party are obliged to replace said loss.

B. International Law

248. The principle *pacta sunt servanda* is a principle of international law.

i) First, it is so because of it being a general principle of law in the meaning of Article 38 of the Statute of the International Court of Justice, since it is common to all legal systems in which the institution of contract is known.

Indeed, the principle is basic to this institution. As a highly competent American scholar puts it "contract or agreement seeks to secure cooperation to achieve social purposes by the use of promises given in exchanges arrived at through bargain ..." (E. A. Farnsworth, "The Past of Promise: An Historical Introduction to Contract", 69 Columbia Law Review 576 at 578 (1969)). Contracts as a principle of ordering rests on the proposition that individuals and legal entities make, for their own accounts and on their own responsibility significant decisions respecting resource utilization and allocation. The form of order which a society seeks to achieve by accepting that institution of contract thus depends upon the recognition that, in principle, *pacta sunt servanda*. It follows that the binding force of contractual duties for parties to a contract or agreement is recognized in every legal order that utilizes the institution of contract.

Thus, for instance, the principle is embodied in civil law systems; it finds its classical expression in Article 1134 of the French Civil Code:

Agreements lawfully made take place of the law for those who have made them. They cannot be revoked except by mutual consent or on grounds allowed by law.

They must be performed in good faith.

The principle is no less vigorous at common law. A remarkable affirmation of it was made by Jessel, M. R., in 1875 (*Printing and Numerical Registering Co v. Samp* (1875) L.R. 19 Eq. 462 at 465):

... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.

(See also, for American law: *Stees v. Leonard*, 20 Minn. 494, 503 (1874); A. Von Mehren and J. Gordley, *The Civil Law System*, 1106 (2nd ed. 1977); "The common law treats any failure to perform a duty imposed by a contractual relationship as presumptively a breach of contract and then considers the question whether, under the circumstances, the failure to perform should be excused"; E. A. Farnsworth, *Contracts* 647 (1982), who speaks of "... the general rule that duties imposed by contract are absolute").

Not referring to examples taken in all legal systems, it is nonetheless worthwhile to note that *pacta sunt servanda* is also a principle of traditional Islamic law (see, e.g.: *Saudi Arabia v. Arabian American Oil Company (Aramco)*, 27 ILR 117 (1958), at 163-4; *Texaco Overseas Petroleum (TOPCO) and California Asiatic Oil Company v. the Government of Libyan Arab Republic* (53 ILR 422, 1977 Award at 164).

ii) The principle of *pacta sunt servanda* was stated again in Article 26 of the Vienna Convention on the Law of Treaties (May 23, 1969).

To be sure, the transposition of this principle to agreements between States and private enterprises is debated in contemporary doctrine. However, the Tribunal is bound to note that it was applied in leading international awards (see, e.g. the *Aramco* and *TOPCO* awards, above mentioned: *add: Sapphire International Oil Company v. National Iranian Oil Company*, 35 ILR 136, at 181 (1968); *Libyan American Oil Company v. Government of the Libyan Arab Republic*, 62 ILR 41 (1977) at 170, 190.

iii) Now, as already said, the relationship between the parties to the instant case, engendered by the application to invest and the approval thereof is not identical to a private law contract, however close it may be to the same.

Be that as it may, it must be pointed out that the above-mentioned international awards were made in cases where the dispute concerned contracts of concession. The nature of such contracts is itself debated and it has in particular been contended that the concession resulted from a unilateral act of the State, or at least that it was an administrative contract following the pattern offered by French law. Not wishing to enter into this debate, which would not be directly relevant in the instant case, the Tribunal wishes to underscore that this state of affairs did not prevent the international arbitral tribunals from deciding that the State was bound by the obligations undertaken in concession contracts, except when allowed by law to depart from them.

Moreover, even if the relationship here in dispute does not constitute, properly speaking, a concession contract, nor derives from such a contract, it remains that there is a significant resemblance between these two legal structures: indeed, when authorizing a company to invest, the State grants it

rights to create and operate local economic enterprises. This a state also does by a concession contract.

iv) Accordingly, the basic concept which underlies *pacta sunt servanda* leads necessarily to the application, in the instant case, of the very contents of the same: the party who has undertaken obligations is bound to perform them, except for cases established by law, and this fundamental rule applies to States as well as to private entities or persons.

v) Moreover, independently from *pacta sunt servanda* and its logically and morally necessary extension in the present case, another principle of international law can be considered to be the basis of the Republic's international liability: it is the principle of respect of *acquired rights* (see, e.g.: PCIJ, Judgment of May 25, 1926, *German Interest in Polish Upper Silesia (Merits)*, Series A, No. 7 (1926) at 22 and 44;^[2] *Aramco Award*, cited above, at 168, 205; *Starret Housing Corp v. Iran*, (1984), decision of the Iran-United States Claims Tribunal, Iranian Assets Lit. Rep. 7685 (1983);^[3] *Award in the Shufeldt Claim*, July 24, 1930, UN Reports of International Arbitral Awards, vols II, XXVII, at 1081, 1097^[4]).

Indeed, by receiving the authorization to invest, Amco was bestowed with acquired rights (to realize the investment, to operate it with a reasonable expectation to make profit and to have the benefit of the incentives provided by law). These were transmitted to the Indonesian entity, PT Amco, created in conformity with said authorization and with Indonesian law, and then partially, upon authorization by the competent authority, to Pan American.

These acquired rights could not be withdrawn by the Republic, except by observing the legal requisites of procedural conditions established by law, and for reasons admitted by the latter. In fact, the Republic did withdraw such rights, not observing the legal requisites of procedure, and for reasons which, according to law, did not justify the said withdrawal. The principle of respect of acquired rights was thus infringed, and the Republic has committed its international liability also in this respect.

249. Not to admit international liability in the circumstances of this case, would amount to disregard of the very aim of the ICSID Convention as solemnly expressed in the very first sentence of its Preamble:

The Contracting States

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

It is in order to take this need and role into account, by protecting host States as well as foreign investors that the Convention was concluded. To deny the host State's liability where the same infringes the obligations undertaken towards the investor – as well as to refuse, in other instances, the investor's liability where he infringes his own obligations – would move to empty the ICSID Convention of any meaning.

[² 3 Ann Dig 81 at 82.]

[³ 85 ILR 34.1

[⁴ 5 Ann Dig 179.]

250. The Respondent's liability towards Claimants being thus established, the Tribunal will now examine the prejudice which resulted for the Claimants from the State's organs actions, and determine the amount of damages to be awarded in order to compensate said prejudice.

CHAPTER III — THE PREJUDICE AND THE DAMAGES TO BE AWARDED IN COMPENSATION THEREOF

Section I – The Prejudice to be Compensated

251. The Tribunal will first examine the nature and the extent of the prejudice suffered by the Claimants, and then establish the causal link between the illegal acts committed by the Respondent and said prejudice.

A. The Nature and the Extent of the Prejudice

252. The events that occurred from April 1, 1980 onwards, as described in Part I, Chapter II (Facts) above deprived the Claimants of the right to operate the Hotel Kartika Plaza, granted them by the approval of Amco's Application to Invest, which referred to the Lease and Management Agreement previously concluded between Amco Asia Corporation and PT Wisma Kartika, or, as far as the taking of the hotel's possession on April 1, 1980 is concerned, of the actual exercising of said right.

In addition, the revocation of the licence deprived the Claimants from the right to possibly invest in Indonesian enterprises active in the field described in the Application (Article II, as amended: see Exh. A to the Request for Arbitration, at 7, Resp. Exh. to CM, vol. I, No. 16), and referred to in the Decision of the Minister of Public Works of July 29, 1968 (see above, paras 28 and 32).

253. Thus, the prejudice suffered by Claimants consisted of the loss of incorporeal, patrimonial and potentially profitable rights.

The exercise of these rights was limited in time, and there is a controversy between the parties as to the period of time for which they have been granted.

Claimants contend that this period was of thirty years. (Reply to Indonesia's CM, at 119), that "(c)learly the investment was authorized for an initial period of 30 years". Claimants rely, in this respect, on the usual practice of the Indonesian administration, according to which investment authorizations were generally granted for thirty years (see Cl. Doc. No. 36, at 52; CM F. App. C-2), and on the fact that the duration of the Lease and Management Agreement, initially of 20 years, was extended to thirty years by the agreement of January 24, 1969 (see above, para. 52). In fact, it is to be noted that according to the Management Profit Sharing Agreement of October 6, 1978 (Cl. Doc. 15, Resp. Exh. CM No. 42), the profit sharing period was extended to September 30, 1999.

Respondent rejects Claimant's interpretation. It contends that the

authorization having referred to the initial Lease and Management Agreement was necessarily limited to the duration of the same as agreed upon, and that its extension could not have extended the licence's duration, since no application was presented, and consequently no approval to that effect was granted. In fact, Respondent contends (see Rejoinder on the Merits, at 56-7 and footnotes) that the approval was granted for nineteen years only, since the first extension of the Lease and Management Agreement, from 19 to 20 years, although agreed upon on May 19, 1968 – that is to say prior to the granting of the authorization, which occurred on July 29, 1968 – had not been brought to the attention of the Indonesian authorities that issued the licence.

Moreover, Respondent points out that according to Article 111 of the Application to Invest, at the end of the nineteenth year after the establishment of the business, all shares were to become the property of Indonesian citizens or businesses. In the amendment the reference to nineteen years was deleted.

254. The Tribunal first notes that in its general wording, the authorization to invest did not refer exclusively to the Kartika Plaza. In addition, as to the latter, it could be admitted that the effect of the Lease and Management Agreement's extension was to extend for the same period of time the licence to operate the Kartika Plaza, notwithstanding the lack of particular application and authorization to that effect. Indeed, the licence was not limited to the Kartika Plaza; it authorized the business that would be established to be generally active in the field of real estate, and in particular of managing and leasing buildings constructed by it. Accordingly, considering that no time-limit was expressly provided for in the licence, it may be admitted that the same had been granted for the usual duration of thirty years. It could be admitted as well that the authorization covered the extended time period of the Kartika Plaza operation, since the same was, by its very nature, an activity which was covered in the authorization's general scope.

255. However, it is not necessary to take a definite position in this respect. Indeed, even assuming that in respect of the Kartika Plaza, the authorization was granted only for the duration of the Lease and Management Agreement as initially agreed upon, the foreign investors would have had to sell their shares to Indonesian citizens or business at the end of that period. At said date, the value of the shares would have included the profit expectations of PT Amco for the remaining period of the Lease and Management Agreement. Accordingly, the prejudice suffered by the foreign investors does correspond to the loss of the right to operate the hotel, including the loss of the remaining value of said right from the date of the shares' sale to the date of expiry of the Lease and Management Agreement.

B. The Causal Link Between the Prejudice and the Respondent's Illegal Acts

256. The Claimants contend that the deprivation of the rights they had

acquired by the effect of the Lease and Management Agreement and of the authorization to invest resulted from one fact and two acts, namely, taken in their chronological order:

- (a) their *de facto* dispossession of the hotel on April 1, 1980;
- (b) the revocation of the licence by the decision of July 9, 1980;
- (c) and the rescission of the Lease and Management Agreement by the decision of the Central Jakarta District Court of January 12, 1982, affirmed by the judgment of the Jakarta Appellate Court of November 28, 1983.

257. (a) The dispossession as such did not have any legal effect: it merely created a *de facto* situation, which was the actual deprivation of PT 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 rights they had acquired did not result from this *de facto* dispossession, the fact of the matter is that the actual prejudice they suffered, consisting in the deprivation of the profit they were entitled to expect by exercising said rights, commenced on April 1, 1980, and that at this date, the cause of the prejudice was the dispossession: in other words, during this very first stage, there was effectively a causal link between the dispossession and the prejudice.

258. Such causal link continued, in any event, up until July 9, 1980, the day on which the Chairman of BKPM issued the Decision of Revocation of the licence, and possibly for the supplementary period of time which the effective implementation of the same would have lasted, had not the previous dispossession already produced the effects which would have been those of the revocation.

Nothing in the documents presented to the Tribunal, nor in the oral evidence, allows the Tribunal to determine the possible duration of such supplementary period. But such determination is not necessary. Indeed, the fact of the matter is that the prejudice suffered by the Claimants began on April 1, 1980, that it did not cease since that time and that it will cease only at the end of the time period during which or in respect of which the Claimants were entitled to expect a profit drawn from the exercise or the transfer of their rights. In other words, there is a continuous prejudice caused by the *de facto* dispossession during a first period – and indeed, a rather short one – then, from the end of the same, by the licence's revocation.

To conclude, the *de facto* dispossession was the cause of a portion of the prejudice, and the revocation, as it will be now shown, that of another portion. Now, the State is responsible for the assistance the army and police personnel gave to the dispossession which was an illegal action, as well as for the revocation of the licence, unlawfully decided without due process and for reasons that did not justify it. Therefore, the allocation of the prejudice between the two causes is not necessary: in fact, the effects of the two causes acted successively in an uninterrupted period of time.

259. (b) The second causal act was the *revocation of the licence*.

It is, in the first place, obvious that the revocation was the *sole* cause of the Claimants' deprivation of the general right to invest in the field of real estate businesses, granted them by the licence.

But in addition, the causal link between the revocation and the Claimants' deprivation of their right to operate the Kartika Plaza Hotel cannot be actually contested. Indeed, deprived by the revocation of its right to operate businesses in Indonesia, PT Amco obviously could not have continued to operate the Kartika Plaza Hotel, leaving alone the fact that this very business having been referred to in the application to which the authorization itself referred, the revocation involved it mainly, if not exclusively.

260. In the Tribunal's view, no objection can be drawn against this conclusion from the fact that the previously analysed decisions of the Jakarta Courts did rescind the Lease and Management Agreement.

To be sure, such rescission would have been sufficient to deprive PT Amco of its right to operate the hotel. It is also right that the decision of the Jakarta Courts to rescind was based on several grounds (see paras 139 and 141). However, among these grounds, the revocation of the licence was obviously fundamental and self-sufficient, as it is shown by the very wording of the District Court decision in this respect (Res. Fact. App. B, Att. 23, at 20-1):

Considering that based on the 9 July BKPM Chairman's decision No. 07/VIII/PMA/1980, Defendant's approval/recognition as a capital investment company in Indonesia was revoked;

Considering that with this revocation of the business licence, Defendant is no longer permitted to operate in Indonesia;

Considering further that as a result of this revocation the existence of the aforementioned agreement between Plaintiff and Defendant is in fact null and void since the bases are not permitted by law;

Considering that in fact the government is not a party to this agreement, but an agreement which conflicts with the law is null and void (Article 1320 of the Civil Code).

No change was made to this finding by the Jakarta Appellate Court. On the contrary, discussing PT Amco's contention that "the 4 June 1980 interlocutory Decree No. 27911980 G does not satisfy civil procedural due process with regard to interlocutory decrees, because the defendant was not summoned to be heard", the Court stated (at 6):

... that BKPM Chairman issued his 9 July 1980 Decision No. 07/VII/PMA/1980 revoking PT Amco Indonesia's foreign investment permit, which until this decision remains unchanged; therefore from that time legally Appellant/Defendant/PT Amco Indonesia may not/no longer manage said Kartika Plaza Hotel Building.

More generally, the Court stated (at 9) that:

... the considerations and dicta of the first judge's decision in the main case were correct and properly according to the law and justice, and because the

opinions and evaluation of the Appellate Court's Council of Judges were similar to them as well... therefore the dicta of the decision in the main case of said District Court must be upheld.

261. Thus, whatever the other grounds on which the rescission of the Lease and Management Agreement was based, the revocation of the licence would inescapably have led the Jakarta Courts to decide it. Indeed, the other grounds were open to discussion, while the revocation made it impossible, due to legal provisions of public policy, to keep the agreement in force. Accordingly, not only the Court decisions do not deprive the revocation of its causal role, but affirm the same.

Moreover, even assuming that the other grounds would have been sufficient for the Courts to take the decision to rescind, this would mean that the revocation on one side and the other grounds on the other, would have been equivalent causes of Claimants' deprivation of their rights in respect of the Kartika Plaza Hotel; nothing else is needed for the revocation to be characterized as being the cause of said deprivation, and consequently of the prejudice suffered by Claimants.

262. (c) The third cause of prejudice relied upon by Claimants are the Jakarta Court decisions themselves.

No doubt these decisions, by rescinding the Lease and Management Agreement, were one of the causes of the prejudice suffered by Claimants.

However, as earlier stated, the Tribunal does not accept that these decisions of and by themselves can commit the State's international responsibility vis-a-vis the Claimants (see above, paras 150-1).

Accordingly, the causal link between the Court decisions and the prejudice is irrelevant.

263. However, it should be also recalled that the opinions expressed in the decisions as to the dispossession of April 1, 1980, are not *res judicata* in the present arbitral procedure (see above, para. 177); moreover, the Jakarta Courts did not express any opinion at all as to the legality of the licence's revocation, which they considered as an administrative act of which they had just to draw the consequences.

Section II – The Damages

264. The Tribunal will now establish the legal bases of the calculation of damages to be awarded in order to compensate the prejudice, and then proceed to said calculation.

A. Legal Bases of Calculation of Damages

265. The legal bases of calculation of damages will be set up according to the principles governing the matter, where the prejudice to be compensated results from the failure of a party to a contract to fulfil its obligations under the contract.

This method is justified in the instant case, in spite of the relationship

between the host State and the investor not being strictly identical to a private law contract, as earlier shown, but merely comparable to such a contract.

Indeed, the difference lies in the right of the State to amend, or even to withdraw its previously granted authorization, for reasons of public interest, not being free, however, even in such a case, from the obligation to indemnify the recipient of the withdrawn authorization.

In any event, in the instant case, as the Tribunal finds that no public interest could have justified the revocation of the licence, nor the military and police assistance given to the defacto taking by PT Wisma Kartika of the possession of the Kartika Plaza. Accordingly, the infringement by the State (by giving assistance to the taking of the hotel) of its obligation to protect the foreign investor, and by revoking the licence, of the obligations the State undertook, when granting the application, namely to guarantee to the investor the peaceful operation of his investment for the duration of the licence amount to the equivalent of an infringement of a contractual obligation; consequently, the damages to be awarded to the injured party are governed by the principles applicable in case of failure to contractual obligations.

Moreover, it could by no means be contended that if the illegal acts of the State were of delictual character, the damages to be awarded in compensation of the prejudice should be of a lower amount than damages awarded in the framework of contractual liability.

266. The principles governing damages for contractual liability hardly leave room for discussion.

In Indonesian law, like in all systems of civil law, damages are to compensate the whole prejudice, whose two classical components are the loss suffered (*damnum emergens*) and the expected profits which are lost (*lucrum cessans*).

Indeed, Article 1246 of the Indonesian Civil Code (CI. Statement of Law Docs, Doc. R) provides as follows:

Cost, losses and interest which a claimant may claim shall consist of, in general, losses already suffered and profit which he would otherwise enjoy, subject to the exceptions and qualifications set forth below.

Such exceptions and qualifications concern mainly the contractual limitation of liability (which is of course not met in the instant case), and the requirement of directness and foreseeability of the prejudice, which will be taken into account in the calculation of the damages (see hereunder, paras 268,269 ff.).

Likewise, Article 1149 of the French Civil Code – which has been used as a model by many other civil law systems – reads as follows:

The damages due to the creditor amount in general to the loss which he has sustained and the profit of which he has been deprived, except as provided in the exceptions and qualifications below.

In this respect, the Tribunal can only adhere to the enlightening

explanations presented by Professor Bernard Audit in the legal opinion he delivered to counsel for Respondent (Resp. Leg. App. vol. VIII, 2-2), at pages 6 to 10. Indeed, "the loss sustained must be ascertainable"; "a future loss can be ascertained"; "a loss of profits constitutes a remediable loss"; "the loss must be foreseeable".

The same basic principles are met in common law. The rule of English law is that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed" (Robinson v. *Harman* (1848) 1 Exch. 850, at 855; and in particular as to loss of profits: *Anson's Law of Contract*, 25th (Centenary) ed., by A. G. Guest, Oxford 1982, at 553); in the law of the United States, the courts or arbitral tribunals attempt to put the injured party in as good a position as he would have been in if the contract had been performed (Restatement Second on Contracts, Section 344; Uniform Commercial Code, Sections 1-106 (1)).

267. Thus, the full compensation of prejudice, by awarding to the injured party the *damnum emergens* and *lucrum cessans* is a principle common to the main systems of municipal law, and therefore, a general principle of law which may be considered as a source of international law.

Moreover, the same principle has been applied, in cases of breach of contract by a State (and in particular, in cases of breach of a concession contract which are closely comparable to an unjustified revocation of a licence to invest) by a number of authoritative international judicial decisions and awards.

One could say that the basic precedent in this respect is to be found in the decision *Chorzow Factory* (Germany v. Poland, 1928 PCIJ, Series A, No. 17^[6]) where the Permanent Court of International Justice stated as follows:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

Many international awards have taken the same position, before or after the PCIJ's decision in the *Chorzow* case (see e.g.: *Lena Goldfields*, 1930, 36 *Cornell LR* at 51;^[6] *Shufeldt*, cited above, para. 248-v;^[7] *Sapphire*, 35 *ILR* 136 at 185-6 (1963); *Norwegian Shipowner's Claims*, 1 *R. Int'l Arb. Awards* 307 (1922), at 338; *Lighthouses Arbitration* (*France v. Greece*), 23 *ILR* 299 (1956) at 300-1).

[⁵ 4 *Ann Dig* 268 at 271.]

[⁶ 5 *Ann Dig* 3 and 426.]

[⁷ 5 *Ann Dig* 179.1

268. Applying the same principles, the Tribunal will grant, in the instant case, damages calculated to fully compensate the prejudice suffered by the claimants.

Before proceeding to this calculation, the Tribunal has to state that here again, according to principles and rules common to the main national legal systems and to international law, the damages to be awarded must cover only the direct and foreseeable prejudice. The requirement of directness is but a consequence of the requirement of a causal link between the failure and the prejudice; and the requirement of foreseeability is met practically everywhere (see e.g.: for French law, Civil Code, Article 1150: "The debtor can only be liable for the damages which were foreseen or foreseeable at the time the contract was entered into, unless the contractual obligation was not performed due to his own fundamental act"; cf. *Legal Opinion* of Professor Audit, Resp. Leg. App., vol. VIII, Z 2, at 8; for English law: *Hadley v. Baxendale* (1854) 9 Exch. 341; *Anson's Law of Contract*, 25th ed., by A. G. Guest, at 555; for international law; D. P. O'Connell, *International Law*, 2nd ed. vol. 2, at 117 ff., and the cases cited, footnote 24).

B. Calculation of Damages and Interest

269. As previously set out (see above, para. 2-53), the prejudice suffered by Claimants consisted of the loss of incorporeal, patrimonial and potentially profitable rights, namely: the right to operate the Kartika Plaza Hotel (and to start with, the effective exercising of this right), and more generally, the right to possibly invest in Indonesian enterprises active in the field described in the Application.

270. No evidence having been produced by Claimants as to investments in businesses other than the Kartika Plaza they planned to realize, the Tribunal will not award them damages to compensate for the loss of the general right to invest: indeed, such damages would necessarily be based on mere hypotheses, since the prejudice they would purport to compensate for would be, if not strictly speaking, unforeseeable, in any event largely speculative.

271. Accordingly, the only prejudice to be taken into account for awarding damages is the loss of the right to operate the Kartika Plaza, that is to say the loss of a going concern.

Now, while there are several methods of valuation of going concerns, the most appropriate one in the present case is to establish the net present value of the business, based on a reasonable projection of the foreseeable net cash flow during the period to be considered, said net cash flow being then discounted in order to take into account the assessment of the damages at the date of the prejudice, while in the normal course of events, the cash flow would have been spread on the whole period of operation of the business.

It is true that, in a number of instances, the value of the physical assets lost by the investor due to the taking of the investment is added to the discounted cash flow in order to assess the total amount of the damages. As a matter of principle, this method might raise serious problems in cases where at the end

of the contractual relationship (or of the legal relationship comparable to a contractual one), the injured party would not have been entitled to keep valuable goods previously utilized for the operation of the business. Moreover, the value of physical assets thus utilized is itself essentially based on the earnings that such utilization may yield; therefore, the valuation of the net cash flow may well reflect the commercial value of the physical assets.

272. In any event, in the instant case, while having initially included in the calculation of the damages claimed the alleged value of some physical assets (see Cl. Statement of Facts and Law, at 33), Claimants eventually put forward a calculation of damages exclusively based on the alleged discounted net cash flow. For its part, Respondent, while denying any award of damages, did subsidiarily rely on evidence in which the calculation of the damages Claimants could have borne is made according to the same method.

Accordingly, it is this method (namely, the valuation of the net present value of the lost business, as resulting from the discounted net cash flow) that will be applied by the Tribunal in order to assess the damages to be awarded to the Claimants.

273. In addition, it is stated again that to establish the prejudice, and consequently to assess the damages, the loss suffered will be calculated on the whole duration of the Lease and Management Agreement as amended, namely thirty years, for the reasons previously stated (see above, paras 253-5).

Accordingly, the net discounted cash flow value and the net present value will be calculated from April 1, 1980 to September 30, 1999 inclusive, this being the time limit of the profit sharing agreed upon by PT Amco and PT Wisma.

274. Two estimates of the future income stream were presented to the Tribunal, namely,

- by the Claimants, the Pannell Kerr Forster Report of December 15, 1983 (Cl. Doc. 137),
- and by Respondent, the Horwath & Horwath Report of 28 February 1984 (Resp. Exh. 240).

The Arthur Young & Co Report of April 26, 1982 (Cl. Doc. No. 28) which Claimants originally submitted was subsequently withdrawn, so that the Tribunal will ignore it; as will the Tribunal ignore the comments on this Report by Messrs Touche Ross (see Resp. Exh. vol. V, No. 113).

The Tribunal finds that the Horwath & Horwath Report represents a realistic framework upon which the Tribunal can rely.

Indeed, for the reasons stated in said Report (para. 2.2), "the only data on which the estimated, maintainable income of the hotel can be reliably based is contained in the management accounts of the hotel for the fifteen months period ended 31 March 1980". The Tribunal cannot take as a starting point of the income projection the assumption on which the Pannell Kerr Forster Report is based, namely a loan of US \$3,000,000 "to fund the renovation^s needed for the hotel to reach its full market potential" (Report, at VI-I).

Indeed, this assumption is speculative, since no hard evidence, except only that of an envisaged loan, has been produced to the Tribunal. While normal maintenance expenses, which are indispensable for a hotel to function, must be assumed, the Tribunal cannot base its calculations on a huge investment which is purely hypothetical.

Thus, the period of 1979 and the first quarter of 1980 is the most useful starting point for the Tribunal's purposes.

By the same token however, because of the special circumstances of this case, particularly the fact that PT Amco itself only managed the property, since it had retaken possession of it, for a little over one year and the Ramada influence was only starting when PT Amco lost the hotel, the Tribunal does not feel itself bound to making a strict calculation based only on 1979 and the first quarter of 1980 results. The Tribunal is of the view that certain reasonable adjustments can be made in arriving at a figure for valuation, and therefore for compensation purposes.

275. The management accounts for the hotel for 1979 are to be found in the Nemeth Bolton Report (Cl. Doc. 64, at 3) where the "net earnings for the year ended December 31, 1979", are referred to as being Rp. 157,137,797. This was confirmed by subsequent accounts (see Cl. Doc. 131).

This figure, rounded up to Rp. 157.2 million, is utilized by Horwath & Horwath in Appendix A of its own valuation. It should be noted that during this period, although the hotel had a capacity of 331 rooms, only 280 were available to the public (see Cl. Doc. 137, at IV-1). It should be further noted that Ramada played an insignificant role in the management of the hotel in this period and there was no management or advertising fees payable to Ramada.

In addition, this figure does not take into account any rental income from the commercial area, interest, if any, depreciation, income taxes, profit share payable to PT Wisma.

276. On the same basis (except for the inclusion of a payment of management fees of Rp. 17.8 million to Ramada) the profit for the first quarter of 1980 was Rp. 29,000,000 (see Horwath & Horwath Report, Resp. Exh. 240, Annex A).

277. Some adjustments and recalculations should however be made.

Indeed, the Tribunal notes that in both Horwath & Horwath and Pannell Kerr Forster Reports a reserve for replacement was taken in respect of both the hotel property and the office space. The Tribunal is of the view that although the replacement reserve is indeed appropriate for the hotel furniture and fixtures, it is not appropriate for the office space, which is already covered by maintenance provisions and depreciation. Thus, the Rp. 181.2 million combined income of 1979 and the first quarter of 1980 should be adjusted upward by adding back that portion of the reserve for replacement which is based on the gross income of the commercial premises (such income being, for 1980, i.e. the first period considered, in the amount of Rp. 111.88 million; the same proportion of the total revenue is then to be applied to the subsequent periods). In addition, the Tribunal finds that in the circumstances a 3% replacement reserve is an appropriate figure. Thus on

this basis, and without any other change, the Horwath & Horwath figures shall be adjusted to read as shown in the table hereunder.^[8]

278. The net present value figure of Rp. 1,717,710,000 includes to some extent a deduction for management fees which were paid and would have been paid to Ramada under the Ramada Service Agreements. But by the same token, the Tribunal is cognizant that by March 31/April 1, 1980, the manager selected by Ramada had only been in place for a very short period of time and that the professional management system and international reservation network capability to which the hotel was entitled under its Agreements with Ramada had not yet had an opportunity to make the impact that it is reasonably foreseeable they would have had and which PT Amco could reasonably have expected in the circumstances. In addition, as already said, the figures for 1979 and the first quarter were based on only 280 rooms out of a possible 331 in use at that time. It is also reasonably foreseeable that the unused rooms would have been brought into use by the Ramada appointed management. Accordingly, the Tribunal finds it appropriate to increase the net present value figure referred to above.

Thus, taking all the circumstances into account, the net present value of the business on April 1, 1980, will be fixed at Rp. 2,000,000,000 (Indonesian Rupiahs two billion).

279. The investment in dispute was made in foreign currency, or composed of amounts, like accrued profits and depreciation, which according to Law No. 111967 (Art. 19, paras 1 (a) and (d) were convertible in such currency.

Now, the initial foreign investor was Amco Asia Corporation, and the Company that bought subsequently a fraction of PT Amco's shares was a Hong Kong Company. All the amounts mentioned in the Application to Invest, and in the Lease and Management Agreement are expressed in US dollars. As to the Authorization to Invest, it refers to the Application.

280. It thus appears that the investment was made in US dollars or in currencies convertible into US dollars, and it is to be recalled that several provisions of Law No. 1/1967 purport to authorize the investor to repatriate his capital and earnings.

Accordingly, in order to grant the investor full and effective compensation of the prejudice it suffered, as international law requires, the net value of the taken business as calculated per April 1, 1980, is to be converted in US dollars on the same date.

The exchange rate at said date being 1 (one) US dollar for 625 Indonesian Rupiahs, the amount of damages to be awarded to Claimants, without considering interest, is of:

$$\frac{2,000,000,000}{625} = \text{US } \$3,200,000$$

(Three Million Two Hundred Thousand US Dollars)

HORWATH & HORWATH VALUATION OF BUSINESS
Millions of Rps.

Year	Hotel Profit	Office Rental	Replacement Reserve (3%) on Motel Gross Revenue only	Depreciation	Net Profit before Rent	Net Profit after Rent	Tax	Net Profit after Tax	Depreciation added back	Net Cash Flow	Net Present Value
1980	121.77	111.88	27.88	24.93	180.84	117.54	25.26	92.28	24.93	117.21	117.21
1981	181.85	167.07	41.63	33.24	274.05	178.13	43.43	134.70	33.24	167.94	145.95
1982	203.67	187.11	46.63	33.24	310.91	202.09	50.62	151.47	32.24	184.71	139.67
1983	228.11	209.57	52.22	33.24	352.22	228.94	58.68	170.26	33.24	203.50	133.80
1984	255.48	234.72	58.86	33.24	398.10	243.83	63.14	180.69	33.24	213.93	122.32
	286.14	262.88	65.51	33.24	450.27	225.13	57.53	167.60	33.24	200.84	99.85
	320.48	294.43	73.38	33.24	508.29	254.14	66.24	187.90	33.24	221.14	95.60
		329.76	82.18	33.24	573.27	286.63	75.89	210.70	33.24	243.94	91.71
1988	402.00	369.33	92.04	33.24	646.05	323.02	86.90	236.12	33.24	269.36	88.05
1989	450.24	413.65	103.09	33.24	727.56	363.78	101.20	262.58	33.24	295.82	84.09
1990	504.27	463.29	115.46	33.24	818.86	409.43	121.74	287.69	33.24	320.93	79.33
1991	564.79	518.88	129.31	—	954.36	477.18	152.23	324.95	—	324.95	69.85
1992	632.56	581.15	145.21	—	1,068.50	534.25	177.91	356.34	—	356.34	66.60
1993	708.47	650.89	161.97	—	1,197.39	598.69	206.91	391.78	—	391.78	63.68
1994	793.49	728.99	101.38	—	1,341.10	670.55	239.24	431.31	—	431.31	60.96
1995	888.70	816.47	206.78	—	1,498.39	749.19	274.63	474.56	—	474.56	58.32
1996	995.94	914.45	227.90	—	1,682.40	841.20	316.04	525.16	—	525.16	56.12
1997	1,114.79	1,074.10	255.25	—	1,883.64	941.82	361.31	580.51	—	580.51	53.94
1998	1,248.56	1,147.09	205.88	—	2,109.77	1,054.88	412.19	642.69	—	642.69	51.93
1999	1,048.79	968.55	240.14	—	1,777.20	888.60	337.37	551.23	—	551.23	38.73
											1,717.71

[⁸ The table is reproduced on the following page.]

281. In addition, Claimants are entitled to interest on the sum thus awarded.

i) As to the rate of interest, the Tribunal finds that Indonesian law is to be applied, which will keep the interest on a moderate basis. Indeed, the legal rate of interest according to Indonesian law is of six per cent (6%) per year (Regulation of 30 May 1848, still in force).

ii) The date for the commencement of interest is, in Indonesian law, the day where the compensation "is claimed before the Court" (Indonesian Civil Code, Article 1250). Truth to tell, taken into the context of the whole provision, this starting point appears to concern compensation for the delay in the implementation of "agreements solely regarding payment of a certain sum". However, no provision nor precedents of the Indonesian law have been brought to the attention of the Tribunal which would exclude the same starting point of the interest, where the same is awarded in addition to damages purporting to compensate the prejudice caused by the non-fulfilment of other contracts, or, as in the instant case, by the non-fulfilment of obligations deriving from a legal relationship similar to a contract.

In addition, the Tribunal notes that in international law, the starting point of interest has been generally fixed either at the date of the wrong, or at the date of the presentation of the claim to the competent international authority (see, e.g.: Ch. Rousseau, *Droit international public*, tome V, No. 239; D. P. O'Connell, *International Law*, 2nd ed., vol. 2, at 1122-3, and the mentioned decisions).

Taking into account these provisions and authorities, the Tribunal decides that in the instant case, interest must run from the date of the Request for Arbitration, that is to say from January 15, 1981. As far as necessary, the interest thus awarded for the period elapsed between the said date and the date of payment of the sums awarded, should be considered as part of the compensation granted to the Claimants, in order for the same to come as close as possible to the full compensation prescribed by international law.

282. The amounts thus awarded are due jointly and severally to the three Claimants. They are to be paid outside of Indonesia.

CHAPTER IV — THE COUNTERCLAIM

283. In its Counter-Memorial (at 81-2) Respondent presented a counterclaim seeking the payment by Claimants of all monies they should have paid as taxes and import duties, but for the tax holiday granted by the licence. In the Counter-Memorial (at 82) the value of these facilities was estimated at least US \$1,000,000.

284. In their Reply to the Counter-Memorial (at 120-1), Claimants denied the counterclaim in all respects, stating that "all the taxes and duties now claimed by Indonesia were lawfully excused" and, moreover, that "any claim for taxes due prior to January 1, 1978 is barred by the 5 year Indonesian statute of prescription or limitation of actions".

285. In the Rejoinder on the Merits (at 59 ff.), Respondent stated that

"the total amount of Indonesia's counterclaim ... is US \$583,591,000" (at the current average rate of US \$1/Rp. 975). As to the statute of limitation, Respondent contends that the same "begins to run only as of the date the company tax obligation is incurred", that is to say "the date of the licence

286. To start with, the Tribunal finds that the statute of limitation relied upon by Claimants (namely Tax Law on Interest, Dividend and Royalty 1959, as amended and supplemented by Law No. 10 year 1970: Cl. Doc. 69, and Corporation Tax Ordinance 1925, as amended and supplemented by Law No. 8, 1970: Cl. Doc. 70) are not applicable in the instant case. Indeed, these statutes concern recovery of taxes by the Indonesian authorities, but not the obligation of an investor to pay taxes of which he was exempted, where such obligation results from the laws, regulations and decisions related to the investment.

287. This being said, the Tribunal notes that in the instant case, the revocation of the tax facilities which were attached to the licence, was decided in the BKPM Chairman's decision of July 9, 1980 (see above, paras 128-30) as a result of the revocation of the licence.

Accordingly, since the Tribunal finds that the revocation of the licence was unlawful, as a consequence, the revocation of the tax facilities was unlawful as well.

288. It is true that Article 4 of Decree No. 6311969 (Resp. Fact. App. C. Att. 3) provides that:

(i) if the capital investment plan is not implemented in accordance with the approval that has been granted, this may result in the withdrawal of the business licence that has been issued and/or the withdrawal of all facilities that have been granted.

Accordingly, the competent authorities could withdraw the facilities, while not withdrawing the licence itself. However, such a separate withdrawal was not decided by the Indonesian authorities in the instant case, and it is not for the Tribunal to separate the measures which were strongly linked one with the other by said authorities.

Moreover, a separate revocation of the tax facilities would have been decided without the warnings prescribed by the above-cited regulations (see above, para. 193), and in the same procedural conditions as the revocation of the licence, which resulted in lack of due process.

To conclude, the counterclaim is to be rejected.

289. In addition, the Tribunal wishes to stress that the contention presented by Respondent in the Rejoinder on the Merits (at 59-60), concerning the alleged "uninvested capital", is not submitted as a counterclaim, but as an objection to the possible implementation of the theory of unjust enrichment.

Now, since the Tribunal does not find this theory relevant to the case (see above, para. 149), there is no need to discuss the Respondent's contention in this respect.

290. Article 61(2) of the Washington Convention provides as follows:

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

291. In the instant case, considering that both parties did their best to assist the Tribunal to perform its tasks, and considering in addition the size of the claim compared to the amount that will be awarded, the Tribunal decided that each party should bear the expenses of all kinds incurred by it in the preparation and presentation of its case, and that the arbitrators' fees and the charges for use of the facilities of the Centre are to be shared equally between the parties.

For the above stated reasons,

THE TRIBUNAL DECIDES AS FOLLOWS:

1. The Republic of Indonesia shall pay jointly and severally to Amco Asia Corporation, Pan American Development Limited and PT Amco Indonesia, the sum of US dollars THREE MILLION TWO HUNDRED THOUSAND (US \$3,200,000) with interest on this amount at the rate of six per cent (6%) per annum from January 15, 1981 to the date of effective payment.
2. The amounts thus awarded are due by the Respondent jointly and severally to the Claimants. They are to be paid outside of Indonesia.
- (3) The Respondent's counterclaim is rejected.
- (4) All other submissions of the parties are rejected.
- (5) Each party shall bear the fees and expenses it incurred for the preparation and presentation of its case.
- (6) Each party shall bear one half of the arbitrators' fees and expenses and of the charges for use of the facilities of the Centre.

[Source: This decision is published in full in English in 89 *International Law Reports* 405.]

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

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