

# AMCO v. Republic of Indonesia: Resubmitted Case Decision on Jurisdiction

## A. BACKGROUND

1. On January 15, 1981 Amco Asia Corporation ("Amco Asia"), Pan American Development Limited ("Pan American") and PT Amco Indonesia ("P.T. Amco") filed with the Secretary General of ICSID a Request for Arbitration against the Republic of Indonesia. The Tribunal established for purposes of this arbitration gave an Award on Jurisdiction on September 25, 1983. On November 21, 1984 it gave an Award on the Merits.
2. The Claimants had contended that whereas their investment in the building and management of a hotel complex in 1968 had been authorized by the Republic of Indonesia for a period of thirty years, in 1980 the Republic seized the investment in an armed military action and then unjustifiably cancelled the investment licence. Various decisions of the Jakarta courts later rescinded a Lease and Management Agreement relating to the hotel. The Republic of Indonesia contended that any military or police assistance was only directed to supporting the legal right of an Indonesian national to control the hotel and was not a seizure of the hotel by the government; that the cancellation of the investment licence was fully justified; and that the Jakarta courts had acted in a binding and lawful manner in rescinding the Lease and Management Agreement. In its counterclaim Indonesia asserted that, as the cancellation of the investment licence was justified due to violations of Indonesian and applicable international law, P.T. Amco was obliged to return tax and other concessions granted by Indonesia.
3. A description of the claims, defences and counterclaim are to be found at paragraphs 142–146 of the Award on the Merits. The applicable law, by virtue of Article 42, paragraph 1 of the ICSID Convention was "Indonesian law, which is the law of the state party to the dispute, and such rules of international law as the Tribunal deems to be applicable, considering the matters and issues in dispute." (*Award on the Merits*, para. 148).
4. The Tribunal found in favour of the Claimants, ordering the sum of US\$3,200,000 with interest to be paid, outside of Indonesia. The Republic of Indonesia's counterclaim was rejected. Orders were also made as to fees, expenses, arbitrators' fees and expenses and charges for the use of the facilities of the Centre for the Settlement of Investment Disputes.

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

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

7. Written pleadings and oral hearings ensued in 1985 and 1986. On May 16, 1986 the Ad Hoc Committee handed down its Award.

8. The Ad Hoc Committee described the Award on the Merits of the Tribunal thus:

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

(a) Indonesia had failed to protect P.T. Amco's right to manage the Kartika Plaza Hotel under a contract with P.T. Wisma, a private corporation organized under Indonesian law and controlled by INKOPAD, a body connected with the Indonesian Army. P.T. Wisma had resorted to illegal self-help in its dispute with P.T. Amco and had taken over the management of the hotel with the help of Army and Police personnel on March 31-April 1, 1980. Indonesia's failure to protect P.T. Amco's rights in this regard was violative of a host State's duty under international law to protect foreign investors' rights and interests.

(b) BKPM, Indonesia's Capital Investment Coordination Board, had on July 9, 1980 revoked P.T. Amco's licence to do business in Indonesia, without the prior warning required by BKPM Decree 01/1977. The failure of BKPM to give prior warning to P.T. Amco, and the grant of no more than one hour's hearing to P.T. Amco's representatives in the revocation proceedings, amounted in the view of the Tribunal to a violation of the fundamental principle of due process.

(c) In its revocation order, BKPM found that

(i) P.T. Aeropacific rather than P.T. Amco had carried out P.T. Amco's obligation to manage the hotel under the investment licence; and

(ii) P.T. Amco had contributed only US\$1,399,000 of foreign capital of which US\$1,000,000 was in the form of loan and US\$399,000 in the form of equity capital, instead of the US\$3,000,000 of foreign equity capital plus US\$1,000,000 of loan capital promised by, and required from, P.T. Amco in its application for the investment licence and in the Lease and Management contract (Award, para. 129).

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

(i) Indonesia must have known and had tolerated management of the Kartika Plaza Hotel by P.T. Aeropacific, which management had in any case ceased two years before the revocation order;

(ii) P.T. Amco had invested US\$2,472,490 in equity capital rather than a total of US\$1,399,000, of which US\$1,000,000 was in loan funds and US\$399,000 in equity funds, as stated by BKPM.

(iii) The shortfall of 1/6 of the required investment was not material under the circumstances of the case.

(d) The Tribunal awarded P.T. Amco damages for the illegal deprivation of its

rights to manage the Kartika Plaza Hotel from April 1, 1980 until the stipulated date of expiry of the contract in 1999. The decisions reached by the Indonesian courts before whom P.T. Wisma had on April 24, 1980 commenced proceedings against P.T. Amco for rescission of the management contract on grounds of breach thereof by P.T. Amco, which decisions granted P.T. Wisma's demand for rescission, were based on the fact that the management contract had become inoperative by reason of BKPM having revoked P.T. Amco's license to do business in Indonesia. The Tribunal did not feel bound by the decision of the Indonesian courts and so awarded damages to P.T. Amco. The Tribunal, referring to the right to repatriate capital imported into Indonesia under Indonesia's Foreign Investment Law, held Amco entitled to receive the damages awarded to it in United States dollars and outside Indonesia."

*Decision, para. 3*

9. The Ad Hoc Committee described the grounds on which Indonesia sought annulment of the Tribunal's Award on the Merits thus:

"Indonesia seeks the annulment of the Award for the following reasons:

- (a) That the Arbitral Tribunal manifestly exceeded its powers, seriously departed from a fundamental rule of procedure, and failed to state the reasons upon which it based the Award in deciding that claimant's investment shortfall was not material and did not justify the revocation of P.T. Amco's license, and that the amount of foreign equity capital invested by claimants was approximately US\$2,5 million;
- (b) That the Arbitral Tribunal seriously departed from a fundamental rule of procedure in deciding not to consider the merits of all the grounds justifying the revocation of P.T. Amco's license;
- (c) That the Arbitral Tribunal manifestly exceeded its powers, seriously departed from a fundamental rule of procedure, and failed to state the reasons upon which it based the Award in deciding that Indonesia violated due process in revoking the investment license and therefore must compensate claimants;
- (d) That the Arbitral Tribunal failed to state the reasons upon which it based the Award in deciding that Indonesia incurred State responsibility for failure to afford adequate protection to a foreign investor;
- (e) That the Arbitral Tribunal failed to state the reasons upon which it based the Award in deciding that Indonesia shall compensate claimants in US dollars outside Indonesia, converted from rupiahs at the exchange rate prevailing as of April 1, 1980."

*Decision, para. 4.*

10. The Decision of the Ad Hoc Tribunal of May 16, 1986 was to annul the Award, with certain qualifications. The final paragraph of the Decision states (p. 47):

"the ad hoc Committee by unanimous decision annuls the Award as a whole for the reasons and with the qualifications set out above. The annulment does not extend to the Tribunal's findings that the action of the Army and Policy personnel on March 31–April 1, 1980 was illegal. The annulment extends, however, to the findings on the duration of such illegality and on the amount of the indemnity due on this account . . ."

11. As can be seen, the *dispositif* refers both to annulment "as a whole" and "with . . . qualifications." To understand the scope of the annulment it is therefore necessary to refer to the "qualifications set out above" in the Decision. The

substance of the annulment claims are dealt with at pp. 21–46 of the Decision. The following pertinent findings may be noted:

- : The Ad Hoc Committee rejected Indonesia's contention that the Tribunal failed to evaluate the acts of the Army and Police personnel concerned under Indonesian law (para. 59).
- : The absence of reasons for not requiring Amco to exhaust local remedies was not a ground for annulment (para. 63).
- : The finding of the illegality of the acts of Army and Police personnel and persistence of that illegality even after the issuance of an interlocutory decree by the District Court was not to be annulled for manifest excess of power or for failure to state reasons (para. 66 and *dispositif*).
- : The Tribunal had not manifestly exceeded its powers by assuming jurisdiction over the matter of the legality of the acts of the Army and Police personnel (para. 68).
- : The portion of the Award by which the Tribunal had refused to regard the letters by the Bank of Indonesia as comparable to a required warning under BKPM Decree 01/1977 was not to be annulled for failure to apply the applicable law (para. 71).
- : The taking into consideration by the Tribunal of an administrative regulation issued by BKPM was not a failure to apply the applicable law (para. 72).
- : The holding of the Tribunal that P.T. Amco was denied a fair and adequate hearing during the revocation procedures was not annulled by any failure to apply the applicable law amounting to a manifest excess of power or to state reasons (para. 79).
- : The affirmation of the Tribunal of the "illegality of the revocation procedure while, at the same time, conditioning the award of damages upon the existence of substantive reasons" for the revocation, was not an excess of powers by the Tribunal in applying and interpreting Indonesian Law (para. 83).
- : The Tribunal's rulings on the assignment of management functions to Aeropacific was not to be annulled for excess of powers or failure to state reasons (para. 86).
- : Indonesia's claim for nullity based on unequal treatment of the parties in certain respects was rejected (paras. 88 and 123).
- : Indonesia's claim for nullity based on unequal treatment of the parties in the allocation of burden of proof in the calculation of shortfall was rejected (para. 90).
- : The holding of the Tribunal concerning modalities of payment were not to be annulled for failure to interpret and apply Indonesian law (paras. 119 and 120).

12. All of these findings are, in the view of the present Tribunal, pertinent to an understanding of the "qualifications set out above" referred to in the *dispositif* of the Decision of the Ad Hoc Tribunal—qualifications to the "annulment as a whole."

13. The meaning of "annulment as a whole" subject to such qualifications is better understood by reference to the specific annulment findings of the Ad Hoc Tribunal, which are as follows:

- : The finding of the Tribunal that Amco had reached the investment sum of US\$2,471,490 was a failure to apply the relevant provisions of Indonesian law and to state reasons and was annulled (paras. 95 and 98).
- : The Tribunal's ruling on the non-materiality of the shortfall of P.T. Amco's investment is annulled as a consequence of the annulment of the conclusions of the Tribunal on the calculation and the amount of P.T. Amco's investment (para. 103).
- : The Tribunal's finding that BKPM was not justified in revoking Amco's licence on account of the shortfall in investment, is annulled as a consequence of the annulments in paras. 95 and 98 (para. 105).
- : The granting of compensation by the Tribunal for procedural defects in the revocation order was annulled (para. 106).
- : The Ad Hoc Committee annulled the grant of damages to P.T. Amco in paras. 280-281 of the Award for the period beyond July 9, 1980 (para. 109).
- : The Tribunal's findings on the amount of damages as a whole were annulled (para. 110).
- : The Tribunal's rejection of Indonesia's counterclaim for recovery of tax and import facilities granted to P.T. Amco was annulled (para. 116).
- : The Tribunal's finding that all other submissions of the parties were rejected, is annulled (para. 117).

14. In the light of the above determinations of annulment, and the rejection of annulment in the other claims listed above, the present Tribunal issued on 21 December 1987 a Provisional Indication as to what had been annulled and what remained as *res judicata*. It provisionally indicated that the Award on the Merits of 21 November 1984 was annulled in respect of the following matters:

1. the amount actually invested by P.T. Amco
2. the calculation of any shortfall in respect of the required equity investment
3. the materiality of any such shortfall to the revocation by BKPM of PT Amco's licence
4. The finding that the withdrawal of the licence by BKPM was unlawful for substantive reasons; and legal consequences thereof
5. the award of damages generally, i.e. in respect of acts of the army and police as well as claimed illegalities in respect of the licence revocation.

15. In its Provisional Indication of 21 December 1987 the present Tribunal stated that the following findings of the Tribunal in its Award on the Merits of 21 November 1984 remained *res judicata* for purposes of the present proceedings:

1. the illegality of acts of the army and police
2. exhaustion of municipal remedies in respect thereof
3. whether such acts of the army and police constitute a tort
4. unlawfulness of the revocation of the licence in respect of the procedures followed

5. the inadequacy of the hearing given to P.T. Amco
6. the inability of the ICSID Tribunal to set aside the revocation orders.

#### THE JURISDICTION OF THE PRESENT TRIBUNAL: THE IDENTIFICATION OF RES JUDICATA

16. Both parties agreed with the Provisional Indication of what had been annulled. However, there was not total agreement on the question of *res judicata*. On January 13, 1988 Amco submitted written observations and exhibits on the *res judicata* effect of the Award on the Merits of 21 November 1984 in view of the Decision of the Ad Hoc Committee on 16 May 1986. On January 14, 1988 Indonesia submitted its written observations and exhibits on these matters. Indonesia's submissions included a legal Opinion rendered by Professor W.M. Reisman.

17. On January 30 and February 1 1988 there were held hearings in London on jurisdiction, including on questions of *res judicata*.

18. The written observations of the parties and their oral argument address what we may term the principle and theory of *res judicata*, and the application of such principle and theory to specific questions arising out of the Award on Merits and the Decision on Annulment.

19. The present Tribunal also believes it helpful to deal with the general approach to *res judicata* before its application to specific issues arising in this case.

#### B. THE GENERAL APPROACH TO RES JUDICATA

20. Amco has generally taken the view that only those portions of the Award that were specifically annulled by the Tribunal are annulled; all other findings remain *res judicata* for purposes of the proceedings before the present Tribunal. Occasionally, as we shall indicate below, Amco have appeared to advance specific arguments of application that are not always fully consistent with this general position taken.

21. There is no quarrel between the parties with Professor Reisman's view that when an Ad Hoc Committee issues a qualified nullification of an award rendered by an ICSID Tribunal, a subsequent Tribunal, initiated by the claim of one or both of the original parties, must treat the unannulled parts of the award as binding on the parties and *res judicata* and hear relitigation of and decide only those parts which were nullified by the Ad Hoc Committee. (Reisman opinion, p. 5.)

22. However, that apparently elementary proposition is at once rendered problematic, not because of any difficulty in identifying what parts of the *Award* remain unannulled, but because it is contended by Indonesia that parts of the *annulment Decision*, beyond the *dispositif* as to what is annulled, are binding upon the subsequent Tribunal and constitute *res judicata* along with the unannulled portions of the Award. The principle said to lead to this outcome is what we may term the principle of integrality of the annulment Decision—that is to say, that certain findings of fact and law are necessarily essential to, or necessarily flow from, the annulment Decision; and that as the annulment Decision must be binding on the

subsequent Tribunal, so also must be the reasons that led to it and the consequences that follow upon it.

23. Indonesia, drawing on Professor Reisman's Opinion, contends that a failure to treat such integral findings as *res judicata* would be a failure to give effect to the Decision of the Ad Hoc Committee and an effective nullification of parts of its findings (Reisman Opinion, pp. 5-6).

24. Of course, this begs certain questions, notably, does giving effect to the Decision of the Ad Hoc Committee require endorsing all of the Ad Hoc Committee's findings? And to what exactly is the subsequent Tribunal bound to give effect? In the view of Indonesia, "in interpreting the *ad hoc* Decision, the second Tribunal must accept the interpretations of the ICSID Convention and the findings and forms of expression of the Ad Hoc Committee and interpret them in good faith." (Ibid., p. 6.)

25. The present Tribunal believes that there is here a certain circularity, in that if "the Decision" properly understood, are the decisions to annul certain points and not others, little interpretation is called for. If, however, "the Decision" means decisions to annul (and not annul) *and the reasoning therefore*, then rather more questions of interpretation will arise. And that depends upon whether it is indeed correct that "the second Tribunal must accept... the findings and forms of expression of the Ad Hoc Committee." (Ibid., p. 6)

26. The principle of *res judicata* is a general principle of law: see David, *L'Arbitrage dans le commerce international* (1982) para. 339; Cheng, *General Principles of International Law* (1953) at 336. It is a principle known both to international law and to Indonesian law. It is also generally acknowledged that (unless an instrument shall provide otherwise), nullification may be total or partial (except in the case of corruption of the arbitrator, such corruption tainting the entire award).

27. So far as the text of Article 52 of the ICSID Convention is concerned, it is stipulated that, provided the possible grounds are met "The Committee shall have the authority to annul the award or any part thereof..." The present Tribunal does not find the slight difference of structure of the provision in the Spanish language as compared with the French and English language versions of any significance for present purposes, as there is common cause that unannulled parts of the Award are in principle *res judicata*. The problem rather is whether reasons of the Ad Hoc Committee are to be treated as *res judicata*, even if that has the effect of rendering annulled parts of the Award as effectively closed off from redetermination, notwithstanding that the normal effect of partial annulment is to place the "parties in the legal position in which they stood before the commencement of the proceedings which gave rise to the award which has been impeached..." Common Article 4 of the 1930 Committee of Jurists, reporting to the *League Council on the proposed nullification competence of the Permanent Court*, *Annuaire de l'Institut de Droit International*, New York sess., Vol. II, p. 304, Annex 1228, as cited by Professor Reisman.

28. After a full fifty five pages of careful analysis and scholarly study Professor Reisman reaches the following conclusion:

"Under the ICSID Convention, an *ad hoc* Committee may annul all or part of an award. If it decides to annul only part of the award, those parts of the award which have not been annulled are *res judicata* as between the parties. In my opinion, these conclusions are mandated by the ordinary meaning, objects, and purposes of the text and the context of ICSID Article 52. They are consistent with the historical development, of which the ICSID experiment is a part, and also compelled by international policy considerations. They are consistent with more general practice. The alternative interpretation would lead to an absurdity. An interpretation which refused to give effect to the particular nullification competence of an *ad hoc* Committee would render those words in the Convention meaningless by making decisions of partial nullification, which the *ad hoc* Committee has been mandated to undertake, of no legal effect." (p. 56).

29. The present Tribunal agrees.

30. The problem is still to determine whether the *reasons of the nullifying body* are also *res judicata* for a subsequent Tribunal. The *Orinoco Steamship Company Case*, Hague Court Reports (1916) 226; 5 *AJIL* (1911) 20 does not address that particular question. The passage quoted by Professor Reisman at p. 60 of his Opinion ("The general principle, announced in numerous cases is that a right, question, or fact *distinctly put in issue and distinctly determined* by a court of competent jurisdiction as a ground of recovery, cannot be disputed") does not dispose of this question. It tells us what matters in the original Award on the merits are *res judicata* as between the parties.

31. In so far as the principle is sought to be applied to the effect of the Decision of the Ad Hoc Committee upon the position of the parties before the present Tribunal, the question remains as to exactly what it is that has been "*distinctly put in issue and distinctly determined.*" The answer to that is clearly not the same, for the Ad Hoc Committee was not an appeal court, rehearing the case on its merits. Rather, what was put in issue, and determined, was whether, in reference to specified matters, the first Tribunal has manifestly exceeded its powers, failed to state the reasons on which the Award was based,<sup>1</sup> or seriously departed from a fundamental rule of procedure. The Ad Hoc Committee's determination on each of these matters that was put in issue is binding.

32. It is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes *res judicata*. The finding of the *Pious Fund Case* Hague Court Reports (1916) 1, cannot be read in that way, for the Tribunal said only that "all the parts of the judgment enlighten and mutually supplement each other and . . . all serve to render precise the meaning and the bearing of the dispositif (decisory part of the judgment) and to determine the points upon which there is *res judicata* . . ." Had the Decision of the Ad Hoc Committee as to what was and was not annulled (and as to what thus was and was not *judicata in the Award*) been unclear, all the points in the Decision would undoubtedly have to be relied on to interpret and clarify the dispositif. But the Decision is clear.

33. It is in the same sense that Judge Anzilotti's celebrated dictum in the *Chorzow*

<sup>1</sup> Article 52(1)(b), 52(1)(d) and 52(1)(c). It has not been suggested that other grounds in Article 52—that the Tribunal was not properly constituted or that there was corruption—fall for consideration.



*Factory Case PCIJ*, Series A, No. 13, p. 27 is to be understood, when he says "it is certain that it is almost always necessary to refer to the statement of reasons to understand clearly the operative part and above all to understand the *causa petendi*." But he affirms at both the beginning and end of the dictum that it is the operative part of a judgment which contains the Court's binding decisions.

34. We note too the view of de Visscher, *Aspects récents de droit procédural*, 1966 at p. 179 that "L'autorité de la chose jugée ne s'attache qu'au dispositif de la sentence à l'exclusion des motifs." Professor de Visscher, while acknowledging the difficulty sometimes in distinguishing reasoning from dispositif, finds the *Chorzow Factory Case* to be authority for his opinion. See also Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale*, 1967, p. 247, who believes the distinction between reasons and dispositif to be well founded in both French law and the practice of the International Court, *res judicata* applying to the latter.

35. This approach is shared by Spencer, Bowes and Turner, *Res Judicata*, 2nd ed., at para. 63, who say that when a matter is set aside by an appeal tribunal for want of jurisdiction (rather than because of a reversal on the merits), there is a decision of nullity, but not a decision "in the sense of deciding the question of right, title, or liability in the dispute . . . which question is henceforth in the same position as if it had never been heard or determined at all."

36. Interestingly, Millar, "The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law," 39 *Michigan Law Review* (1940) p. 1 at pp. 8-9 says that:

" . . . it is true everywhere that the rule of *res judicata* applies to the conclusion, but as regards the effect upon the premises wide differences exist between the Anglo-American law and the continental."

37. His survey of practice suggests that *res judicata* does not extend in the continental systems to any part of the premises. See further, Lauterpacht, *Private Law Sources*, 1927, pp. 245-247, Cheng, *General Principles of International Law*, 1953, Chapter 17, "Res Judicata," pp. 350-356.

38. So far as international law practice is concerned, authors have not been able to show a clear trend towards the acceptance of reasons as *res judicata*. Thus Simpson and Fox, *International Arbitration* (1959) 259 say:

"Occasionally states have agreed to submit the question whether an arbitral award was void to a second ad hoc tribunal. In such a case, the second tribunal sits as a court of cassation rather than of appeal. It may only uphold or quash the award, in whole or in part; it cannot substitute findings of its own." (Italics added)

39. This appears from the *Orinoco Case* itself. Arbitrator Scott there states clearly that:

"[whereas] the appreciation of the facts of the case and the interpretation of the documents were within the competence of the Umpire and as his decisions, when based on such interpretation, are not subject to revision by this Tribunal, whose duty it is not to say if the case had been well or ill judged, but whether the award must be annulled."

5 *AJIL* (1911) at 231.

(In fact, the Tribunal in the *Orinoco Case* had been given express powers by the parties to substitute its own findings, and went on to do so).

40. The matter is perhaps not finally determined as a general principle of law. In any event, this Tribunal believes that at the end of the day its view on this difficult question must rest on an appreciation of its special position within the framework of ICSID.

41. Article 52(1) of the ICSID Convention envisages the possibility of annulment, as does Article 52(6) (Professor Reisman usefully addresses in his Opinion the likely reasons and lack of significance of the absence of any reference to partial annulment in these clauses, in contrast to Article 53(3)). The Convention history clearly shows that it was decided not to allow an appeals procedure, but rather to introduce the possibility of total or partial nullity.

42. Commenting on a preliminary draft of what is now Article 52(1) (see *ICSID, History of the Convention Vol. I Analysis of Documents*, p. 230), the representative of Honduras urged inclusion of "violation or unwarranted interpretation of principles of substantive law" as an additional ground for annulment. The Chairman responded that if the draft were to "expand to cover serious errors in the application of substantive law, it would be tantamount to providing for an appeal, a step which thus far had not been contemplated." (*ICSID, History of the Convention Vol. II Pt. I Documents Concerning the Origin and the Formulation*, p. 340). No addition was made.

43. The authority given to the Ad Hoc Committee is clearly that of nullity and not of substantive revision.

44. If the present Tribunal were bound by "integral reasoning" of the Ad Hoc Committee, then the present Tribunal would have bestowed upon the Ad Hoc Committee the role of an appeal court. The underlying reasoning of an Ad Hoc Committee could be so extensive that the tasks of a subsequent Tribunal could be rendered mechanical, and not consistent with its authority—as indicated in Article 52(6), which speaks of "the dispute" being submitted to a new Tribunal.

45. This will be the approach of the present Tribunal in deciding particular claims concerning *res judicata*. It is emphasised that, far from reviewing or failing to apply the Decision of the Ad Hoc Tribunal, it is an approach that is fully consonant with the formulation that the Ad Hoc Tribunal has itself chosen in indicating what is and is not nullified, and thus what is and is not *res judicata*.

46. This Tribunal fully accepts each and every determination by the Ad Hoc Committee that a finding of the first Tribunal is or is not nullified. All of these matters are *res judicata*, and this Tribunal thereby gives full effect to the Decision of the Ad Hoc Committee.

### C. RES JUDICATA: APPLICATION TO SPECIFIC CLAIMS OF THE PARTIES

47. In application of their respective approaches to *res judicata* the parties have made various specific claims as to what may and may not be relitigated before the present Tribunal.

*I. Matters Sought by a Party to be Annulled by the Ad Hoc Committee, but Expressly not Annulled, or Expressly Confirmed, are Res Judicata*

48. This principle is agreed by the parties and by the present Tribunal. The

examples offered by Indonesia (*Observations on the Jurisdiction of the New Tribunal*, p. 33, para. 2) are also the subject of agreement: (i) the responsibility of Indonesia to compensate P.T. Amco for damages for the events of March 31–April 1, 1980; (ii) the first Tribunal's finding that the procedure of the licence revocation was unlawful; and (iii) three of the modalities of payment (currency, date of conversion, place of payment).

49. These examples should therefore be added to the list provisionally indicated by the present Tribunal on 21 December 1987 (see above, para. 14).

50. Within this category Amco has listed certain findings additional to those provisionally indicated by the Tribunal on December 1987. *The first of these* was "The finding that the Indonesian court decisions neither interrupted nor cut off claimants' right to damages arising out of either the wrongful actions of the Army and Police or the revocation of claimants' investment license." (*Observations on Res Judicata*, January 13, 1988, p. 2(1)).

51. Before the Ad Hoc Committee Indonesia had contended that the Tribunal did not apply Indonesian law and gave no reasons for its finding that there existed an uninterrupted causal link between the illegality of the acts of Army and Police personnel and the revocation of the licence by BKPM. The Award on the Merits (para. 258) had found that "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 license, 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."

52. The Ad Hoc Committee found that the above conclusion of the Tribunal could not be annulled for manifest excess of power or for failure to state reasons. (*Decision*, para. 66).

53. The present Tribunal cannot accept Indonesia's view (*Observations on Jurisdiction of the New Tribunal*, p. 35, para. 5(ii)) that the issue of the intervening effect of the Indonesian court judgments can be relitigated. Lack of intervening effect of the interlocutory decree as upheld by the Supreme Court judgment of August 4, 1980 cannot be relitigated and is *res judicata*.

54. However, the present Tribunal believes that it may be helpful to indicate to the parties at this juncture that it finds it has jurisdiction to deal with any intervening effect of the Supreme Court decision rendered on April 30, 1985, such matter being admissible as a new fact available only after the Award was rendered.

55. Also *res judicata* is the finding of the first Tribunal that the illegality (and any attendant right to claim in respect thereof) continued uninterrupted at least until July 9th. As to any continued illegality beyond July 9th, the first Tribunal alluded to this possibility, but avoided pronouncing on it. This remains open for consideration by the present Tribunal.

56. Amco has advanced a *second* contention that the finding that the Aeropacific sublease was not a valid substantive reason for revocation of the investment licence is *res judicata* (*Observations on Res Judicata*, January 13, 1988, p. 2).

57. The present Tribunal finds this to be correct. The first Tribunal found, for reasons advanced at paras. 206–219 of its Award, that the assigning of the sublease was not a sufficient ground for revocation. The Ad Hoc Committee held in clear terms that in making the above ruling the Tribunal had not failed to apply the applicable law or to state sufficiently pertinent reasons (*Decision*, para. 86).

58. Amco has further contended, *thirdly* (*Ibid.*, p. 2) that “the finding that both sides share equally the burden of proof on how much claimants invested” is *res judicata*, this finding having been raised before the Ad Hoc Committee, which refused to treat it as a ground of annulment. Paragraphs 90–91 of the Decision are cited by Amco in support of this contention.

59. The present Tribunal is unable to accept this view. In fact, when carefully examined, neither the first Tribunal nor the Ad Hoc Committee made the determination that “both sides share equally the burden of proof” on how much the claimants invested. The finding of the first Tribunal was a rejection of a strict allocation of burden of proof. (See *Award*, page 108). For its part, the Ad Hoc Tribunal rejected the Indonesian claim for nullity on grounds of unequal treatment in the question of burden of proof (*Decision*, paras. 90–91). The present Tribunal finds for these reasons that there is no *res judicata* as to an equal sharing of burden of proof, and does not find it necessary to determine whether, if such a prior finding had existed, it would constitute *res judicata*, given its procedural character.

60. Amco’s *fourth* claim (*Observations*, p. 2) is that the finding that the principle of materiality exists in Indonesian law is *res judicata*. The present Tribunal finds that the Ad Hoc Committee accurately recites the arguments as they arose before the first Tribunal on the existence and relevance of materiality. The Ad Hoc Committee concluded that Indonesia had acknowledged the existence of materiality in Indonesian civil or contract law and “may thus be regarded as conceding the relevance of materiality understood as proportionality in its administrative law” (*Decision*, para. 102). In the view of the present Tribunal no issue of *res judicata* here arises, there being no determination of the legal position by the first Tribunal, and no legal finding challenged before the Ad Hoc Committee and confirmed by it.

61. Amco’s *fifth* claim of *res judicata* (*Observations on Res Judicata*, p. 2) is the finding that “grounds not mentioned in BKPM’s revocation decree cannot be used after the fact to justify the revocation.” Indonesia, by contrast, contends that three of the substantive grounds for licence revocation, including the claim of tax fraud, have never been decided upon by the Tribunal and can therefore be relitigated (*Observations on the Jurisdiction of the New Tribunal*, p. 35).

62. *The present Tribunal makes the following preliminary point:* On Indonesia’s very broad approach as to what constitutes *res judicata*, it would seem that the *res judicata* effect of the Decision of the Ad Hoc Committee is not only the annulment of the finding of the Tribunal that the revocation order was invalid; but also opinion offered by the Ad Hoc Committee that the revocation order was valid. If indeed the validity of the revocation Order is *res judicata*, it is hard to see how substantive grounds for the licence revocation fall to be relitigated.

63. However, from the different starting point of the present Tribunal on *res judicata*, explained above, paras. 20–42, the issue is a real one that requires further examination.

64. This first Tribunal found it unnecessary to consider certain grounds suggested by Indonesia for revocation of the licence, not being grounds relied on in the legal act which pronounced the revocation: “It is not for the Tribunal to build hypotheses, nor to try to guess thoughts which the authority of the revocation did not express.” (*Award*, para. 205). The pronouncements of the Ad Hoc Tribunal clearly showed that it thought no case for annulment was made. In para. 124 of the Decision (incorrectly numbered para. 122) the Ad Hoc Committee says that the Tribunal “gave sufficient reasons for holding these grounds irrelevant” and goes on to say that “the Tribunal did not find it necessary to rule on the possible additional grounds.”

65. A finding by a Tribunal that, in the circumstances before it and in the context of its own reasoning, it is unnecessary to rule on certain matters, is not *res judicata* for another Tribunal whose circumstances or reasoning may or may not be similar. Further, a decision that it is unnecessary to rule on a matter is not a finding that certain matters “cannot be used after the fact to justify the revocation”—it is a discretion as to its preferred methods of reasoning exercised by the initial Tribunal. The present Tribunal finds that no *res judicata* exists in respect of this matter for present purposes. The absence of *res judicata* extends to all the grounds mentioned in para. 121 of the Ad Hoc Committee’s Decision. Tax matters may therefore fall for consideration in the context of grounds for licence revocation—a matter quite distinct from the separate issue (on which see below, paras. 115–27) of whether a new claim for tax fraud can be brought in the present proceedings.

66. Amco’s *sixth* and *seventh* contentions are (Observations on Res Judicata p. 2) that “the finding that damages are to be paid in U.S. dollars outside Indonesia is *res judicata*”; and that “the finding that the applicable date for converting to U.S. dollars any damage expressed in rupians is the date that the damage occurred.”

67. Both of these findings were challenged by Indonesia as providing grounds for annulment. These challenges were considered and rejected by the Ad Hoc Committee (Decision, paras. 118–120). These findings clearly have the character of *res judicata* for purposes of these proceedings. (And see further paras. 83–84 below.)

68. These *sixth* and *seventh* contentions should therefore be added to the list provisionally indicated by the present Tribunal on 21 December 1987.

## *II. Matters Adverse to Either Party on the Merits, which have not been put before the Ad Hoc Committee for Annulment*

69. Amco, in its *Observations on Res Judicata*, 13 January 1988, at p. 5, *Fifth Category of Findings*, includes in this category the following:<sup>2</sup> (i) the finding that the treatment accorded Claimants by the Indonesian Courts did not constitute a denial of justice; (ii) the finding that BKPM, not just Parliament, had authority to revoke investment licences; (iii) the finding that Claimants were obligated to invest

<sup>2</sup> Numbering added by the Tribunal for convenience of reference.

\$3 million of foreign capital; (iv) the finding that loans should be excluded when calculating the amount of investment; (v) the finding that the foreign capital which claimants caused KLM and Mr. Pulitzer to invest in the hotel was not to be included in the investment calculation; (vi) the finding that P.T. Wisma was not acting as the *alter ego* of the Indonesian military in connection with the takeover of the hotel.

70. Amco's contention is that none of these findings was essential to the Award and Claimants should therefore not be precluded from relitigating them.

71. Indonesia identifies in this category (i) the decision that the Indonesian courts [have not]<sup>3</sup> committed a denial of justice; and (ii) two of the modalities of payment with respect to any damages suffered by Amco group, the rate of interest (six per cent *per annum*) and the date it begins to run (January 15, 1981).

72. Indonesia's contention is that these matters cannot be relitigated.

73. The Tribunal is unable to accept Amco's contention. Matters decided by the first Tribunal but never put forward for annulment are binding on the parties and can not be relitigated. This is not because, as Indonesia suggests (*Observations*, January 14, 1988, p. 33) such matters are implicitly confirmed by the Ad Hoc Committee and are therefore binding, but simply because, never having been before the Ad Hoc Committee, they remain binding as *res judicata* of the first Tribunal. However, it follows from the present Tribunal's general approach to *res judicata* that, while unchallenged findings of the first Tribunal will constitute *res judicata*, not every incidental statement or procedural ruling made by the first Tribunal is to be treated as a "finding" to which this principle applies.

74. The Tribunal now applies the principle above to the items listed by Amco and Indonesia.

75. As to item (i) listed by Amco, (the finding that the treatment accorded Claimants by the Indonesian courts did not constitute a denial of justice), the present Tribunal finds that this is *res judicata* as this issue was addressed and determined in the Award (*Award*, paras. 150 and 262) and was not annulled by the Ad Hoc Committee.

76. As to item (ii) listed by Amco (the finding that BKPM, not just Parliament, had authority to revoke investment licences), this was addressed and determined in the Award. The first Tribunal did not accept Indonesia's arguments that only Parliament had the power to cancellation (*Award*, para. 212 at p. 94).

77. As to item (iii) listed by Amco (the finding that claimants were obligated to invest \$3 million of foreign capital, rather than a lesser amount up to \$3 million) this was addressed and determined in the Award (*Award*, paras. 29 and 330).

78. As to item (iv) listed by Amco (the finding that loans should be excluded when calculating the amount of investment), this was addressed and determined in the Award (*Award*, para. 228).

79. As to item (v) listed by Amco (the finding that the foreign capital which Claimants caused KLM and Mr. Pulitzer to invest was not to be included in the

<sup>3</sup> Indonesia confirmed to the Tribunal on March 11, 1988 that a typographical error in its claim should be amended to read as here shown.

investment calculation), this was addressed and determined in the Award (*Award*, para. 27).

80. As to item (vi) listed by Amco (the finding that P.T. Wisma was not acting as the *alter ego* of the Indonesian military in connection with the take over of the hotel) this was addressed and determined in the Award (*Award*, paras. 161–63).

81. All of these issues were definitely determined by the Tribunal and none of them was annulled by the Ad Hoc Committee. They are therefore *res judicata*.

82. As to item (i) listed by Indonesia (the decision that the Indonesian courts have not committed a denial of justice), the present Tribunal's views are given in para. 75 above.

83. As to item (ii) listed by Indonesia (that two of the modalities of payment (rate of interest and date from which it runs) are *res judicata*, the arguments of the parties may be summarised as follows. Indonesia contends that it had before the Ad Hoc Committee sought annulment by reference to findings in three different aspects of the modalities of payment—US dollars as the currency of payment; the situs of payment to be outside of Indonesia; and the date of conversion of the payment currency. The Ad Hoc Committee rejected Indonesia's contentions, leaving the findings of the first Tribunal as *res judicata*. Two further aspects of the modalities of payment (rate of interest, date from which it runs) were never challenged, and thus likewise remain *res judicata*. Amco by contrast contended (see *Observations on Res Judicata*, January 13, 1988, p. 2) that, notwithstanding the fact that no challenge to the findings of the first Tribunal on interest rate and date were made before the Ad Hoc Committee, these matters are to be regarded as integral to the calculation of compensation; as the compensation amount had been set aside, these two items (not specifically affirmed as *res judicata* by the Ad Hoc Committee) can be relitigated.

84. The present Tribunal finds that the rate of interest and the date from which it runs no more or less integral to the calculation of compensation than the other modalities of payment. An unchallenged finding of an initial Tribunal remains *res judicata*, and it can readily be seen that it cannot be necessary for such a finding to be brought before an annulment committee (in the hope that an undesired challenge will be rejected) for it to be affirmed as *res judicata*.

### *III. Matters Expressly Annulled Can Therefore Be Relitigated*

85. The present Tribunal obviously affirms that matters expressly annulled may be relitigated, and agrees that two items identified by Indonesia—(i) the restitution of the tax and import concessions granted to P.T. Amco and (ii) the quantum of damages (if any) owed to P.T. Amco for the period April 1 to July 9, 1980 (*Observations on the Jurisdiction of the New Tribunal*, January 14, 1988, p. 35) fall within this category. The present Tribunal observes, however, that this list is by no means exhaustive.

### *IV. Matters that Were Expressly Annulled but which Are Said To Be Res Judicata because of the Integrality of the Committee's Reasons*

86. In its *Observations on the Jurisdiction of the New Tribunal* of January 14, 1988, Indonesia acknowledges that certain findings have been annulled. However,

adhering to its arguments that not only the Ad Hoc Committee's decision to annul certain portions of the Award is *res judicata*, but also matters that are "integral to" such findings, Indonesia lists six further items as *res judicata*. Amco, by contrast, contends that each of these matters can be relitigated, having been annulled by the Ad Hoc Committee. It is convenient to provide in full Indonesia's listing of items said to be *res judicata* under this head:

- (i) the Amco group did not satisfy their investment obligation and therefore the licence revocation was substantively justified and lawful;
- (ii) the calculation of the Amco group's actual investment;
- (iii) the materiality of the investment shortfall;
- (iv) the procedure relating to the licence revocation cannot *per se* support an award of damages;
- (v) damages due for wrongful acts of the army and police terminate on July 9, 1980;
- (vi) P.T. Amco's right to manage the hotel ended on July 9, 1980.

87. As indicated above, the present Tribunal is unable to accept the very broad view of *res judicata*, whereby matters said to be "integral" to nullity decisions of the Ad Hoc Committee are said to be binding, even if the conclusion to which they lead is the striking down of a prior finding by the Tribunal and a rehearing upon such prior findings.

88. Turning to heading (i) above, the present Tribunal notes that this is an example of the Ad Hoc Committee treating the annulment ground under Article 52(1)(b)—"that the Tribunal has manifestly exceeded its powers"—as having been evidenced by a perceived failure to apply the applicable law, by virtue of its having been applied in a manner that reaches a conclusion believed untenable by the Ad Hoc Committee. The present Tribunal is clearly bound by the particular decision of the Ad Hoc Committee that the determination of the sum invested by the first Tribunal is nullified. It is clear from paragraph 98 of the Decision that the Ad Hoc Tribunal relied on at least two grounds for its conclusion. Further, if one turns to the Dispositif at p. 47 of the Decision and acknowledges general annulment subject to identifiable qualifications, this heading does not qualify as an identifiable qualification. Furthermore, neither an understanding of the distinction this Tribunal has already made (para. 40 above) between appeal from the merits and nullification under Article 52(1)(b), nor an understanding of the reasons given by the Ad Hoc Tribunal require the statements that Amco did not satisfy its investment obligation, and that the licence revocation was substantively justified, to be treated as *res judicata* rather than reopened for argument.

89. The same considerations apply to headings (ii) and (iii).

90. As for heading (iv), if the Ad Hoc Committee had stated not only that the award of damages was to be nullified, but also that Indonesian law properly understood did permit damages for procedural defects, the present Tribunal would have been bound (on its views of the scope of *res judicata* and on the critical distinction between appeal and nullification functions) to have reached the same conclusions as in i-iii above.

91. However, the situation is still less clear, in that the first Tribunal does not



seem ever to have found in terms that procedural defects alone justify damages, nor has the Ad Hoc Committee clearly pronounced on this precise issue. At paragraphs 201–202 of the Award the Tribunal explains its reasons for finding that the procedures did not afford due process of law to the claimants. At paragraph 74 of the Decision the Ad Hoc Tribunal notes that the Tribunal found it had to accept the BKPM revocation order as a definitive act, and it could do not more than “award compensation to P.T. Amco for damages, if any, sustained by it from the definitive revocation order. The amount of such compensation was of course dependent on whether or not the revocation was justified on substantive grounds.” It is not clear to this Tribunal why the Ad Hoc Committee in para. 10 refers to para. 74 to support the statement “according to the findings of the Award itself, no compensation was due for the lack of three warnings and for other procedural defects of the revocation rider” if BKPM was in fact justified in revoking the licence on substantive grounds.

92. For all of these reasons, item (iv) falls for reconsideration. In seeing whether damages are due, and if so in respect of what period, the present Tribunal is not precluded from itself examining whether there should be under Indonesian law an element reflecting damages for procedural violations.

93. The Tribunal turns now to heading (v), namely that claim that damages due for wrongful acts of the army and police terminate on July 9, 1980. This matter has already been addressed above (at para. 51). It has been explained that there is a *res judicata* as to the unlawful acts of the police and army up to July 9, 1980, and compensation due for that period. (See para. 109 of the Decision). The finding that the period of violation (by virtue of the acts of police and army) continued beyond July 9 is nullified and therefore has to be determined afresh by this Tribunal.

94. The claim under (v), as formulated by Indonesia, would effectively require the present Tribunal to accept two tiers of reasoning to arrive at a finding of *res judicata*. The Ad Hoc Committee did not simply state that the Tribunal had acted in excess of powers or had failed to state reasons as to the substantive correctness of the licence revocation (which would clearly have required the substantive correctness of the licence revocation to be decided *de novo* by the present Tribunal). Instead, it offered the view that the substantive revocation was wrong; and proceeded from there to state that this entailed consequences turning on the date of July 9th. The present Tribunal does not accept that these two findings by the Ad Hoc Tribunal, obiter to the nullity function, constitute *res judicata*.

95. As for (vi), namely that P.T. Amco's right to manage the hotel ended on July 9, 1980, it is correct that in paragraph 107 of its Decision the Ad Hoc Committee states:

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

96. However, for all the reasons elaborated above the present Tribunal finds that it has for itself to decide whether P.T. Amco had any right to manage beyond July 9, 1980, whether on grounds addressed by the first Tribunal or Ad Hoc Committee, or otherwise.

97. Finally, the Tribunal notes that all these items, viz. (i)–(vi), are stated to be matters that cannot be relitigated because of the integrality of the Ad Hoc Committee's reasons. (*Observations on Jurisdiction of New Tribunal*, p. 34.) In fact, items (i)–(iv) in a sense relate to the Ad Hoc Committee's reasoning in reaching its nullity decisions, while (v) and (vi) are really stated consequences upon the nullity decisions (and indeed are dealt with under that description at p. 41 of the Decision). The present Tribunal notes that the consequence of annulment is stated in Article 52(6) to be submission of the dispute a new Tribunal, for its own consideration, should a party so request.

98. The Tribunal here refers also to Indonesia's contention at p. 34 of its *Observations on the Jurisdiction of the New Tribunal*. Indonesia there contends that no unjust enrichment claim may be advanced by Amco because this would create "a seemingly new argument to evade the legal force of *res judicata*." But unjust enrichment was never the subject matter of a finding by the first Tribunal, as although the issue had been advanced before that body, it reached its pertinent findings on other grounds. Even if the present Tribunal had found that the statement of the Ad Hoc Committee on the lawfulness of the licence revocation was *res judicata*, the claim of unjust enrichment could still be advanced in the present proceedings.

#### D. JURISDICTION RATIONE PERSONAE

99. In its Observations of January 14, 1988 on the jurisdiction of this Tribunal, the Republic of Indonesia objected to the jurisdiction *ratione personae* of Amco Asia. This objection was stated to be based on new facts that did not become known to Indonesia until after the date of the Award, namely, that Amco Asia, a company registered in Delaware was dissolved under the laws of Delaware on December 27, 1984, approximately one month after the rendering of the Award. A different company, bearing the name Amco Asia Corporation, was then incorporated under the laws of the state of Delaware. It was said by Indonesia in its Observations of January 14, 1988 that this new company was created "for the sole purpose of creating the semblance of its status on a claimant."

100. However, at the oral hearings held in London on January 30th and February 1, 1988, Amco told the Tribunal that it was not suggested that Amco Asia Corporation was a claimant in the present arbitration. Rather, the situation was that Amco Asia continued in existence under the laws of the state of Delaware for purposes of this arbitration.

101. Having heard oral argument on this point, the Tribunal then invited the parties to make further brief written submissions on this issue. This Amco and Indonesia did, on February 22nd and 23rd, 1988 respectively.

102. It was agreed by both parties that the law which governs the dissolution of

Amco Asia was the law of the state of Delaware. However, Indonesia drew a distinction between the dissolution of Amco Asia and the legal effect of such dissolution on the holder of rights and duties under an agreement to arbitrate. Indonesia contended that in the facts and circumstances of the present case, Article 42(1) of the ICSID Convention provided the guide to the appropriate applicable law; and that Indonesian law only was to be applied. Indonesia stated that "under Indonesian law, once a limited liability corporation is dissolved, it ceases to exist for any purpose": *Supplementary Submissions on Jurisdiction*, February 23, 1988.

103. The Tribunal does not believe that the distinction put forward by Indonesia leads to the conclusion that Indonesian law should apply. Nor does the Tribunal find it necessary to pronounce upon the respective place of Indonesian law and international law in Article 42(1) of the ICSID Convention.

104. Indonesia stated in its *Supplementary Submissions on Jurisdiction* of February 23, 1988, at p. 17: "Generally speaking, the question of whether a corporation has been terminated or suspended is determined by the local law of the state of incorporation. . . . The analysis would not be different under Indonesian law." In the view of the Tribunal, the same rule applies to the question of whether that corporation is still an existing legal entity for a particular purpose. The rule as it applies to the effect of dissolution should not be different from the rule applied, in international contracts, to the effect of creation of such a corporation. When a company enters into an agreement with a foreign legal person, the legal status and capacity of that company is determined by the law of the state of incorporation. Similarly, one should apply the law of the state of incorporation to determine whether such a company, though dissolved, is still an existing legal entity for any specified legal purpose.

105. The dissolution of Amco Asia was governed by the law of the state of Delaware. Under Delaware law Amco Asia remains a juridical entity for purposes of any action, suit or proceeding begun by or against it prior to or within three years of dissolution or until such action, suit or proceeding is completed and any judgment, order or decree therein is executed: Section 278, Delaware General Corporation Law.

106. Delaware law (as would be the case in most leading jurisdictions) regards arbitration as "proceedings": Section 122(2) Delaware Corporation Law.

107. It is also the case that Amco Asia is not prohibited by the law governing its dissolution from remaining in existence for purposes of this arbitration because of any failure to meet prescribed time limits. Section 278 of the Delaware General Corporation Law allows the continuation in existence of a dissolved corporation in respect of a proceeding begun by or against it "either prior to or within three years after the date of its expiration or dissolution." The Tribunal finds correct the contention of Amco in its supplemental observations of February 22, 1988 that whether this arbitration is deemed to have been commenced on January 15, 1981 with the filing of the claimant's request for arbitration, or on May 12, 1987, with the filing of the claimant's request for resubmission, such arbitration would have been within the time limits presented by Delaware law.

108. Thus, the acknowledgement that Delaware law governs the dissolution of

Amco Asia results only in the *status quo ante*, namely that Amco Asia continues in existence for purposes of the present arbitration. There is thus no "consequence of dissolution," different from the *status quo ante*, to which Article 42(1) of the ICSID Convention could be said to apply.

109. The Tribunal therefore finds that it continues to have jurisdiction *ratione personae* over the dissolved Amco Asia.

#### E. NEW CLAIMS/COUNTERCLAIMS

110. On June 12, 1987 the Republic of Indonesia filed its Request for Resubmission. Amco had already filed its Request for Resubmission on May 12, 1987. In paragraph 4 of its Request Indonesia explained that by this separate Request it was resubmitting certain aspects of the investment dispute, rather than those submitted by Amco for decision by the new Tribunal. These were often aspects "which it had asserted in the previous arbitration." Indonesia's claims were summarized on pp. 13-15 of its Request, item C of which, headed "Tax Fraud," indicated that "Indonesia further claims to recover corporate taxes that P.T. Amco has not paid to the Indonesian Government since 1973. Indonesia will submit further evidence in this arbitration providing a systematic course of tax evasion by P.T. Amco over many years." In a footnote Indonesia refers to "the restitution of tax and other concessions and . . . tax fraud."

111. In its communication to the parties of 21 December 1987, the Tribunal invited observations on the following matter: "May the parties bring before the present tribunal new claims and counterclaims arising out of this dispute or are they limited to the claims and counterclaims as formulated before the arbitral tribunal which gave its Award in December 1984." The observations of Amco on this matter were received on 20th January 1988 and of Indonesia on 21st January 1988. Amco contended that compensation for tax fraud was a new claim, or counterclaim, not made in the dispute submitted to the first Tribunal and that it should not be considered by the present Tribunal. Indonesia contended that the alleged tax fraud was raised in the first arbitration but was not decided. There being no decision on this point the Ad Hoc Committee found that there was nothing relevant for annulment (*Decision*, para. 124). (Indonesia had submitted the first Tribunal's decision not to consider the tax fraud as a ground for annulment.)

112. Indonesia further contended that, even had the tax fraud claim not previously been raised, it could still be introduced as a new claim, or counterclaim, before the present Tribunal. This was subject to the qualification that a new claim not be *res judicata* as an underlying predicate of a finding of the Ad Hoc Committee, nor time-barred, and that it be otherwise within the present Tribunal's competence *ratione materiae*. According to Indonesia, the tax fraud claim met these qualifications and could therefore be introduced.

113. At the London hearings held on January 30th and February 1, 1988 the parties further addressed the Tribunal on this issue. At that time, Amco not only reasserted that the tax fraud had not been dealt with, save in rebuttal, before the first Tribunal, but also that it could not be introduced now as it was beyond the

jurisdiction *ratione materiae* of the new Tribunal. At the conclusion of the hearings the parties were invited to provide brief supplementary submissions to assist the Tribunal in ascertaining whether indeed the matter of tax fraud had been before the first Tribunal, and on its competence *ratione materiae* to this matter. Memoranda were received from Amco on February 22, 1988 and from Indonesia on February 23, 1988.

114. In the view of the Tribunal the issue falls to be decided in relation to three questions. *First*, is the claim of tax fraud a new claim or an old claim, in the sense that it had or had not been advanced before the first Tribunal? *Second*, if it is a new claim, are new claims in principle admissible before a new Tribunal established by request of the parties subsequent to annulment or partial annulment of the Award of the first Tribunal? And *third*, if the answer to the second question is in the affirmative, is this particular claim within the jurisdiction of the present Tribunal *ratione materiae*? It may be that a negative conclusion on either the second or third questions would make it unnecessary for the remaining questions to be solved by the Tribunal. However, the Tribunal believes that these matters raise issues of importance not only for the parties but also for the ICSID system generally, and has therefore resolved to address each of these questions in turn.

*1. 'Tax Fraud' as an existing or new claim*

115. The Tribunal has reviewed the written observations on the scope of claims and counterclaims of Indonesia of January 21 1988, and of Amco of January 20, 1988, the exhibits referred to therein, the relevant portions of the oral hearings in London at the end of January 1988, and the two further written submissions and exhibits submitted by Amco and Indonesia on February 22nd and 23rd 1988 respectively.

116. We find the evidence clear that the matter was referred to during the hearings on the merits before the first Tribunal, and that argument was addressed in some detail. It is equally clear, however, that the issue of tax fraud was advanced by Indonesia as one of the arguments justifying the licence revocation. It was raised as a defence in the course of argument, and not as a counterclaim.

117. Insofar as that is the case, the question of whether the allegation relating to tax fraud was quantified, and whether, given the status of the evidence available to Indonesia at that time, it was possible to quantify in a more definitive manner, is academic.

118. The Tribunal notes in this context the relevance of Rule 40 of the Rules of Procedure for Arbitration proceedings. This provides:

- (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counterclaim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
- (2) An incidental or additional claim shall be presented not later than in the reply and a counterclaim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage of the proceeding.

119. It would seem that Indonesia, having sufficient information to advance argument on tax fraud at the Copenhagen hearings, was in a position to have sought to make a request at that time under Rule 40(2), although the actual formulation and quantification could, with the permission of the Tribunal, have been deferred. No such request to advance an additional claim was made.

120. The fact that argument was exchanged on the question of tax fraud, in the context of justifying the revocation of the license and in support of an "unclean hands" argument, does not mean that tax fraud was a claim in existence before the first Tribunal. For that to have been so, it would have been necessary for it to have been advanced as a counterclaim or as an additional claim under Rule 40.

121. *It is therefore necessary to proceed to examine whether tax fraud may now be introduced as a new claim in the present proceedings.*

*2. Amco's contention that Tax Fraud is outside the Jurisdiction of the present Tribunal Ratione Materiae*

122. It is contended by Amco that the tax fraud claim would be precluded from being advanced *de novo* before the present Tribunal because it is not "a legal dispute arising directly out of an investment" within the meaning of Article 25(1) of the Convention. Given the finding of the Tribunal that the tax fraud issue was not a claim as such before the previous Tribunal, Amco is not estopped from raising this argument for the first time now. Amco contends, in its Supplemental Observations of February 22, 1988 that, even if subject matter jurisdiction under Article 25(1) is literally construed, and even if disputes relating to taxes are not *per se* excluded, "it does not follow that every tax dispute with an investor is a dispute arising *directly* out of an investment." Amco argues that this particular tax dispute is related only in the most indirect way to the investment.

123. Indonesia, by contrast, in its Supplemental Observations of February 23, 1988, points to the central place in its investment programme of tax concessions and advances arguments to show that ICSID jurisdiction covers tax matters, and that it must be permitted to a host state, as much as to an investor, to advance tax claims under the ICSID by them.

124. In fact, both parties agree, as does the Tribunal, that tax claims *may* be within ICSID's jurisdiction and that claims in relation thereto would be available to both parties to an investment dispute.

125. The issue is therefore whether this particular claim falls within Article 25(1) of the ICSID Convention. In answering this question the Tribunal believes that it is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention.

126. The obligation not to engage in tax fraud is clearly a general obligation of

law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment.

127. For these reasons the Tribunal finds the claim of tax fraud beyond its competence *ratione materiae*.

3. *May claims not presented to an ICSID Tribunal be advanced before a new Tribunal constituted under Article 52(6) of the Convention?*

128. In its communication of 21 December 1987 the Tribunal invited submissions from the parties on whether parties may bring before the present Tribunal claims and counterclaims other than those presented to the initial Tribunal.

129. In its Observations of 20 January 1988 Amco contended that Article 52(6) of the Convention provides that if an award is annulled "the dispute shall, at the request of either party, be submitted to a new Tribunal . . .," and that different claims and counterclaims would "constitute a different dispute." Indonesia, in its Observations of January 21 1988, emphasized a relationship between Article 52(6) and Article 25(1) of the Convention, and contended that what was required was to ensure that the jurisdiction of the new Tribunal did not go beyond what was permitted under Article 25(1). An ICSID dispute was "the entire complex of issues between the parties relating to an investment. Accordingly, the ICSID Convention allows for the assertion of additional claims or counterclaims if they arise directly out of the subject matter of the dispute. Reference was made to Article 46 of the Convention, to Arbitration Rule 40, Note B(a), and to the ICSID Convention, Vol. II, Pt. 2, Documents Concerning the Origin and the Formulation of the Convention, p. 270. An Opinion was also entered by Dr. Aron Broches elaborating these arguments. While agreeing that the new Tribunal must check that any new claims arise directly out of the dispute, are within the scope of the consent of the parties, and are not *res judicata* (Rule 55(3)), Dr. Broches stated that otherwise parties are free to present new claims or counterclaims. Dr. Broches opined that "there is no justification for arbitrarily reading into the Convention a restriction on a party's right to present claims or counterclaims other than the dispositive one of Arbitration Rule 55(3)." In this context he referred to Article 46 of the Convention on the presentation of additional claims.

130. Article 46 provides:

"Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

131. But Article 46 is to be read together with Rule 40, which provides specific procedures and time limits for the intervention of ancillary or additional claims, which, as noted above, have not been pursued here. It is also clear that Article 46 and Rule 40 are directed essentially to the question of additional claims presented before an ongoing single Tribunal hearing an arbitration and does not in terms address the issue of new claims and counterclaims as it may arise in relation to a new Tribunal under Article 52(6).

132. Nor is the matter resolved by reference to Article 25, for while indeed the

jurisdiction of the Centre shall extend to "any legal dispute arising out of an investment" Article 52(6) (which presupposes that Article 25 jurisdiction already exists) states that if an award is annulled "the dispute" shall be submitted to a new Tribunal.

133. Article 52 is not a provision for starting a totally new arbitration, restricted only by the requirements of Article 25. Rather, it is a procedure for resubmission of an existing dispute in respect of which Article 25 jurisdiction exists.

134. In the present proceedings the Tribunal is meeting to reconsider an original award annulled only in part. The wording of Rule 55(3), which covers this situation, signifies that this is not a totally new proceeding constrained only by Article 25 (and by consideration of *res judicata*). It is a reconsideration of the dispute. Note B to Rule 55 speaks of the procedure for resubmission as being "roughly analogous to that for an original request," and continues "It is . . . especially important to . . . state in detail what aspects of the former dispute (the one to which the annulled award related) are to be considered by the new Tribunal." (Italics added.)

135. "A dispute" in arbitration is to be understood not merely as subject matter within the scope of jurisdiction that is contested, nor even arguments that have been advanced in oral hearings and responded to. Argument is directed to supporting a dispute: it does not define the dispute. A dispute is defined by claims formally asserted and responded to in claim and defence, or in counterclaim and reply to counterclaim—in other words, the causes of action.

136. "The" dispute or "the former" dispute is necessarily the dispute as formulated in the pleadings before the first Tribunal whose Award (save insofar as it is *res judicata*) is now being reconsidered. The principle of finality to litigation also leads to the same view.

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For all these reasons the Tribunal finds that the tax fraud issue is beyond its jurisdiction in the present proceedings.

#### F. INDONESIA AS A NEW CLAIMANT/DEFENDANT

137. The Secretary General of ICSID has registered, on May 21 1987 and June 24 1987, two requests from Amco and Indonesia respectively, for the resubmission of the dispute under Article 52(6) of the Convention.

138. In its Resubmission Request and in its Submissions of January 14 1988 on the jurisdiction of this Tribunal, Indonesia has described itself as a Claimant, specifying in the latter document certain causes of action. Brief oral argument was also submitted by the parties at the hearing in London on January 30–February 1, 1988 on whether Indonesia has the status of a claimant, as well as a defendant, in these resubmitted proceedings.

139. As these proceedings are a resubmission of what is not *res judicata* in the dispute brought before the first Tribunal, the starting point is that the parties in this resubmission are in the same position as they were before the first Tribunal. The reconsideration by this Tribunal is not a totally new proceeding unrelated to



the first proceeding.

140. The Tribunal has carefully considered Indonesia's contention that not all of the arguments it wishes to advance could be placed before us, save by virtue of it being a claimant. The ability to advance new claims turns on the considerations we have identified above, (paras. 101ff) and not on ones's status as claimant or defendant. And there is a great flexibility to introduce new or to expand existing argument, without any charge in designation as claimant or defendant.

141. The very fact the Secretary General has registered two requests for resubmission means that Indonesia is entitled to identify, as it sees fit, all the aspects of the existing dispute that are to be reconsidered.

142. Indonesia is not disadvantaged by being in the position of defendant and the Tribunal rules that the pleadings on the merits should proceed on the basis adopted heretofore, so far as the respective positions of the parties are concerned.

*London*

*/s/  
Per Magid*

*/s/  
Rosalyn Higgins*

*10th May 1988*

*/s/  
Marc Lalonde*