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ADE HERAWATI

ASPEK HUKUM PERDATA INTERNASIONAL DALAM KEPUTUSAN ARBITRASE

(Studi Kasus AMCO Asia v. Republik Indonesia)

FAKULTAS HUKUM UNIVERSITAS AIRLANGGA
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DIAJUKAN UNTUK MELENGKAPI TUGAS

DAN MEMENUHI SYARAT-SYARAT UNTUK

MENCAPAI GELAR SARJANA HUKUM

OLEH

ADE HERAWATI

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DOSEN PEMBIMBING DAN PENGUJI

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FAKULTAS HUKUM UNIVERSITAS AIRLANGGA

SURABAYA

1993

Telah diuji Pada Tanggal 7 Agustus 1993

Panitia Penguji :

Ketua : M. Isnaeni, S.H., M.S. (.....)

Sekretaris: Sri Handajani, S.H. (.....)

Anggota : Djasadin Saragih, S.H., LL.M. (.....)

KATA PENGANTAR

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Surabaya, 7 Agustus 1993

ADE HERAWATI

DAFTAR ISI

BAB I

PENDAHULUAN

1. Permasalahan: Latar Belakang dan Rumusannya

Sudah menjadi kebenaran yang nyata dewasa ini bahwa tidak ada suatu bangsa atau negara (maju maupun sedang berkembang) manapun, yang dapat hidup sendiri tanpa mengadakan hubungan atau pergaulan dalam bentuk kerja sama yang saling menguntungkan dengan bangsa-bangsa lain. Dalam bidang ekonomi khususnya, yaitu perdagangan internasional dan penanaman modal asing, nampak sekali adanya ketergantungan tersebut. Misalnya saja, apabila peraturan-peraturan Indonesia di bidang industrialisasi dan ekspor impor dapat disempurnakan sedemikian rupa, maka produksi nasional dapat ditingkatkan secara maksimal.

Namun, tidak dapat disangkal bahwa dalam hubungan atau pergaulan tersebut, walaupun untuk beberapa hal sudah ada pengaturan yang bersifat internasional maupun nasional, tidak jarang masih terjadi juga benturan-benturan antara para pihak yang terlibat dalam transaksi yang terwujud dalam bentuk persoalan atau sengketa.

Arbitrase merupakan salah satu bahkan menjadi metode yang paling disukai saat ini untuk menyelesaikan

sengketa dalam bidang perdagangan dan penanaman modal, karena sifatnya yang relatif "confidential" (private), tidak banyak formalitas, antara pengusaha/pihak yang bonafide, lebih murah dan cepat (keputusannya "final and binding").[1]

Secara etimologi perkataan arbitrase berasal dari Bahasa Latin (arbitrare) yang berarti kekuasaan untuk menyelesaikan sesuatu menurut kebijaksanaan.[2]

Dalam salah satu penerbitan American Arbitration Association berbentuk kartun dikatakan:

> Have you ever, in the course of an argument or discussion, suggested asking a third and neutral person to who was right? Did you expressly or impliedly agree or intend that the third's person answer would be - accepted as putting an end to the dispute or argument? If so, you were suggesting arbitration, albeit of the very roughest kind.

Apabila diperhatikan sepintas lalu kutipan di atas, seolah-olah pihak ketiga (wasit/para wasit) yang diminta

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[1]Sudargo Gautama, Arbitrase Dagang Internasional, Bina Cipta, Bandung, 1986, h. 1-5.

[2]R. Subekti, Arbitrase Perdagangan, Bina Cipta, Bandung, 1981, h. 1.

[3]Julian lew, Applicable Law in International Commercial Arbitration, Queen Mary College, Martinus Nijhoff Publishers, 1987, h. 11.

oleh para pihak yang bersengketa untuk menyelesaikan perselisihan di antara mereka, semata-mata berdasarkan keputusannya atas pertimbangan kebijaksanaan atau wisdom tanpa memperhatikan norma-norma hukum. Apakah memang benar demikian?

Seperti dikatakan Julian Lew:

> In many cases no question of law is involved. The dispute may concern various matters, e.g. the meaning of a particular term in the contract, the existance of certain factual circumstances, whether the parties have adequately performed the contract, the effect of a failure to perform their application under the contract, the effects of supervining occurance or some extraneous but fundamental and relevant events. In resolving these questions, arbitrators may have no need to refer to any legal standard. The particular character of international arbitration enables them to apply no-or extra-legal yardsticks to disputes before them. Such yardsticks differ from case to case and depend upon the contract terms, the arbitrators and the particular facts of the case.[4]

Walaupun unsur kebijaksanaan (non hukum) memang dimiliki oleh wasit atau para wasit dalam memutuskan sengketa, namun hal itu ada batas-batasnya. Sebagai contoh dibawah ini yang terdapat dalam beberapa ketentuan lembaga arbitrase, "amiable composition" (ex aequo et bono) pada umumnya baru dapat terlaksana jika para pihak yang bersengketa menyetujuinya:

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[4]Julian Lew, op. cit., h. 493.

> The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono if the parties have expressly authorized the arbitral tribunal to do so. (Ps 33:2, UAR)
>
> The provisions of ... shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree. (Ps. 42:3, ICSID)
>
> The arbitrator shall assume ... amiable compositeur if the parties are agreed to give such powers. (ICC Rules, Ps 13:4)

Beberapa kutipan di bawah ini yang terdapat dalam ketentuan lembaga arbitrase, jelas sekali bahwa pada prinsipnya para wasit diwajibkan memutuskan sengketa yang diajukan kepada mereka berdasarkan norma-norma hukum:

> The arbitral tribunal shall aplly the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral ... shall apply the law determined by the conflict of law rules.... (Ps. 33:1, UAR).
>
> The tribunal shall decide...such rules of law as may be agreed by the parties. In the absence ... shall apply the law of the contracting state... (Ps. 42:1, ICSID)
>
> The parties shall be free to determine the law to be applied by the arbitrators ... In the absence the law disignated as the proper law. (Ps. 13:3. ICC Rules)

Arbitrase lebih mudah dicirikan daripada didefinisikan. Namun, ada baiknya memperhatikan beberapa definisi yang mungkin dapat membantu yaitu antara lain:

> An arbitration is the reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of

competent jurisdiction.[5]

The settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an aquitable decision.[6]

Sedangkan istilah perwasitan international menurut Sunaryati Hartono dipakai dalam pengertian:

a. Bidang hukum internasional

Sebagai metode penyelesaian sengketa antar negara. Arbitrase tersebut dapat dilakukan secara institusional (lembaga) maupun secara ad hoc (baru diadakan setelah terjadi sengketa).

b. Bidang Hukum Perdata Internasional (Perdagangan Internasional)

Dalam hal ini dapat dikatakan bahwa istilah Arbitrase Internasional dipakai bukan dalam arti sebenarnya, sebab pada umumnya hukum yang akan berlaku (Lex Causae) adalah hukum nasional. Arbitrase tersebut dapat dilakukan secara institusional misalnya ICC (International Chamber of Commerce), London Court of Arbitration dan sebagainya, maupun secara ad hoc.

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[5]Ibid.

[6]Julian Lew, Op cit., h. 11.

c. Bentuk Campuran Perwasitan Internasional (antara bidang Hukum Internasional dan Hukum Perdata Internasional)

Bentuk ini dimungkinkan karena yang menjadi pihak adalah negara dan badan hukum (asing). Obyek persengketaan ialah dalam bidang penanaman modal sebagai salah satu obyek bidang ekonomi internasional.

Dalam hal ini para pihak dapat memilih arbitrase ad hoc dengan menggunakan ketentuan-ketentuan arbitrase UNCITRAL (United Nations Commision on International Trade Law), UNECE (United Nations Economic Commissions for Europe) and for Asia and the Far East (UNECAFE) dan sebagainya, maupun yang institusional yaitu ICC (International Chamber of Commerce), The London Court Arbitration dan sebagainya.[7]

Dua contoh lembaga arbitrase di bawah ini sengaja dibahas secara tersendiri. Kedua lembaga tersebut adalah:

a. Arbitrase ICC

Dalam kontrak-kontrak dagang yang dilakukan antara pengusaha (perusahaan) Indonesia dan pengusaha asing sering dicantumkan suatu klausula arbitrase.

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[7] R. Subekti, op. cit., h. 1.

ICC didirikan di Paris pada tahun 1919 dengan tujuan mengembangkan/memajukan perdagangan dan kerjasama internasional, memperkuat peranan perusahaan swasta, serta memajukan kondisi perdagangan internasional. Untuk maksud ini ICC berusaha mendorong adanya saling pengertian antara pengusaha dan organisasi-organisasi dagang di seluruh dunia dengan pelayanan yang praktis. Badan Arbitrase ini ketika pertama kali didirikan sampai sekarang statusnya tetap sebagai suatu organisasi swasta internasional, yang memiliki anggota kurang lebih di 80 negara. Kerjasamanya antara lain dengan negara-negara berdaulat, organisasi-organisasi antar pemerintah serta organisasi internasional publik dan privat, dengan cara menetapkan komite-komite nasional di beberapa negara namun tetap bebas dari "political allegiance."[8]

Setiap bentuk sengketa perdagangan internasional dapat diajukan ke badan arbitrase ini. Badan arbitrase ini juga mengatur ketentuan konsiliasi di samping perwasitan serta mengawasi penerapan ketentuan tersebut oleh para wasit.

b. Arbitrase ICSID

ICSID merupakan suatu badan antar pemerintah yang

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[8]Julian Lew, op.cit., h. 494.

didirikan pada tahun 1966 berdasarkan "The Convention of the Settlement of Investment Disputes between States and Nationals of Other States". Wewenang badan ini terbatas pada sengketa penanaman modal yang salah satu pihaknya adalah negara (negara penerima modal). Badan ini dibentuk untuk memperkecil risiko nasionalisasi yang dilakukan oleh negara penerima modal terhadap perusahaan-perusahaan asing dari negara penanam modal.

Dengan diadakannya badan arbitrase yang khusus menyelesaikan sengketa antara warganegara dan pemerintah secara langsung, dapatlah dikatakan bahwa telah terjadi perkembangan yang baru dalam pengertian hukum internasional, sebab sebelumnya jika sebuah perusahaan asing akan menggugat negara tempat perusahaan tersebut beroperasi, maka negara asal dari perusahaan asing tersebut harus mengambil alih gugatan tersebut.[9]

Lembaga arbitrase yang inkonstitusional yang akan dibahas di bawah ini adalah:

Arbitrase ad hoc

Arbitrase dalam bentuk ini adalah arbitrase yang baru diadakan apabila terjadi sengketa dengan pengangkat-

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[9]Sunaryati Hartono, Beberapa Masalah Transnasional Dalam Penanaman Modal Asing di Indonesia, Pradnya Paramita, Bandung, 1982, h. 11.

an sejumlah wasit/wasit tunggal oleh para pihak sendiri. Bentuk arbitrase ini banyak disukai dalam sengketa di mana salah satu pihak adalah negara yang berdaulat dan sengketanya berhubungan dengan perdagangan minyak dalam perspektif "Timur-Barat".

Sehubungan dengan bentuk arbitrase ini, saya memandang perlu untuk memperhatikan "The Uncitral Arbitration Rules" (UAR), yaitu suatu kaidah/ketentuan arbitrase yang bersifat universal, hasil karya UNCITRAL (United Nations Commission on International Trade Law) dan telah diterima oleh Sidang Umum Perserikatan Bangsa-Bangsa dengan Resolusi No. 31/98 1976. Ketentuan-ketentuan arbitrase ini sifatnya "optional", maksudnya para pihak dapat memasukkan suatu "Arbitration Clause" dengan menunjuk kepada ketentuan UAR atau tidak memakainya. Selain ditujukan untuk arbitrase ad hoc, ketentuan-ketentuan UAR ini dapat juga dipakai untuk mengesampingkan kaidah-kaidah arbitrasenya sendiri.[10]

Masalah arbitrase mulai mendapat perhatian serius dari Pemerintah Republik Indonesia sehubungan dengan mengalirnya modal asing ke Indonesia secara besar-besaran, sebagai akibat sistem ekonomi terbuka yang dianut

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[10]Sudargo Gautama, Indonesia dan Arbitrase Internasional, Sinar Harapan, Jakarta, 1986, h. 124.

sejak tahun 1967, dengan meratifikasi suatu konvensi internasional yang disponsori oleh Bank Dunia yaitu "International Convention on the Settlement of Invesment Disputes" (ICSID) melalui Undang-Undang no. 5 tahun 1968.

Akibat langsung dari ratifikasi tersebut adalah untuk pertama kali (1981), Negara (pemerintah) Republik Indonesia digugat oleh pihak investor asing dalam pembangunan Hotel Kartika Plaza di Jakarta, di hadapan forum arbitrase ICSID. Walaupun keputusan arbitrase tersebut memenangkan pihak penanam modal, tetapi keputusan itu sendiri merupakan "landmark decision" yang diperhatikan dan menarik bagi sarjana dalam bidang hukum internasional, khususnya berkenaan dengan arbitrase penanaman modal.[11]

Dalam perkembangan yang lain, Pemerintah Republik Indonesia juga telah menyatakan ikut serta dalam "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" tahun 1958 melalui Keputusan Presiden No. 34 tahun 1981. Keputusan Presiden No. 34 tahun 1981 ini ternyata dalam praktek hukum telah menimbulkan beberapa masalah. Salah satu contohnya adalah instansi manakah yang berwenang melaksanakan keputusan arbitrase luar

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[11] Ibid.

negeri/asing?

Di samping masalah-masalah tersebut, ternyata masih banyak masalah yang harus dibenahi berkaitan dengan arbitrase baik yang bersifat yuridis maupun yang non yuridis, seperti masalah minimnya pengetahuan para sarjana tentang aspek-aspek arbitrase, belum adanya kepercayaan dari dunia luar terhadap otoritas BANI (Badan Arbitrase Nasional Indonesia), kekhawatiran tentang "international wrong" sehubungan dengan pelaksanaan keputusan arbitrase luar negeri.[12] Permasalahan tersebut merupakan hal yang harus dijernihkan oleh pemerintah, agar tidak menimbulkan lebih banyak lagi penafsiran simpang siur, yang akhirnya akan lebih menambah ketidakpastian hukum saja.

Sehubungan dengan yang telah diuraikan di atas, maka saya merumuskan beberapa permasalahan sebagai berikut:

a. bagaimanakah kedudukan Lembaga Arbitrase (ICSID) dalam penyelesaian sengketa hukum perdata internasional?
b. bagaimanakah proses penyelesaian sengketa AMCO Asia v. Republik Indonesia?

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[12] Ibid., h. 74.

2. Penjelasan Judul

Skripsi ini berjudul "Aspek Hukum Perdata Internasional Dalam Keputusan Arbitrase". Agar tidak menimbulkan penafsiran yang berbeda perlulah kiranya diberikan penjelasan atas judul tersebut.

Aspek hukum, maksudnya penerapan unsur-unsur yuridis dalam penyelesaian kasus. Sedangkan yang dimaksud dengan arbitrase atau dalam istilah Indonesia sering disebut dengan perwasitan adalah suatu lembaga penyelesaian sengketa yang cara kerjanya "sederhana", yang dengan sukarela dipilih oleh para pihak. Putusan (penyelesaian) perselisihan dilakukan oleh seorang arbiter (wasit) atau suatu tim arbiter atas pilihan mereka bersama. Putusan arbiter tersebut didasarkan atas isi kasus itu, dan para pihak tersebut menyetujui putusan yang diterimanya sebagai hal yang final dan mengikat.[13] Dalam skripsi ini arbitrase yang dimaksud adalah International Centre for Settlement of Invesment Disputes (ICSID).

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[13] R. Subekti, Loc. cit.

3. Alasan Pemilihan Judul

Melihat fakta dan perkembangan yang ada, saya tertarik untuk menulis skripsi mengenai "Aspek Hukum Internasional dalam Keputusan Arbitrase" dalam kasus antara AMCO Asia v. Republik Indonesia. Sebab dalam kasus ini terdapat aspek hukum internasional yang menarik untuk dikaji.

Selain itu melalui kasus tersebut dapat ditelaah lebih lanjut sejauh mana prinsip-prinsip hukum internasional dapat diterapkan dalam kasus konkret, terutama bila dihadapkan pada prinsip kedaulatan negara.

4. Tujuan Penulisan

Tujuan penulisn skripsi ini secara khusus untuk memenuhi persyaratan akademis dalam memperoleh gelar sarjana hukum di Fakultas Hukum Universitas Airlangga. Sedangkan secara umum untuk memberikan sumbangan pemikiran dan informasi bagi perkembangan hukum dewasa ini guna menambah pengetahuan dan analisis kritis terhadap aspek-aspek hukum.

5. Metodologi

Metode yang saya pakai adalah yuridis normatif, yaitu suatu penelitian hukum yang secara khusus mempela-

jari peraturan-peraturan perundang undangan, keputusan pengadilan (arbitrase), teori teori dan data-data kepustakaan lainnya, sehingga analisis yang saya lakukan terhadap kasus yang dikemukakan merupakan analisis normatif kualitatif.

a. Pendekatan Masalah

Sesuai dengan dasar analisis yuridis, maka pendekatan masalah yang saya gunakan bersifat yuridis normatif. Namun tidak menutup kemungkinan pada hal-hal tertentu yang belum jelas pengaturannya, maka akan didekati dengan pendekatan yuridis sosiologis. Jadi dengan pendekatan-pendekatan semacam ini saya akan menitikberatkan pada hubungan hukum antara para pihak yang bersengketa di depan ICSID, maksudnya dari segi bentuk hubungan hukumnya maupun dari hak dan kewajibannya.

b. Sumber Data

Data yang dipergunakan dalam penulisan skripsi ini bersumber dari studi kepustakaan berupa buku-buku literatur, bahan-bahan perkuliahan, peraturan perundang-undangan serta tulisan-tulisan para ahli tentang arbitrase di surat kabar dan majalah-majalah hukum. Di samping itu data juga diperoleh dari putusan arbitrase.

c. Prosedur Pengumpulan dan Pengolahan Data

Cara pengumpulan data yang saya lakukan melalui

penelitian kepustakaan (termasuk di dalamnya buku-buku, majalah hukum maupun surat kabar) dan studi terhadap kasus yang saya angkat. Setelah terkumpul, data tersebut saya teliti kebenarannya kemudian diklasifikasi serta dilakukan penyuntingan data.

d. Analisis data

Susunan data secara sistematis yang telah saya kumpulkan akhirnya saya tuangkan dalam bentuk sajian tulisan yang deskriptif analitis dengan jalan menganalisis data yang mendukung tujuan penulisan ini.

6. Pertanggungjawaban Sistematika

Dalam pembahasan dan penguraian masalah, skripsi ini saya bagi dalam empat bab termasuk di dalamnya pendahuluan dan penutup.

Secara garis besar masalah yang saya bahas dalam skripsi ini saya letakkan pada bab I pendahuluan termasuk di dalamnya pokok-pokok bahasan serta latar belakang penulisan skripsi ini. Dengan membaca bab I diharapkan pembaca dapat mengerti maksud dan inti permasalahan yang saya tulis. Oleh karena itu dalam bab I ini banyak disebutkan definisi serta kutipan langsung dan tidak langsung (parafrase) dari berbagai sumber untuk memperjelas masalah yang saya tulis.

Bab II merupakan pembahasan lebih lanjut tentang masalah yang saya angkat. Pada Bab II ini diuraikan tentang yuridiksi yang dimiliki oleh ICSID dalam menyelesaikan sengketa penanaman modal. Kemudian dijelaskan juga prosedur penyelesaian sengketa yang berlaku dalam ICSID serta bagaimana pelaksanaan putusannya.

Dalam bab selanjutnya dibahas proses penyelesaian sengketa antara AMCO Asia v. Republik Indonesia oleh ICSID. Sebelum itu saya uraikan kembali latar belakang timbulnya sengketa serta kedudukan para pihak dalam sengketa tersebut.

Akhirnya, setelah memahami apa yang telah saya uraikan dalam bab-bab terdahulu, saya sampai pada tahap akhir, yaitu bagian penutup yang berupa kesimpulan dan saran yang saya kemukakan sebagai sumbangan pemikiran dalam mencari jalan keluar dari masalah yang telah saya uraikan. Pembahasan ini saya letakkan dalam bab IV sebagai bab terakhir.

BAB II

KEDUDUKAN LEMBAGA ARBITRASE (ICSID) DALAM PENYELESAIAN SENGKETA

1. Yuridiksi Lembaga Arbitrase

Ketentuan yang mengatur juridiksi badan arbitrase ICSID diatur di dalam pasal 25 Konvensi Washington. Menurut pasal ini, sedikitnya ada tiga persyaratan pokok yang harus dipenuhi oleh para pihak untuk dapat menggunakan sarana arbitrase badan ini di dalam menyelesaikan sengketa yang diajukan kepadanya.

Pertama, harus ada kata sepakat. Kata sepakat ini, menurut David A. Soley, merupakan tonggak ("corner stone") bagi juridiksi badan arbitrase ICSID.
Para pihak sebelumnya harus mencapai kesepakatan bersama untuk menyerahkan sengketa kepada badan arbitrase ICSID. Di dalam hal ini, Konvensi mensyaratkan adanya suatu kesepakatan tertulis yang menunjuk pemakaian badan arbitrase ICSID. Penunjukan badan arbitrase ini tercantum dalam suatu klausula perjanjian penanaman modal yang menetapkan penyerahan sengketa yang kelak timbul dari perjanjian tersebut. Namun, menurut pasal 25 ayat 1, kesepakatan untuk menyerahkan sengketa kepada badan ini

tidak perlu "dinyatakan di dalam suatu dokumen tersendiri". Negara tuan rumah melalui perundang-undangan penanaman modalnya dapat menawarkan agar sengketa yang timbul dari perjanjian penanaman modal dengan pihak asing diserahkan kepada (juridiksi) badan arbitrase ICSID. Dan penanam modal dapat memberikan kesepakatannya dengan menerima tawaran tersebut dengan tertulis.[14]

Di samping kesepakatan yang datang dari kedua belah pihak, salah satu pihak, khususnya negara peserta konvensi, berdasarkan pasal 25 dapat memberitahukan kepada badan arbitrase ICSID sebelumnya tentang kewenangan badan ini terhadap kasus yang dihadapi negara tersebut, baik pemberitahuan itu dilakukan pada waktu meratifikasi Konvensi atau pada waktu kapan pun juga, tentang kasus-kasus sengketa yang bagaimana saja, yang sudah barang tentu sepanjang hal itu masih ada kaitannya dengan penanaman modal yang dapat menjadi wewenang badan arbitrase. Sampai saat ini baru 5 negara yang melaksanakan ketentuan pasal ini. Negara-negara tersebut adalah Saudi Arabia yang telah menyatakan bahwa negaranya berkeinginan untuk tidak menyerahkan sengketa-sengketa penanaman modalnya yang berhubungan dengan tindakan-tindakan "kedaulatan".

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[14]David A. Soley, "ICSID Implementation", International Lawyer, Vol. 19, No. 2, 1985, h. 524.

Pemerintah Guyana dan Jamaica telah menyatakan pula niatnya untuk tidak menyerahkan sengketa-sengketanya yang berhubungan dengan "kekayaan mineral dan kekayaan alam lainnya". Juga sama halnya dengan Papua New Guinea, yang telah menetapkan pula bahwa negaranya hanya akan menyerahkan sengketa-sengketanya yang bersifat fundamental.[15]

Kedua, Juridiksi ratione materiae. Yang menjadi juridiksi badan arbitrase ICSID terbatas pada sengketa-sengketa hukum saja sebagai akibat adanya penanaman modal. Istilah sengketa hukum ini digunakan untuk memisahkan sengketa yang murni ekonomis atau politis sifatnya. Di samping itu, sengketa hak adalah juga termasuk ke dalam juridiksi badan ini. Namun sengketa atau konflik kepentingan tidak termasuk ke dalamnya.

Sebagai kesimpulan di luar sengketa hukum di atas, adalah penting juga untuk mengetahui penggolongan sengketa atau konflik lain yang dikemukakan dalam konvensi MIGA (Multi Investment Guarantee Agency) tentang sengketa yang

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[15]George R Delaume, "ICSID Arbitration", Contemporary Problems in International arbitration, Queen Mary College, Martinus Nijhoff Publishers, 1987, h. 26.

timbul sebagai akibat adanya penanaman modal.[16]

Macam-macam sengketa tersebut, yakni:

a. transfer risk, yaitu risiko kerugian sebagai akibat pembatasan terhadap konversi mata uang oleh negara yang bersangkutan (negara penerima modal);
b. expropriation risk, yaitu risiko kerugian sebagai akibat adanya tindakan-tindakan legislatif dan administratif, atau karena terjadinya pengambil alihan hak;
c. repudiation risk, yaitu risiko kerugian karena penolakan atau pelanggaran hukum oleh negara penerima, para investor tidak dapat menuntutnya melalui pengadilan atau badan arbitrase;
d. war and civil disturbance, yaitu risiko kerugian sebagai akibat terjadinya konflik bersenjata atau gangguan-gangguan lainnya oleh kaum sipil.[17]

Hal yang penting di sini, adalah yang dimaksud dengan penanaman modal (invesment) harus diterjemahkan

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[16]Cf. Michael Tupman, "Case Studies in the Jurisdiction of the International Centre for Settlement of Invesment Disputes", International and Comparative Law Quarterly, vol. 35, October 1986, h. 815.

[17]M. Yahya Harahap, Arbitrase, Pustaka Kartini, Jakarta, 1991, h. 273.

dalam arti yang luas. Selama perundingan pembentukan Konvensi Washington, beberapa peserta mengusulkan beberapa usulan untuk membuat batasan tentang arti penanaman modal. Namun kemudian pada akhirnya, usul untuk memberi batasan yang tegas tentang arti penanaman modal ini tidak disepakati. Pertimbangannya karena telah ada persyaratan yang lebih penting, yakni syarat adanya kesepakatan di antara para pihak yang bersengketa (untuk menyerahkan sengketa tersebut ke badan arbitrase). Konsekuensinya, dengan tidak adanya batasan arti penanaman modal, berarti pula memberi kemungkinan yang lebih leluasa kepada Konvensi untuk menampung bentuk-bentuk penanaman modal yang baru sebagai akibat majunya pertumbuhan bentuk-bentuk hubungan ekonomi baru di dalam masyarakat. Sebagai contoh, yang termasuk bentuk-bentuk penanaman modal yang baru yaitu berbagai bentuk kontrak suplai atau alih teknologi.[18]

Ketiga, Yuridiksi rations personae. Maksudnya badan arbitrase ICSID hanya memiliki wewenang menyelesaikan sengketa-sengketa antara negara dengan warga negara asing lainnya yang negaranya juga adalah angggota/peserta Konvensi Washington. Badan arbitrase ini tidak memiliki

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[18]Cf. George R Delaume, Loc.cit.

wewenang untuk mengadili sengketa antara negara dengan negara, atau seorang warga negara dengan seorang warga negara lainnya meskipun sengketa yang diserahkan kepadanya itu adalah sengketa hukum yang timbul karena adanya perjanjian penanaman modal.

Lebih lanjut, yang dimaksud dengan warga negara menurut pasal 25 ayat 2 Konvensi adalah sebagai berikut:

a. setiap orang yang memiliki kebangsaan dari negara peserta Konvensi yang bersengketa pada tanggal sewaktu para pihak setuju untuk menyerahkan sengketanya kepada badan arbitrase atau juga pada saat atau tanggal permintaan untuk berarbitrase didaftar oleh Centre (badan arbitrase);
b. setiap subyek hukum yang memiliki kebangsaan dari negara peserta Konvensi yang bersengketa pada tanggal para pihak setuju untuk menyerahkan sengketanya kepada Centre; dan
c. setiap subyek hukum yang memiliki kebangsaan dari negara peserta Konvensi yang bersengketa pada tanggal persetujuan dan yang karena adanya pengawasan asing (foreign control). para pihak sepakat sebagai warga negara dari negara peserta Konvensi lainnya.

2. Prosedur Berperkara di ICSID

Sehubungan dengan pembahasan masalah pemeriksaan mahkamah arbitrase, akan diuraikan berbagai segi, pertama-tama akan dijelaskan terlebih dahulu mengenai sebutan para pihak dalam proses pemeriksaan arbitrase. Telah ada sebutan standar yang sudah diinternasionalisasikan dalam literatur. Misalnya dalam berbagai Konvensi sebutan tersebut sudah baku. Seperti yang dijumpai dalam pasal 3 UNCITRAL, di situ dijelaskan sebutan para pihak adalah "claimant" dan "respondent".[19]

Proses pertama yang melahirkan kewenangan arbitrase memeriksa dan menyelesaikan sengketa secara materiil ialah dengan adanya pengajuan permohonan gugat oleh salah satu pihak. Pengajuan gugatan dalam arbitrase telah dibakukan dengan istilah "claim". Pengambilan inisiatif mengajukan claim kepada arbitrase sudah dijelaskan sebutannya yakni claimant. Pada prinsipnya, pengajuan gugat akan lebih mudah ditempuh oleh salah satu pihak apabila klausula arbitrase yang tercantum dalam pactum de compromittendo atau akta kompromis sudah menunjukkan badan arbitrase yang mereka kehendaki. Misalnya para pihak dalam klausula arbitrase telah sepakat menunjuk ICSID.

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[19] Ibid., h. 183.

Dalam kasus yang seperti itu, pihak claimant sudah dapat langsung mengajukan gugat kepada badan arbitrase yang dimaksud.

Masalah pendaftaran claim pada prinsipnya berkaitan dengan arbitrase yang ditunjuk. Kalau arbitrase yang ditunjuk para pihak adalah arbitrase institusional seperti ICSID atau ICC, maka badan arbitrase tersebut memiliki Rules yang secara cermat telah mengatur tata cara pendaftaran claim.

Menurut pasal 36 ICSID, pendaftaran seolah-olah tidak digantungkan pada pembayaran biaya, akan tetapi menggantungkan pendaftaran berdasarkan yuridiksi dan apabila dasar gugat yang dipersengketakan para pihak berada di luar jangkauan yuridiksi, maka Sekretaris Jendral harus menolak pendaftaran gugat (refusal to register). Nampaknya aturan ICSID dalam hal ini lebih praktis dan sederhana jika dihubungkan dengan tujuan dan keberadaan arbitrase sebagai badan yang menghendaki proses sederhana dan cepat.

Proses pemberitahuan claim kepada responden, di badan arbitraase ICSID tidak diatur tenggang waktu penyampaian dan pemberitahuannya, akan tetapi sesuai dengan asas proses sederhana dan cepat yang dihendaki, seharusnya prosesnya memakan waktu yang singkat.

Pasal 41 ayat 1 menetapkan bahwa Dewan Arbitrase ICSID adalah "hakim" atas wewenang-wewenang atau juridiksinya. Ketentuan ini dapat diartikan pula sebagai kewenangan untuk menetapkan apakah persyaratan-persyaratan suatu sengketa yang diserahkan kepadanya telah memenuhi persyaratan Konvensi dan apakah sengketa yang diserahkannya itu berada di dalam kewenangannya.[20]

Layak untuk diketahui bahwa badan-badan internasional lainnya di dalam soal kompetensi ini, menentukan dirinya sendiri sebagai badan atau pihak yang berwenang terhadap hal-hal apa saja yang menjadi kompetennya. Hal penentuan wewenang oleh badan arbitrase yang bersangkutan ini disebut pula dengan doctrine of severability. Sebagai contoh lainnya dapat dikemukakan di sini. misalnya :

a. Ketentuan dalam The UNCITRAL Rules and Model Law (The Arbitration Rules).

di dalam pasal 16 ayat 1 UAR yang menyatakan:

> The Arbitral tribunal may rule on its jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail he ipso jure the invalidity of the arbitration clause.

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[20] R. Subekti., op. cit., h. 17.

3. Pelaksanaan Isi Putusan

Asas pertama putusan arbitrase ICSID, yaitu mahkamah mesti memutus sengketa sesuai dengan peraturan hukum yang disetujui oleh para pihak. Hal ini terumus dalam pasal 42 ayat 1 yang berbunyi: "The Tribunal shall decide a dispute an accordance with such rules or law as may be agreed by the parties." Jadi untuk mengetahui peraturan hukum yang mana yang harus diterapkan mahkamah arbitrase memutus sengketa dengan merujuk kepada kesepakatan para pihak. Mahkamah meneliti terlebih dahulu, apakah dalam klausula arbitrase telah disepakati aturan hukum oleh para pihak. ICSID memberi hak kepada para pihak untuk menentukan peraturan hukum mana yang mereka pilih menyelesaikan sengketa. Apabila telah ditetapkan pilihan, kemudian hal itu dicantumkan secara tegas dalam perjanjian arbitrase, mahkamah arbitrase mutlak harus menerapkan aturan hukum yang dimaksud.

Berkaitan dengan pelaksanaan isi putusan, perlu diperhatikan pula Keputusan Presiden Republik Indonesia tanggal 5 Agustus 1981 (No. 34 tahun 1981), yang telah mensahkan Konvensi tentang pengakuan dan pelaksanaan putusan arbitrase luar negeri (Convention on Recognition and Enforcement of Foreign Arbitral Awards) dari PBB tahun 1958. Dengan demikian maka keputusan arbitrase yang

telah diucapkan di luar negeri, tidak dapat diragukan lagi dapat juga dijalankan di Indonesia sepanjang telah diucapkan dalam suatu negara yang juga peserta Konvensi PBB ini.

Dengan demikian maka tambah luaslah lapangan untuk pengakuan dan pelaksanaan keputusan-keputusan arbitrase luar negeri ini di dalam wilayah negara kita sendiri. Hal ini berarti apabila sekarang seorang pengusaha Indonesia ditarik di hadapan Dewan Arbitrase di London, maka keputusan-keputusan yang dikeluarkan di London tersebut dapat dilaksanakan di Indonesia. Dengan berlakunya Konvensi PBB tentang keputusan arbitrase luar negeri tersebut maka semakin bertambahlah masalah-masalah yang berkenaan dengan arbitrase untuk negara kita sekarang ini.

BAB III

PROSES PENYELESAIAN SENGKETA
AMCO Asia v. REPUBLIK INDONESIA

1. Latar Belakang Timbulnya Sengketa

Pada tanggal 22 April 1968 diadakan "Lease and Management Agreement" antara AMCO Asia Corporation (AMCO), sebuah perusahaan berbadan hukum negara bagian Delaware, USA, dengan PT Wisma Kartika (PT WISMA), sebuah perseroan terbatas berbadan hukum Republik Indonesia. Perjanjian tersebut mensyaratkan pembagian keuntungan management hotel (Hotel Kartika Plaza) selama sembilan belas tahun, tetapi diperpanjang lagi menjadi tigapuluh tahun (sampai tahun 1999) berdasarkan persetujuan PT Wisma Kartika tanggal 24 Januari 1969.

Sementara itu, pada tanggal 16 Mei 1968, AMCO Asia menyampaikan permohonan kepada Pemerintah Republik Indonesia untuk mendirikan PT AMCO Indonesia yang memiliki badan hukum Indonesia. Dalam perkembangan selanjutnya, AMCO Asia mengalihkan sebagian saham yang dimiliki PT AMCO kepada PAN AMERICAN DEVELOPMENT Ltd. (PAN AMERICAN), suatu perusahaan berbadan hukum Hongkong pada tanggal 26 Oktober 1968. Pengalihan tersebut disetujui oleh Sekjen

Kementerian PU pada tanggal 25 April 1972.

Kemudian pada tanggal 15 January 1981, ketiga perusahaan tersebut mengajukan gugatan kepada Sekjen ICSID, mengenai tindakan Pemerintah Indonesia yang telah mencabut izin penanaman modal mereka, dengan dalil pencabutan tersebut dilakukan dengan suatu "armed military action", sedangkan pada saat itu sedang terjadi sengketa antara PT AMCO dengan PT Wisma.[21]

Kasus ini adalah mengenai sengketa pencabutan lisensi penanaman modal Amco Asia Corp. oleh pemerintah Indonesia tahun 1980. Sengketa ini tidak dapat diselesaikan secara damai antara Amco dan PT Wisma. Akhirnya, PT Wisma memutuskan keikutsertaan manajemen Amco. Selain itu pemerintah Indonesia telah pula mendesak BKPM (Badan Koordinasi Penanaman Modal) untuk membatalkan penanaman modal Amco atas hotel tersebut. Pada tanggal 15 Januari 1981, Amco mengajukan sengketa ini kepada sekjen ICSID.

Setelah mengadakan beberapa kali sidang, Dewan Arbitrase ICSID mengeluarkan dictum putusan pokok perkara pada tanggal 20 November 1984, yang isinya secara singkat berbunyi:

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[21] International Legal Material 1987 No. XXIII dan Sudargo Gautama, Indonesia dan Arbitrase Internasional, Bina Cipta, Bandung, 1986, h. 218.

a. pihak Indonesia harus membayar secara tanggung renteng kepada AMCO Asia, Pan American, dan PT AMCO, sejumlah US$ 3.200.000 dengan bunga atas jumlah tersebut sebesar 6% setahun, sejak tanggal 15 January 1981 sampai pembayaran lunas;
b. jumlah yang dikabulkan itu secara tanggung renteng dibayar oleh tergugat kepada pihak penggugat. Cara pembayaran harus dilakukan di luar Indonesia;
c. gugatan Rekonvensi/Counterclaim dari pihak tergugat ditolak;
d. Lain-lain permintaan para pihak ditolak;
e. tiap pihak akan menanggung biaya pengacara dan lain-lain biaya yang telah dikeluarkan dalam mempersiapkan dan mengajukan perkara.[22]

Karena pemerintah Indonesia tidak merasa puas dengan keputusan Dewan Arbitrase ICSID tersebut, maka berdasarkan Pasal 52 Konvensi ICSID yang mengatur tentang pembatalan:

a. dewan arbitrase secara tegas telah melewati batas-batas wewenangnya;
b. dewan Arbitrase secara sangat serius bertindak bertentangan dengan prosedur yang bersifat fundamental dan;

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[22] Ibid.

c. keputusan arbitrase telah lalai memberikan alasan alasannya; maka diajukanlah permohonan pembatalan pada tanggal 18 Maret 1985. Berdasarkan permohonan tersebut dan dikeluarkan keputusan oleh Panitia Arbitrase Ad Hoc pada tanggal 16 Mei 1986.

2. Penerapan Exhaustion of Municipal Remedies Dalam Penyelesaian Sengketa

Indonesia menyangkal bahwa tindakan tentara dan polisi pada tanggal 31 Maret-1 April 1980 menyebabkan Indonesia melakukan "international wrong" (perbuatan melawan hukum internasional). Tanggung jawab Indonesia akan ada hanya apabila hukum Indonesia tidak menawarkan cara/saluran yang memadai terhadap tindakan itu. Ternyata hukum Indonesia memberikan cara-cara penyelesaian (remedies) baik kepada warga negaranya maupun WNA dan jika PT AMCO memilih untuk tidak memakai kesempatan itu, maka harus tidak (tidak boleh) merugikan Indonesia.[23]

Indonesia juga mempermasalahkan bahwa Dewan telah melampaui batas wewenangnya dengan menetapkan bahwa AMCO dapat mengajukan gugatannya tentang ganti rugi (compensation of demages), berdasarkan tindakan tentara atau

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[23] Ibid.

polisi secara langsung kepada Internasional Center tanpa terlebih dahulu mencari penyelesaian di hadapan pengadilan pengadilan Indonesia sesuai dengan ketentuan umum hukum internasional tentang "local remedies", panitia tidak yakin bahwa bagian ini dapat dibatalkan. Dewan sebagai badan yang dihasilkan konvensi, terikat untuk menerapkan konvensi, termasuk pasal 26. Dengan menerima yuridiksi ICSID tanpa mengadakan persyaratan menurut pasal 26 konvensi, Indonesia dianggap telah melepaskan hak itu.[24]

Menurut saya, AMCO dapat secara langsung mencari penyelesaian melalui Dewan Arbitrase ICSID tanpa perlu menggunakan "Indonesian Local Remedies". Dewan tidak melampaui batas wewenangnya ataupun gagal menyatakan alasan-alasan pada saat menerapkan hukum internasional yaitu menggolongkan intervensi tentara dan polisi pada tanggal 31 Maret - 1 April 1980, sebagai suatu "international wrong".

Indonesia menggugat bahwa dewan tidak menerapkan hukum Indonesia dan tidak mengemukakan alasan apapun mengenai hubungan kausal antara ketidaksahan tindakan tentara dan polisi serta pencabutan kembali lisensi oleh

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[24] Ibid.

BKPM. Indonesia memandang bahwa ketidaksahan tersebut telah diakhiri dengan "Keputusan Interlocutoir" Pengadilan Jakarta Pusat tanggal 28 Mei 1980, yang memberi wewenang kepada PT Wisma melakukan management hotel sambil menunggu penyelesaian akhir.

Dewan berpendapat bahwa meskipun "interlocutory order" tersebut mungkin cukup untuk sementara waktu "menghilangkan" ketidaksahan tindakan tentara dan polisi. Dewan tidak dapat dianggap telah gagal menerapkan Hukum Indonesia pada saat Dewan berpendapat bahwa ketidaksahan tetap berlangsung (terjadi) bahkan setelah keluarnya keputusan interlocutoir. Dewan memperhatikan bahwa pada tanggal 8 Juli 1980, Pengadilan Tinggi Jakarta telah mengabulkan permohonan PT AMCO untuk penundaan penerapan keputusan interlocutoir tersebut. Pada tanggal 4 Agustus 1980, Mahkamah Agung menerima kembali keputusan Pengadilan Negeri semula. Sementara itu pada tanggal 9 Juli 1980, satu hari setelah Pengadilan Tinggi membatalkan keputusan interlocutoir dan hampir satu bulan sebelum MA mengeluarkan keputusannya, BKPM mengeluarkan perintah pencabutan lisensi penanaman modal AMCO. Dengan kata lain, Dewan berpendapat bahwa tindakan tentara dan tindakan polisi tidak sah, sehingga memungkinkan PT Wisma memperoleh secara paksa pengawasan atas hotel (de facto) dari PT

AMCO yang akibatnya dianggap oleh Pengadilan Tinggi sebagai suatu tindakan yang melawan hukum.

3. Tuntutan Pembatalan Perintah Pencabutan Lisensi oleh BKPM

Menurut Dewan, BKPM telah mengesampingkan "due process" (proses yang wajar) yang diakui hukum Indonesia dan prinsip-prinsip hukum internasional pada umumnya karena:

a. Lisensi PT AMCO dicabut tanpa pemberian "Prior Warning" sesuai dengan pasal 13 (3) ketentuan BKPM 01/-1977 bahwa BKPM akan memberikan peringatan (warning) maksimum tiga kali, dalam jangka waktu satu bulan antara pernyataan masing-masing. Kalaupun ada, dewan menganggap bahwa "authorship, dates and language" dari surat-surat yang dikirimkan Bank Indonesia, tidak sesuai dengan pasal tersebut di atas.

b. Dalam proses administratif yang mengakibatkan penarikan kembali lisensi, PT AMCO hanya diberikan waktu satu jam dengar pendapat (hearing) lalu dalam waktu tiga hari (11 April-13 April 1980) setelah dengar pendapat tersebut, BKPM sudah mengambil kesimpulan dan tindakan untuk mengusulkan kepada Presiden RI supaya diadakan pencabutan lisensi PT AMCO pada tanggal 9

Juli 1980.[25]

Pihak Indonesia menyatakan bahwa hukum administrasi Indonesia tidak mencakup setiap prinsip hukum umum ataupun "standards of due process", tetapi Panitia berpendapat bahwa walaupun kata-kata "due-process" tidak terdapat dalam konstitusi (perundang-undangan) Indonesia, namun perlu ditegaskan bahwa seseorang yang menganggap dirinya dirugikan oleh tindakan pemerintah atau "administration", dapat meminta penyelesaian di pengadilan-pengadilan di Indonesia, menurut pasal 1365 BW. Juga ganti rugi akan diberikan jika keputusan badan administratif, berdasarkan studi per kasus, didapati "ultra vires" atau tidak sesuai dengan konsep keadilan utama yang berlaku dalam masyarakat. Sehingga nyata bagi Panitia bahwa standar umum hukum Indonesia ini secara kualitatif tidak berbeda dan nampaknya sama dalam pengertian fungsional, dengan apa yang ditentukan Dewan tentang "The General and Fundamental Principle of Due Process".

Dewan menganggap PT AERO PACIFIC didirikan berdasarkan hukum Indonesia, sehingga merupakan perusahaan "berkebangsaan Indonesia". Namun demikian PT AERO bukan suatu "Indonesian Enterprise" jika ditinjau dari Pasal 3

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[25] Ibid.

UU No. 6/1968, yang menyatakan bahwa "National Enterprise" adalah suatu perusahaan yang paling sedikit modalnya (51%) dimiliki oleh negara atau suatu perusahaan swasta nasional; sedangkan PT AERO 50% modalnya dimiliki Mr Pullitzer warga negara Amerika, 25% oleh KLM suatu perusahaan Belanda, dan hanya 24% oleh Garuda suatu perusahaan Indonesia. Lagi pula pasal 1(1) UU No.6/1968 mengatur bahwa "Modal Dalam Negeri" boleh dipunyai negara atau warga negara (badan hukum swasta) atau "foreign enterprise domiciled in Indonesia". Dengan demikian, modal dari PT AERO dianggap sebagai "modal domestik" yang dimiliki oleh suatu "foregin private enterprise", akibatnya dalil penggugat bahwa modal yang dimasukkan oleh PT AERO dimasukkan pula seperti dimasukkan oleh PT AMCO Indonesia, dianggap tidak tepat.[26]

Dewan Arbitrase mengakui bahwa investasi yang dilakukan pihak penggugat tidak mencukupi yakni seharusnya US $3,000,000 tapi hanya dimasukkan US $ 2,472,490. Meskipun demikian, kekurangan ini hanya sedikit lebih dari 1/6 dari seluruh jumlah yang harus ditanam oleh pihak penggugat. Dengan demikian, kekurangan ini dianggap bukan sebagai alasan yang kuat untuk membenarkan penca-

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[26] Ibid.

[illegible]rtan lisensi. Terutama dalam perkara ini, pihak investor kemungkinan besar dapat mengadakan investasi tambahan, jika ada peringatan sebelumnya dari BKPM.

Dari segi lain mengenai pernyataan pihak Indonesia bahwa pemerintah Indonesia tidak diberi tahu tentang adanya persetujuan PT Wisma kepada "Sub Lease Agreement" antara PT AMCO dan PT AERO tidak dapat diterima, karena pelaksanaannya sudah berjalan begitu lama (15 Oktober 1969 s/d 1 Juni 1978), dan juga mengingat PT Wisma ini sebagian sahamnya dipegang oleh Inkopad yang mempunyai hubungan erat dengan pemerintah.

Indonesia menyatakan bahwa Dewan telah sungguh-sungguh menyimpang dari ketentuan prosedur yang mendasar dengan memperlakukan para pihak secara tidak seimbang/memadai dalam hal-hal tertentu. Misalnya Dewan menyatakan bahwa Pemerintah RI mengetahui adanya persetujuan PT Wisma pada kedua "Sub-Lease Agreements" (pertama dengan Pulitzer/KLM/Garuda dan yang kedua dehgan PT AERO PACIFIC), meskipun DEWAN sebelumnya telah menolak alasan AMCO bahwa PT Wisma bukan "alter ego" dari Republik Indonesia, serta menolak menghubungkan RI dengan pengambilalihan management hotel. Di lain pihak, Dewan menolak serangkaian surat mengenai kegagalan PT AMCO untuk mendaftarkan penanaman modalnya, yang dikeluarkan Bank Indonesia,

selain daripada BKPM secara langsung.

Panitia ad hoc mengakui bahwa hasil-hasil berbeda dicapai Dewan dalam kedua hal di atas. Namun demikian, di dalam ketentuan The UNCITRAL Rules and Model Law (The Arbitration Rules) yang menyatakan:

> the ad hoc Committe after according due regard to the fundamental rule of equality of the parties, is unablee to conclude that the Tribunal in evaluating the surrounding facts in the two situations clearly exceded the scope of dicretionary authority granted to it by Arbitration Rule 34 and must consequently refuse Indonesia's claim of nullity in this regard.

Akan tetapi, dewan akan memperhatikan dua hal dalam sengketa ini, yaitu:

a. Jumlah Kekurangan Penanaman Modal

Indonesia mempermasalahkan tentang jumlah modal keseluruhan sebesar US$ 2.472.490 yang dikatakan Dewan telah ditanamkan oleh PT AMCO. Padahal kalkulasi tersebut tidak benar jika Dewan sungguh-sungguh menerapkan hukum Indonesia.

Panitia berpendapat bahwa menurut ketentuan hukum Indonesia yang relevan/berhubungan, hanya penanaman modal yang diakui dan didaftarkan secara jelas oleh pihak yang berwenang (Bank Indonesia), merupakan penanaman modal (asing) dalam pengertian Undang undang No. 1 tahun 1967. Segera setelah pengumuman undang-undang tersebut, keluarlah Surat Edaran atau pemberitahuan kepada Biro Valuta

Asing Bank Indonesia yang mewajibkan para investor asing menyampaikan bukti bahwa modal asing harus berasal dari luar Indonesia, sesuai dengan Undang-undang No. 1 tahun 1967. Pengumuman tersebut menyatakan bahwa Bank Indonesia akan menentukan dengan pernyataan tertulis kepada perusahaan yang bersangkutan apakah barang-barang yang diimpor atau valuta asing tersebut akan diakui sebagai modal yang ditanamkan.

Kewajiban pengakuan dan pendaftaran ini merupakan mekanisme utama untuk penerapan pasal 1 Undang-Undang No. 1 tahun 1967, sehingga kepada pihak penanam modal asing diberikan fasilitas dan insentif tertentu.[27]

Ternyata PT AMCO lupa mendaftarkan kepada Bank Indonesia, jumlah yang dinyatakan AMCO telah ditanamkan pada proyek *hotel*. Dinyatakan oleh penasihat AMCO bahwa AMCO pada mulanya mengesahkan jumlah tersebut melalui pendaftaran tetapi dibatalkan. Dalam hal ini AMCO memberi kesan bahwa Bank Indonesia tidak bersedia mendaftarkan jumlah yang dinyatakan PT AMCO telah ditanamkan.

Tetapi penasihat Indonesia menyatakan bahwa pasal 1365 BW mensyaratkan suatu "remedy" terhadap setiap

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[27] Lihat Lampiran "Decision Rendered by the ad hoc Committee dari Sudargo Gautama, Indonesia dan Arbitrase Internasional, Bina Cipta, Bandung, 1986, h. 425.

penolakan (Bank Indonesia) yang sewenang-wenang dalam hal pendaftaran sesuai deengan Undang-Undang No. 1 tahun 1967 dan bahwa AMCO selama bertahun-tahun tidak pernah meminta "*remedy*" tersebut, tetapi sebaliknya mengabaikan beberapa peringatan tertulis dari Bank Indonesia tentang pendaftaran.

Sampai tahun 1977 Dewan Arbitrase mengetahui bahwa penanaman modal (asing) AMCO yang telah didaftarkan kepada Bank Indonesia sesuai dengan Undang-Undang no.1 tahun 1967, hanya berjumlah US$ 983.992. Dewan menentukan PT AMCO telah menanamkan modal sebanyak US$ 2.472.490, dengan memakai cara "accounting khusus", yang justru menyimpang dari cara penghitungan menurut hukum Indonesia.

Dalam menentukan jumlah investasi yang telah dimasukkan AMCO sebanyak US$ 2.472.490 ternyata Dewan melupakan kenyataan bahwa menurut surat pencabutan dari BKPM tersebut, PT AMCO hanya menaruh modal sebanyak US$ 1.399.000 yang terdiri dari US$ 1.000.000 pinjaman (loan capital) dan sisanya modal sendiri (equity capital). Dengan demikian, dewan telah gagal menerapkan pasal 2 Undang-undang no. 1 tahun 1967 yang membatasi penanaman modal dengan "equity capital".

Baik PT Amco yang pada mulanya berhutang

US$ 1.000.000 dari ABN maupun PT AEROPACIFIC yang menanggung pembayaran kembali pada ABN (Algemene Bank Nederland), berpura-pura telah memperoleh hak dari pihak yang berwenang."to consider such loan funds as quity invesment of PT AMCO".

b. Standar Material

Indonesia menganggap bahwa suatu reaksi yang sah terhadap suatu kesalahan harus sebanding dengan kesalahan itu sendiri. Karena panitia telah membatalkan kesimpulan Dewan tentang kalkulasi dan jumlah penanaman modal PT AMCO, dengan sendirinya pandangan Dewan yang mengatakan bahwa kekurangan penanaman modal US$ 600.060 (kalkulasi Dewan) bukan merupakan kriteria material untuk melakukan pencabutan izin penanaman modal; harus dibatalkan, karena sesuai dengan kalkulasi ketentuan hukum Indonesia, hanya US$ 983.992 (equity capital) yang sudah ditanamkan, padahal seharusnya US$ 3.000.000.

Dengan demikian, panitia membatalkan semua keputusan dewan secara keseluruhan, kecuali pandangan dewan bahwa tindakan tentara dan polisi pada tanggal 31 Maret 1980 s.d. 1 April 1980, merupakan perbuatan melanggar hukum, dan pihak tergugat harus mengganti rugi sesuai dengan kerugian yang diderita sejak tanggal kejadian tersebut.

BAB IV

PENUTUP

1. Kesimpulan

Dari pembahasan bab-bab yang terdahulu, saya menarik kesimpulan sebagai berikut :

a. Dewasa ini arbitrase telah menjadi salah satu metode yang disukai, bahkan paling disukai dalam menyelesaikan sengketa ekonomi internasional, yang terjadi antara badan hukum asing dengan negara berdaulat dan atau antara badan hukum asing dengan badan hukum nasional. Hal ini disebabkan oleh sifatnya yang relatif lebih confidental (private), tidak terlalu banyak formalitas, antara para pihak/pengusaha yang bonafise, lebih murah, keputusannya "Final and Binding" serta bebas dari campur tangan pengadilan nasional kecuali jika pengadilan nasional diminta untuk membantu karena salah satu pihak tidak melaksanakan kewajibannya. Dalam suatu klausula perjanjian antara Amco Asia v. Republik Indonesia, apabila timbul sengketa maka kedua belah pihak sepakat menunjuk badan arbitrase ICSID.

b. Keputusan arbitrase yang hanya menerapkan/memperhatikan hukum nasional sudah tidak terhitung lagi jumlah-

nya, tetapi tidak demikian halnya dengan hukum internasional (publik). Namun demikian telah terjadi kecenderungan untuk memperhatikan hukum nasional dan internasional secara integral yang dikenal dengan pendekatan transnasional. Pendekatan semacam ini khususnya banyak diterapkan dalam sengketa yang salah satu pihaknya adalah negara yang berdaulat. Dalam skripsi ini yang menjadi pihak dalam sengketa adalah Republik Indonesia v. PT Amco Asia.

2. Saran

a. Diperlukan adanya "dokumen tersendiri" yang mengatur mengenai kesepakatan tertulis dari para pihak untuk menyelesaikan sengketa kepada badan arbitrase yang telah disepakati oleh para pihak dalam perjanjian.

b. Pada kasus yang terjadi antara negara dengan badan hukum asing maupun badan hukum asing dengan badan hukum nasional, terjadi kombinasi antara hukum nasional dan hukum internasional. Oleh karena itu supaya terjadi keseimbangan maka kasus yang dibahas sebaiknya sebagian berhubungan dengan persoalan antar negara dan sebagian lagi antar negara dengan badan hukum asing atau badan hukum asing dengan badan hukum nasional/-asing lainnya.

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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: DECISION OF THE AD HOC COMMITTEE SETTING ASIDE THE AWARD RENDERED ON THE MERITS IN THE ARBITRATION BETWEEN AMCO ASIA CORPORATION ET AL. AND INDONESIA

[May 16, 1986]

Introductory Note*

On May 16, 1986, the Ad Hoc Committee, composed of Prof. Ignaz Seidl-Hohenveldern, Chairman, Prof. Florentino Feliciano and Prof. Andrea Giardina, unanimously annulled the ICSID award rendered on the merits on November 21, 1984 by an arbitral tribunal composed of Prof. Berthold Goldman, Chairman, Prof. Isi Foighel and Mr. Edward W. Rubin [24 I.L.M. 1022 (1985)]. The decision left untouched the "award" rendered on the question of jurisdiction in the same case on September 25, 1983 by the Arbitral Tribunal [23 I.L.M. (1984)]; (Clunet 1986.200, note Gaillard). See also the decision on the request of the Republic of Indonesia for recommendation of provisional measures [24 I.L.M. 365 (1985)].

This decision, reproduced below, caused great concern among specialists of international law (for the first comments, all critical, of this decision, see Mark B. Feldman, "The Annulment Proceedings and the Finality of ICSID Arbitral Awards" to be published in 2 ICSID Review, Foreign Investment Law Journal No. 1 (1987); Ph. Kahn "Le controle des sentences arbitralas rendues par un Tribunal CIRDI", CREDIMI, 1986 and E. Gaillard, "Chronique des sentences arbitrales CIRDI" to be published in Clunet 1987, No. 1). This decision is particularly alarming for the ICSID arbitration system given the annulment, on May 3, 1985, by the Ad Hoc Committee composed of Prof. Pierre Lalive, Chairman, Prof. Ahmed El-Kosheri and Prof. Ignaz Seidl-Hohenveldern of the award rendered on October 21, 1983, by Mr. Eduardo Jimenez de Arechaga, Chairman and Mr. William D. Rogers (with a dissenting opinion of Prof. Dominique Schmidt). (The award is reproduced in Clunet 1986.409, note Gaillard and the annulment decision in 1 ICSID Review Foreign Investment Law Journal 89 (1986). See also, Clunet 1987, No. 1, note Gaillard).

In the AMCO case, the dispute arose between foreign investors, AMCO Asia, its affiliates and assignees and Indonesia about the construction and subsequent management of the Kartika Plaza Hotel in Djakarta.

The hotel construction was completed substantially as planned but a dispute arose over AMCO's performance of the management portion of the Agreement. Finally, the owner, an Indonesian organisation linked with the Indonesian Army, sought to discontinue AMCO's involvement in the Agreement, and the Tribunal found that it

*[The Introductory Note was prepared for International Legal Materials by Emmanuel Gaillard, I.L.M. Corresponding Editor for France, Professor of International Law and of the Paris Bar].

enlisted armed forces of the Indonesian Government to take over control and ownership of the hotel. It also found that the Indonesian organisation persuaded the Indonesian Government to revoke the investment license. Accordingly, the Tribunal held that the Republic of Indonesia should pay to the investors the amount of US $3,200,000 with interest at the rate of 6% per annum on the ground that the acts of the owner were illegal self-help and that the assistance or lack of protection afforded to the foreign investor by the Army/Police was an international wrong attributable to the Republic. It also found the Republic of Indonesia liable for the unlawful withdrawal of the investment license on the grounds of (1) violation of Indonesian law which included (a) due process (b) a substantial justification for such removal, as well as (2) the violation of the principles of international law (a) pacta sunt servanda and (b) the respect of acquired rights [24 I.L.M. 1022 (1985)].

After extensive hearings and careful scrutiny of the award, the Ad Hoc Committee upheld the Tribunal's "finding that the action of Army and Police personnel was illegal" but annulled the "award as a whole" for the reason that the evidence before the Tribunal showed that as late as 1977, AMCO's investment of foreign capital duly registered with the Foreign Investment Law amounted to only US $983,992 and that the Tribunal "manifestly exceeded its powers" in determining that the investment had reached the sum of US $ 2,472,490.

This decision, which amounts to a review of the facts and of the substance of the applicable law, clearly departs from one of the strongest trends of international commercial arbitration, which limits any kind of judicial review (both in annulment and exequatur proceedings) to a limited number of cases and excludes any kind of review on the merits (See inter alia, Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the United Kingdom Arbitration Act of 1979 [18 I.L.M. 1248 (1979)], the 1981 French Decree on International Arbitration [20 I.L.M. 725 (1986)], the 1985 Belgian Statute [25 I.L.M. 725 (1986)], and Article 34 of the UNCITRAL Model Law on International Arbitration [24 I.L.M. 1302 (1985)]. This decision also goes far beyond the intention of the Convention's drafters (see inter alia, ICSID History of the Convention, Vol. 2, Part II, at 853-54).

It is to be hoped that the conception of the Ad Hoc Committee in the AMCO case, which is of course not binding on future Ad Hoc Committees, will not jeopardize the ICSID arbitration mechanism which, in many respects, is one of the most appropriate for State contracts.

D E C I S I O N

Rendered by the ad hoc Committee

Constituted by the Chairman of the Administrative Council
of the International Centre for Settlement of
Investment Disputes (ICSID)

In Accordance with Article 52 of the Washington Convention
of March 18, 1965

On the Application for Annulment Submitted by
the Republic of Indonesia
Against the Arbitral Award
Rendered on November 20, 1984

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

v.

Republic of Indonesia

(ARB/81/1)

Index

I - The Arbitral Award of November 20, 1984 and the Application for its Annulment

1. On March 18, 1985, the Republic of Indonesia (hereinafter referred to as "Indonesia") filed with the Secretariat of the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter referred to as "ICSID") an application for the annulment, under Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965, (hereinafter referred to as the "Convention") of an arbitral Award rendered on November 20, 1984 in ICSID Case No. ARB/81/1 (hereinafter referred to as the "Award"). The Arbitral Tribunal (hereinafter referred to as "Tribunal") which handed down the Award was formed in 1981 as a result of the filing by Amco Asia Corporation, a company incorporated in the State of Delaware, Pan American Development Limited, a limited liability company incorporated under the laws of Hong Kong (hereinafter referred to as "Pan American") and P.T. Amco Indonesia, a company incorporated under the laws of Indonesia (hereinafter referred to as "P.T.Amco") (the three companies being hereinafter collectively referred to as "Amco") of a request for arbitration entered by ICSID on January 15, 1981.

2. The Tribunal was composed of Mr.Edward W. Robin, of Canadian nationality, as arbitrator appointed by Amco; Prof. Isi Foighel, of Danish nationality, as arbitrator appointed by Indonesia and Prof. Berthold Goldman, of French nationality, as President appointed by the Chairman of the Administrative Council of ICSID.

3. 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 license 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 license; 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 license 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 license, 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 which 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.

4. 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".

5. Indonesia's Application for annulment was accompanied by a request for stay of enforcement of the Award. The Application having been registered by the Secretary General of ICSID on March 27, 1985, appointed Dr. Florentino P. Feliciano, of Philippine nationality, Prof. Andreä Giardina, of Italian nationality, and Prof. Ignaz Seidl-Hohenveldern, of Austrian nationality, as members of the ad hoc Committee, pursuant to Article 52(3) of the Convention. The ad hoc Committee elected Prof. Ignaz Seidl-Hohenveldern as Chairman.

6. Pursuant to Article 52(5) of the Convention and to Article 54(2) of the ICSID Arbitration Rules, the Secretary General, together with the notice of registration, informed both parties of the provisional stay of enforcement of the Award. On May 3, 1985, Amco submitted a memorandum in opposition to Indonesia's request to stay enforcement of the Award. On May 10, 1985, Indonesia filed a memorandum in support of continuing the stay of enforcement.

7. In the presence of Dr. Georges R. Delaume, representative of ICSID and Secretary General of the ad hoc Committee and of the attorneys for the parties (Ms. Carolyn B. Lamm, Dr. Gillis Wetter and Mr.Tupman of White & Case, Washington for Indonesia; Mr. William Rand, Mr. Robert N. Hornick and Mr. Paul de Friedland of Coudert Brothers, New York for Amco), the ad hoc Committee held an initial meeting on May 17, 1985 in Frankfurt in order to discuss various procedural questions. This meeting gave rize to a procedural order of the same day establishing the dates for the exchange of memorials and the dates for the oral proceedings, and dealing with various questions of detail.

8. By a further order also dated May 17, 1985, the ad hoc Committee granted to Indonesia a provisional stay of enforcement of the Award, provided Indonesia furnished an irrevocable and unconditional bank guarantee for payment of the Award or parts thereof in accordance with such final decision

as the ad hoc Committee might reach. The bank guarantee, with terms and provisions approved by the Chairman of the ad hoc Committee, was issued on July 3, 1985.

9. The ad hoc Committee met in Rome on September 7 and 8, 1985. By an order of September 7, 1985, the ad hoc Committee confirmed its understanding of the terms of the bank guarantee and confirmed the stay of enforcement until the issuance of its decision on the Application for annulment.

10. In accordance with the ad hoc Committee's order of May 17, 1985, and the ICSID Arbitration Rules, the Memorial of Indonesia was filed on August 30, 1985; Amco's Counter-Memorial was filed on October 15, 1985; the Reply of Indonesia was filed on November 1, 1985; and the Rejoinder of Amco on November 15, 1985. In its Memorial of August 30, 1985, Indonesia, while maintaining that the Tribunal's decision on jurisdiction constituted an excess of power, withdrew that ground for annulment initially submitted in its Application for annulment "so that the Committee might focus on other issues bearing directly on Indonesia's liability for payment" (Memorial, p.32).

11. Hearings on oral argument were held in Vienna on January 8,9 and 10, 1986, in the presence of Prof. Gautama for Indonesia and Mr. Tan for Amco. The members of the ad hoc Committee continued their deliberations on January 11-13, 1986. The complete files and transcripts of the proceedings before the Tribunal were at the disposal of the ad hoc Committee during the Vienna hearings. The ad hoc Committee requested the parties on January 13, 1986 to indicate where in these records and transcripts appear documents and statements bearing on certain arguments pleaded before the ad hoc Committee. The parties complied with this request.

12. After the Vienna hearings, the Chairman asked ICSID to furnish to the members of the ad hoc Committee copies of certain documents from the files of the Tribunal. ICSID complied with these requests.

13. The transcripts of the Vienna hearings were completed on February 19, 1986, and circulated to the members of the ad hoc Committee and to the respective counsel for the parties.

14. The ad hoc Committee met for a working session in Paris on April 1-5, 1986, having at its disposal the complete files and transcripts of the proceedings before the Tribunal. The ad hoc Committee met for a final working session in Vienna on May 12-15, 1986.

15. On May 12, 1986, the Chairman of the Committee asked ICSID to advise the parties that the proceedings were closed.

II - The law governing the Annulment Proceedings

16. The ad hoc Committee has been instituted to determine whether the Award, or any part thereof, should be annulled on one or more of the grounds for annulment established in Article 52(1) of the Convention. In its Application for annulment, Indonesia invokes one or more of three grounds - "that the Tribunal manifestly exceeded its powers" (Art. 52[1][b]); "that there has been a serious departure from a fundamental rule of procedure" (Art. 52[1][d]); and "that the award has failed to state the reasons on which it is based" (Art. 52 [1][e]) - in respect of several findings and conclusions of the Tribunal. The ad hoc Committee will deal with the various claims of nullity raised by Indonesia following the general sequence of the findings and conclusions adopted by the Tribunal in its Award, instead of grouping the specific claims under each of the three grounds for annulment set forth in the Convention. In carrying out its task, the ad hoc Committee will seek to "deal with every question submitted" to it by the parties (Art.48[3], Convention; "répondre à tous les chefs de conclusion" [in the French text]; "todas las pretensiones" [in the Spanish text], (cf. infra para. 34) every question, that is which reasonably relates to the principal issues before it. In view of the provisions of Article 52(4) of the Convention the ad hoc Committee believes that Article 48(3) of the Convention is as applicable to the annulment proceedings before it as to the original proceedings before the Tribunal.

17. As a preliminary matter, the ad hoc Committee has to consider certain general questions raised by the parties which bear directly upon the main features of annulment proceedings and the evaluation of asserted grounds of nullity under the Convention.

1. The law to be applied by the ad hoc Committee

18. The first general question which the ad hoc Committee must deal with preliminarily, refers to the law governing the annulment proceedings and to the law governing the resolution of the dispute among the parties.

The ad hoc Committee, having been established under the provisions of an international instrument - i.e., the Convention - believes that the proceedings before it are governed by the relevant Articles of the Convention and by the Rules of Procedure for Arbitration Proceedings (Arbitration Rules) adopted by the Administrative Council of ICSID. Problems of interpretation or lacunae which emerge have to be solved or filled in accordance with the principles and rules of treaty interpretation generally recognized in international law.

19. As to the law applicable in respect of the substance of the dispute before it, the ad hoc Committee considers Article 42 of the Convention controlling, in exactly the same way that the Tribunal regarded the same article decisive of the law governing the substantive dispute before it. Since the parties had not agreed on some other law governing their relations, the Tribunal (Award, para. 148) declared that it would apply to the dispute the law of Indonesia and such rules of international law as may be applicable.

20. It seems to the ad hoc Committee worth noting that Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure

precedence to international law norms where the rules of the applicable domestic law are in collision with such norms.

21. The above view of the role or relationship of international law norms vis-à-vis the law of the host State, in the context of Article 42(1) of the Convention, is suggested by an overall evaluation of the system established by the Convention. The law of the host State is, in principle, the law to be applied in resolving the dispute. At the same time, applicable norms of international law must be complied with since every ICSID award has to be recognized, and pecuniary obligations imposed by such award enforced, by every Contracting State of the Convention (Art. 54(1), Convention). Moreover, the national State of the investor is precluded from exercising its normal right of diplomatic protection during the pendency of the ICSID proceedings and even after such proceedings, in respect of a Contracting State which complies with the ICSID award (Art. 27, Convention). The thrust of Article 54(1) and of Article 27 of the Convention makes sense only under the supposition that the award involved is not violative of applicable principles and rules of international law.

22. The above view on the supplemental and corrective role of international law in relation to the law of the host State as substantive applicable law, is shared in ICSID case law (Decision of May 3, 1985 of an ICSID ad hoc Committee [1 Foreign Investment Law Journal p. 89 ss (1986)] annulling the Award of October 21, 1983, in Klöckner v. Republic of Cameroon, [ICSID Case No. ARB/81/2, Ciunet 1984 p.409], hereinafter referred to as "Klöckner ad hoc Committee Decision", para. 69) and in literature (e.g. Broches, The Convention for the Settlement of Investment Disputes between States and Nationals of Other States, Recueil des Cours Vol. 136 [1972,II] p. 392), and finds support as well in the drafting history of the Convention (See ICSID Convention, Analysis of Documents Concerning the Origin and the Formulation of the Convention, Vol.II/1, p.894 [Washington, D.C. 1970]; hereinafter referred to as "History").

23. The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention. The ad hoc Committee has approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.

24. The Tribunal recognized (Award, para. 147) that the parties had not authorized it to decide the case ex aequo et bono which the parties could have done (art. 42(3), Convention). Amco (Rejoinder, p.32) submits that this explicit recognition by the Tribunal created an "overwhelming" presumption, albeit a rebuttable one, that the arbitrators did indeed refrain from deciding ex aequo et bono any issue raised by the parties. The ad hoc Committee, however, has not been pointed to, and has been unable to discover, any legal principle or rule justifying acceptance of such a general presumption. Accordingly, the ad hoc Committee has had to examine closely both what the Tribunal said it was doing and what it was in fact doing, in resolving particular questions.

25. At the same time, the ad hoc Committee does not believe that the Tribunal had necessarily to preface each finding or conclusion with a specification of the Indonesian or international law rule on which such finding or conclusion rests. The Tribunal's conclusions or findings must of course be read in their context (cf. infra para. 40).

26. Neither does the ad hoc Committee consider that any mention of "equitable considerations" in the Award necessarily amounts to a decision ex aequo et bono and a manifest excess of power on the part of the Tribunal. Equitable

considerations may indeed form part of the law to be applied by the Tribunal, whether that be the law of Indonesia or international law. The parties discussed this issue before the ad hoc Committee in respect of both Indonesian law and international law. Postponing discussion of this item in relation to Indonesian law until examination of the issue of lawfulness of the revocation of P.T.Amco's investment licence (infra para. 104), the ad hoc Committee will consider it here in relation to international law.

27. Indonesia asserts that the International Court of Justice has applied equitable considerations, or rather "equitable principles" (cf. ICJ Reports, 1969, p. 48), only in the context of delimitation of maritime boundaries and that application of such considerations should remain restricted to such context (Reply, p. 18). It appears to the ad hoc Committee, however, that when the International Court of Justice looked into whether a claim for compensation was "reasonable" in the Corfu Channel Case (ICJ Reports, 1949, p.249), the Court was in effect taking account of equitable considerations in a context not involving maritime boundaries delimitation. The Court did much the same thing in its Judgment on the Merits in the Barcelona Traction Case (ICJ Reports, 1970, p. 48, para.92) and dealt directly with this problem in its Advisory Opinion of October 23rd, 1956 on Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO, (ICJ Reports 1956, p.100). The view that a tribunal applying international law may take account of equitable considerations in non-maritime boundaries cases, is fairly widely shared among scholars in international law (See, e.g., Verdross-Simma, Universelles Völkerrecht, p. 422 [3rd ed., 1984]; Rosenne, "Equitable Principles and the Compulsory Jurisdiction of International Tribunals". In Festschrift für Rudolf Bindschedler, p. 410 [1980]; Pirotte, "La Notion d'Equité dans la Jurisprudence Récente de la CIJ", 77 RGDIP p. 131 [1973]; and W. Friedmann, "The North Sea Continental Shelf Case: A Critique", 64 AJIL 234-235 [1970]).

28. The ad hoc Committee thus believes that invocation of equitable considerations is not properly regarded as automatically equivalent to a decision ex aequo et bono which, in view of the determination of the law applicable to the present case (supra para.24), would constitute a decision annulable for manifest excess of power. Nullity would be a proper result only where the Tribunal decided an issue ex aequo et bono in lieu of applying the applicable law.

2. Annulment proceedings and proceedings for completion or correction of an award

29. The second preliminary general question which the ad hoc Committee needs to address refers to the relationship between the annulment proceedings provided for in Article 52 of the Convention and the proceedings contemplated in Article 49(2) concerning the completion and correction of an award by the same ICSID arbitral tribunal which pronounced it.

30. The ad hoc Committee has before it an Indonesian claim of nullity relating to an alleged failure on the part of the Tribunal to answer all the questions submitted to it, in disregard of the requirement of Article 48(3) of the Convention that "the award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based". The specific claim of Indonesia here is that the Tribunal had wrongfully refused to consider some grounds which could have led it to conclude that the revocation by BKPM of the P.T.Amco license to do business in Indonesia was lawful, which grounds, however, had not been set forth in the BKPM order of revocation. In the view of Indonesia, this refusal by the Tribunal constituted a denial of equal treatment to the parties and hence a serious procedural defect and a ground for annulment of the Award (Art. 52 [1][e], Convention).

31. Upon the other hand, Amco (Counter-Memorial, p. 35) states that failure of the Tribunal to decide some of the questions submitted to it, is not, in itself, a ground for annulment but rather simply entitles a party to request from the Tribunal the completion or correction of the Award under Article 49(2) of the Convention. Article 49(2) provides that a Tribunal may, upon the request of a party made within 45 days from the date of rendition of the award, render its supplementary decision which becomes part of the original award.

32. The ad hoc Committee believes that the obligation set out in Article 48(3) of the Convention to "deal with every question submitted to the Tribunal and [to] state the reasons upon which [the award] is based", can find its sanction in Article 52 (1)(e) of the Convention. Failure to deal with one or more questions raised by the parties would entail annulment of the award where such omission amounts to "failure to state reasons upon which [the award] is based" (Art. 52 [1][e], Convention). Such an omission could, moreover, amount in particular situations to "a serious departure from a fundamental rule of procedure" (Art. 52[1][d]) and to a manifest excess of power (Art. 51[1][b]).

33. To support its above view, Amco (Counter-Memorial p.35) draws on the drafting history of the Convention and points in particular to the fact that a motion for insertion of a clause providing that failure to comply with the duty to state reasons could be a ground for annulment was rejected by a majority vote (History, II/1, p.849; Amco Exhibit 4). It seems worth noting, however, that, at the time such vote was cast, the present Article 52(1)(e) had already been approved and adopted (History, I, p. 210 and 230). Votes against the above motion cannot therefore necessarily be regarded as importing an objection to the content of the clause proposed, since the delegates voting against the motion may simply have found it redundant in view of the prior adoption of Article 52(1)(e).

34. Moreover, Article 49(2) of the Convention must be considered in its entirety. After authorizing a Tribunal to "decide any question which it had omitted to decide in the award", Article 49(2) goes on immediately to direct the Tribunal to "rectify any clerical, arithmetical or similar error in the award". Article 49(2) thus appears to offer a remedy merely for unintentional omissions to decide "any question" ("question" in the French text and not "chef de conclusion", "puntos" in the Spanish text and not "pretensiones", cf. supra para. 16). It may be safely assumed that arbitrators will strive in their award to express clearly at least the main reasons on which the award rests. Any omissions of relatively minor points may be repaired pursuant to Article 49(2) by simply inserting the Tribunal's conclusions thereon in the award, the main reasoning of the award remaining unaffected by such insertion. This evaluation of Article 49(2) as being limited in scope is approved by Pirrung, Die Schiedsgerichtsbarkeit nach dem Weltbankübereinkommen für Investitionsstreitigkeiten, p. 176 (Berlin, 1972).

35. In the present case, however, Indonesia alleges that the Tribunal had disregarded facts and arguments which, had they been considered, could have obliged the Tribunal to abandon the very bases of its Award. If the Tribunal had accepted as valid any of the arguments invoked in the Application for annulment, their insertion in the Award would have contradicted what had hitherto been the main lines of reasoning of the Award. Thus, the Tribunal would have been obliged to modify the rationale of the Award. However, the full or partial annihilation of the reasoning and conclusion of an award is the very task which the Convention allots to an ad hoc Committee created pursuant to Article 52(3) of the Convention, and not to the Tribunal which had rendered the Award.

36. It follows that the remedy provided by Article 49(2) would be inadequate to cope with the allegations set out in the Application before the present ad hoc Committee. Further, in line with the international law rule that a claimant does not need to exhaust inadequate remedies before resorting to remedies believed to be more efficient (Finland/Great Britain, Finnish Shipowners claim (1934) RIAA III, 1499, at 1503-1504; cf. Brownlie, Principles of Public International Law (1979), p. 498 and Jimenez de Aréchaga, International Law in the Past Third of a Century, Recueil des Cours 159 (1978 I) p.294) Indonesia can have recourse to Article 52(1) without having previously requested the Tribunal, under Article 49(2), to decide the questions which, according to Indonesia, it had omitted to decide in the Award. This conclusion of the ad hoc Committee finds support in Note B to Arbitration Rule 50 prepared by the ICSID Secretariat, and according to which an Application for annulment under Arbitration Rule 50 must be made separately from a request for supplementary decisions and rectifications under Arbitration Rule 49.

37. For the above reasons, the ad hoc Committee affirms its jurisdiction to decide the claim of Indonesia that the Tribunal seriously departed from a fundamental rule of procedure when it refused to consider other grounds for revocation of P.T.Amco's investment license, different from those adopted in the BKPM order. (On the substance of this claim cf. infra paras. 121-124).

3. Failure of an award to state the reasons on which it is based

38. The third preliminary issue upon which the parties present opposing positions and implications to the ad hoc Committee relates to the duty of an ICSID tribunal to state in its award the reasons upon which it is based (Art. 48(3)) and consequently to the meaning of failure to state the reasons on which the award is based as a ground for annulment (Art. 52(1)(e)). Indonesia urges that the mere presence or inclusion in the Award of a statement of reasons would be insufficient to avoid annulment if that statement is not reasonably capable of justifying the result reached by the Tribunal (Memorial, p. 24). The view taken by Amco, on the other hand, is that failure to state reasons as a ground for nullity requires no more than reference to a simple test of whether or not a statement of reasons is in fact set forth in the Award and does not refer to the quality of the reasoning adduced. To annul an award for inadequate reasoning would, in Amco's view, amount to reviewing the award on appeal, which is not the task given to an ad hoc Committee by Article 52 of the Convention. (Counter-Memorial, pp.37-38).

39. It has been claimed that the reasoning of an award would be incomplete if a reader of the award would not be able to find there all the reasons which prompted the arbitrators to reach their conclusions and which led to the findings in the operative part of the award (Broches, in History II/1 p. 519). The ad hoc Committee would, however, note that the International Court of Justice in its Advisory Opinion in the Fasla case (ICJ Reports 1973, p.210, para.88) rejected as too rigorous the claim that a tribunal should enter meticulously into every claim and contention by each side, or else see its award annulled.

40. An arbitral award addresses itself first and foremost to the parties before a tribunal, the parties thus are the readers to which the statements by an arbitral tribunal are presented in the first place. In the ICSID system, by refusing their consent to the publication of the award (cf. Art. 48, para.5) the parties may even prevent the emergence of other readers. The parties, moreover, may be expected to understand the award in its context. Uncontradicted pleadings and uncontested references to cases and authorities will enable them to fill what outside readers might deem to constitute lacunae in the reasoning of the award.

41. Prior to the decision of the Klöckner ad hoc Committee (supra para.22), the most useful discussion of the problem of lack or insufficiency of the supporting reasoning of an international arbitral award was to be found in the judgment of the International Court of Justice, and in the pleadings submitted to it, in the case of the Arbitral Award made by the King of Spain on December 23, 1906 (Honduras v. Nicaragua, ICJ Reports 1960, p.192; Pleadings Vol. II, p. 71, 346 and 469).

42. The ad hoc Committee in the Klöckner case read the duty of a tribunal to state reasons imposed by Article 48(3) and Article 52(1)(e) of the Convention as a duty to give "sufficiently pertinent reasons" for its award. The Klöckner ad hoc Committee referred expressly to the solution offered by the International Court of Justice in its judgment concerning the Award by the King of Spain (ICJ Reports 1960, p. 216) in refusing to annul that Award on the ground of lack or inadequacy of supporting reasons. The Court had found that that Award dealt "in logical order and in some detail with all relevant considerations" and contained "ample reasoning and explanations in support of the conclusions arrived at by the arbitrator". The Klöckner ad hoc Committee read this conclusion of the International Court of Justice in the context of the debate between Professor Guggenheim denying that insufficiency of motives should be a cause for annulment (Pleadings, Vol. II, p. 71) and Professor Bolin urging that any award must contain a "motivation suffisante"(ibid., p. 469) and "pertinente" (ibid., p.346). The Klöckner ad hoc Committee understood

the conclusion of the International Court of Justice as an acceptance of Professor Rolin's plea (Klöckner ad hoc Committee Decision, paras. 61 and 120).

43. This ad hoc Committee finds the above reading of the Klöckner ad hoc Committee convincing. If it be true that a full control and review of the reasoning followed by an ICSID tribunal would transform an annulment proceeding into an ordinary appeal, it is also true that supporting reasons must be more than a matter of nomenclature and must constitute an appropriate foundation for the conclusions reached through such reasons. Stated a little differently, there must be a reasonable connection between the bases invoked by a tribunal and the conclusions reached by it. The phrase "sufficiently pertinent reasons" appears to this ad hoc Committee to be a simple and useful clarification of the term "reasons" used in the Convention.

44. Neither the decision of the International Court of Justice in the case of the Award of the King of Spain nor the Decision of the Klöckner ad hoc Committee are binding on this ad hoc Committee. The absence, however, of a rule of stare decisis in the ICSID arbitrations system does not prevent this ad hoc Committee from sharing the interpretation given to Article 52(1)(e) by the Klöckner ad hoc Committee. This interpretation is well founded in the context of the Convention and in harmony with applicable international jurisprudence. Therefore this ad hoc Committee does not feel compelled to distinguish strictly between the ratio decidendi and obiter dicta in the Klöckner ad hoc Committee decision.

III - Time-Bar to Indonesia's Annulment Claims

1. The Plea of Time-Bar: General Considerations

45. Amco contends that the five pleas advanced by Indonesia for the annulment of the Award or parts thereof are time-barred (Counter-Memorial, pp. 48-49). Amco invokes Arbitration Rule 50(1)(c) which provides that an Application for annulment shall "state in detail . . . the grounds on which [it] is founded". The application for annulment must be made within 120 days after the date of

rendition of the Award (Art. 52(2), Convention). Amco claims that the pleas involved were raised by Indonesia only in the latter's Memorial of August 30, 1985; more than 120 days after rendition by the Tribunal of its Award on November 20, 1984, and consequently are time-barred.

46. It appears to the ad hoc Committee that Arbitration Rule 50(1)(c) is not adequately complied with by an Application for annulment which merely recites verbatim the specific subparagraph(s) of Article 52(1) of the Convention being invoked by the applicant. The thrust of Arbitration Rule 50 is not successfully avoided by coupling a recital of the subparagraphs invoked with a general reservation of a "right to supplement [a] presentation [of Indonesia's claims] with further written submissions" (Indonesia's Application for Annulment, p.8).

47. The letter of the Secretary General of ICSID dated March 18, 1985 registering the Application for annulment does not, by itself, resolve the time-bar argument of Amco. In this letter, relied on by Indonesia (Reply p.13), the Secretary General stated that he had "ascertained that the conditions for considering the request, as set forth in Article 52 of the ICSID Convention and in Rule 50 of the ICSID Arbitration Rules were satisfied". The registration of an Application by the Secretary General cannot, however, be considered as conclusive in this regard upon an Arbitral Tribunal (Holiday Inns v. Government of Morocco, ICSID Case No. ARB/72/1; Pierre Lalive, "The First World Bank Arbitration [Holiday Inns v. Morocco], Some Legal Problems", BYIL, 1980, p. 144, Note 2; and Parra, "The Screening Power of the ICSID Secretary General", News from ICSID [1985] No.2, p.12) nor upon an ad hoc Committee.

48. Indonesia (Reply, p.14) contends that Amco's time-bar argument is absurd as in effect requiring a party to file not just an application to annul but the complete memorial as well within 120 days from rendition of the Award. While the ad hoc Committee believes that to require a memorial within 120 days after rendition of an award need not be absurd, it does not consider Arbitration Rule 50 to have established such a requirement.

49. In the Vienna hearings (Transcript, p.511), counsel for Indonesia opposed Amco's reading of Arbitration Rule 50 [illegible] by emotionally pointing out that in its procedure and practice the International Court of Justice admits changes and additions to the submissions of the parties right up to the close of the written proceedings (See Rosenne, Procedure in the International Court, p.112 [1983]).

50. The ad hoc Committee does not believe there is any lacuna in the ICSID Arbitration Rules justifying recourse to the practice before the International Court as a model. It is useful to refer in this connection to Note B to Arbitration Rule 50 which states that the procedure there set out "is roughly analogous to that for the filing and registration of an original request for arbitration in accordance with the Institution Rules". Note X to ICSID Institution Rule 2(1)(e) states that this Institution Rule requires that the request for arbitration contain "information concerning the issues in dispute. No evidence on this subject need be submitted at this stage; the information given can be developed by the requesting party in subsequent phases of the proceeding". If applications for annulment are reasonably analogous to original requests for arbitration, and the ad hoc Committee believes they are, then the statements made in Indonesia's Application for annulment may be taken together with the development or amplification of such statements in Indonesia's Memorial.

51. The above general considerations would seem sufficient by themselves to lead to a denial of the time-bar plea of Amco. The ad hoc Committee, however, believes it useful to proceed to a detailed examination of the time-bar pleas of Amco, in order to verify whether the claims for annulment made by Indonesia can reasonably be considered as covered by the statements made in Indonesia's Application for annulment, which Application had been lodged in a timely manner.

2. the specific time-bar pleas of Amco

52. According to Amco, (Counter-Memorial p. 48-49), Indonesia has raised out of time the following new grounds in its Memorial: "(i) that the decision holding Indonesia liable for the participation of its Armed Forces in wrongfully seizing the Hotel was insufficiently reasoned;(ii) that the decision regarding Indonesia's due process violations seriously departed from a fundamental rule of procedure; (iii) that the calculation of the amount of foreign capital invested in the Hotel was a manifest excess of power, seriously departed from a fundamental rule of procedure, and was insufficiently reasoned; (iv) that the decision not to consider the merits of the alleged non-filing of investment implementation reports was a serious breach of fundamental rules of procedure and was insufficiently reasoned; and (v) that the order directing Indonesia to pay compensation outside Indonesia was insufficiently reasoned".

53. The ad hoc Committee believes that the grounds above pointed to by Amco are not really new grounds raised for the first time by Indonesia in its Memorial but were either in fact referred to in the Application or reasonably implicit in the Application. The statements in Indonesia's Memorial thus constitute developments or specifications of statements already made in the Application: (i) The action of Army and Police personnel is referred to in page 19 note 50 of the Application; (ii) The due process violations attributed to Indonesia are referred to in pages 14-15 of the Application; (iii) The calculation of the amount of foreign capital invested in the Hotel is dealt with in pages 13-14 of the Application; (iv) Although the alleged failure to file investment implementation reports is not mentioned expressis verbis on page 16 of the Application, it may be deemed covered by the reference to "unauthorized" transfers in page 16 of the Application; (v) The Application contains no reference to Indonesia's objection to the Award's requiring payment of compensation to Amco outside Indonesia. The ad hoc Committee accepts, however, Indonesia's statement that the order to pay compensation outside Indonesia is a "logical corollary" of the Award's requirement that compensation be paid in United States dollars (Factual

xendix B to Indonesia's Reply, at pp. 4-5). Indonesia did object in its plication (page 22) to the order to pay in United States dollars. The ad hoc mittee accordingly denies Amco's time-bar pleas.

IV - Alleged Waiver by Indonesia of Certain Annulment Claims

. Amco alleges (Counter-Memorial, p. 48) that Indonesia abandoned and herefore effectively withdrew two grounds for annulment set out in the plication (grounds E and F, pp. 18 and 21) since these grounds were not peated in Indonesia's Memorial.

5. Ground E of the Application for annulment relating to an alleged two onth limitation on lost profits is in fact mentioned in pages 91-92 of the morial, while in page 96 the Memorial objects to the order to pay ompensation in United States dollars (ground F) alleging failure of the Tribunal to state reasons for such order. Although the Memorial did not reiterate the further claim raised in page 23 of the Application that the Tribunal had also thereby manifestly exceeded its powers, the ad hoc Committee does not believe that such non-reiteration is adequate basis for finding waiver or withdrawal by Indonesia of this particular claim of nullity.

56. It will be noted that when Indonesia decided to withdraw its annulment claim relating to the jurisdiction of the Tribunal, Indonesia did so explicitly, leaving nothing to inference (cf. supra, para.10). Waiver and withdrawal of grounds for annulment appears to the ad hoc Committee to be so serious a matter that an intent to waive or withdraw cannot lightly be inferred from the mere non-repetition in the Memorial of particular grounds already set out in the Application.

V - The Substance of the Annulment Claims

A. Claims of Nullity Relating to Indonesia's Responsibility for the Acts of Army and Police Personnel on March 31 - April 1, 1980.

1. Legality of the acts of Army and Police personnel under Indonesian and international law.

57. Indonesia claims that the Tribunal manifestly exceeded its powers (Application, p. 19) and failed to state any reasons (Memorial, p. 96) in holding Indonesia responsible for the acts of Army and Police personnel in the Kartika Plaza Hotel from March 31 - April 1, 1980. Indonesia challenges (Memorial p. 79) the finding of the Tribunal that these acts of Army and Police personnel were violative of a special duty imposed by international law on States to protect foreign investors and their property (Award, paras. 171-172). In the view of Indonesia, the Tribunal should have applied Indonesian law and determined whether that law had established such a special duty, before undertaking to apply international law and any duties prescribed by such law.

58. The Tribunal found that the acts of P.T.Wisma involving the takeover of the management of the Hotel from P.T.Amco amounted to illegal self-help and that Army and Police personnel assisted in carrying out such illegal unilateral acts (Award, para.169). The ad hoc Committee reads this portion of the Award to mean that the Tribunal found the acts of P.T.Wisma, and therefore also the acts of the Army and Police personnel involved, to be illegal under Indonesian law. It is true that the Tribunal did not refer to any specific Indonesian statutory or regulatory provision nor to any Indonesian caselaw, but this omission is no more decisive of non-application of Indonesian law than it is indicative of an intent on the part of the Tribunal, at that point in the Award, to apply international law. Indonesia claims (Application, p. 19) that the Army and Police personnel concerned, as of May 20, 1980, the date when the Central Jakarta District Court granted to P.T.Wisma the provisional

right of management of the Hotel pending final resolution of the suit brought by P.T.Wisma against P.T.Amco, "had a duty (under Indonesian law) to assist P.T.Wisma as the lawful possessor of the Hotel". By making this statement, Indonesia must be taken to be simultaneously conceding that the same Army and Police personnel had also a duty under Indonesian law to protect on March 31 - April 1, 1980 P.T.Amco which was up to then in actual, peaceful and uncontested possession of the Hotel. From this position of Indonesia's counsel (Application, p. 19), the ad hoc Committee feels entitled to conclude that there existed, at all times material for present purposes, under general Indonesian law, a duty to protect a person, whether national or foreigner, in actual, peaceful possession of property. In the case of Amco, this duty is reinforced by the undertaking of Indonesia in Article 21 of the Foreign Investment Law (Law No.1 of 1967; Factual Appendix C to the Counter-Memorial before the Tribunal, Attachment 1) "not to restrict the right of control and/or management of the enterprises concerned" (cf. Award, para. 188, p. 78).

59. The ad hoc Committee is consequently unable to sustain Indonesia's contention that the Tribunal failed to evaluate the acts of the Army and Police personnel concerned under Indonesian law.

60. The Tribunal did find that, on the basis of the evidence submitted before it , the acts of the Army and Police personnel were not taken on the private initiative of the individuals concerned (Award, para. 91) and these individuals had acted as organs of the State of Indonesia (Award, para. 101; cf. Jimenez de Arechaga, op. cit. at 277; Report of the International Law Commission, Yearbook of the ILC (1975, vol. II) p.69). It has become unnecessary, however, for the ad hoc Committee, having reached the conclusion it has in the next preceding paragraph, to determine whether or not the Tribunal failed to state reasons in holding (Award, para. 171) that a special duty of States to protect foreign-owned property exists in public international law and that the acts of the Army and Police personnel involved constituted a violation of that duty and hence an "internationally wrongful act - - - attributable to the Government of Indonesia". The ad hoc Committee would nevertheless note that the existence or content of such a "special duty" is at best a controversial matter. A very considerable number of States reject that notion. United Nations General Assembly Resolution No. 3281 (XXIX) Article 2(2)(a), for instance, emphasizes that: "No State shall be compelled to grant preferential treatment to foreign investment". The ad hoc Committee would also note that the propriety of attributing the acts of the Army and Police personnel involved to the Republic of Indonesia was asserted or assumed in the Award (para.172, p.67) rather than demonstrated. Be that as it may, the ad hoc Committee finds it unnecessary to pass upon Indonesia's claim of nullity in this specific respect, having upheld the Tribunal's conclusion on the illegality of the acts of the Army and Police personnel concerned as a matter of Indonesian law.

2. Exhaustion of municipal remedies against the acts of Army and Police personnel

61. Indonesia denies (Memorial p.79) that the acts on March 31 - April 1, 1980 of the Army and Police personnel concerned amounted to an international wrong for which Indonesia is responsible. Indonesia's international responsibility would be engaged, in its view, only if Indonesian law offered no adequate means of redress against such acts. But Indonesian law does offer such remedies to both nationals and foreigners and if P.T.Amco chose not to avail itself of those remedies, such abstention should not work prejudice upon Indonesia.

62. Indonesia further argues (Memorial p.80 and 82) that the Tribunal manifestly exceeded its powers by holding that Amco could bring its claims for compensation or damages based on the acts of the Army and Police personnel involved directly to an ICSID Tribunal without previously seeking redress before the Indonesian courts in conformity with the general international law rule on exhaustion of local remedies. In the allegation of Indonesia, the Tribunal failed to state any reasons for its disregard of this rule.

63. The Tribunal did not in fact set out in the Award any reasons for not requiring Amco to exhaust local remedies. The ad hoc Committee, however, does not believe that this portion of the Award may be annulled on this account.

The Tribunal being a creature of the Convention was bound to apply the Convention, including Article 25 thereof. By acceptance of ICSID jurisdiction without reserving under Article 26 of the Convention a right to require prior exhaustion of local remedies as a condition for obtaining access to an ICSID tribunal, Indonesia must be deemed to have waived such right (cf. Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA", 1 Foreign Investment Law Journal p.10 (1986)). This view seems to be shared by Professor Hartono in her book (in Indonesian) on "Some Transnational Problems of Foreign Investment in Indonesia" (1972), pages 200-201 (an excerpt submitted to the Tribunal as Claimant's Legal Document 18 on March 1, 1984). The ad hoc Committee cannot disregard this circumstance (cf. supra para. 40) in evaluating this portion of the Award which embodies a conclusion compelled by the fundamental law of all ICSID tribunals.

64. Thus Amco could seek redress directly from the Tribunal for the action of the Army and Police personnel without need of exhausting Indonesian local remedies. The Tribunal did not exceed its powers nor fail to state reasons when, applying international law, it characterized the intervention of Army and Police personnel on March 31 - April 1, 1980 as an international wrong although Amco had not exhausted local remedies in Indonesia.

65. It is also claimed by Indonesia (Memorial, p. 92) 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 concerned and the revocation of the licence by BKPM (Award, para. 258). The Indonesian view is that such illegality, assuming it had initially existed, was effectively ended by the interlocutory decree of the Central Jakarta District Court dated May 28, 1980 in the action brought by P.T. Wisma against P.T.Amco authorizing P.T.Wisma to manage the Hotel during the pendency of the proceedings (Attachment 3 to Indonesia's Factual Annex B in the Proceedings before the Tribunal).

66. While that interlocutory order may have been sufficient for the time being to cure the illegality of the acts of the Army and Police personnel, the Tribunal cannot be regarded as having failed to apply Indonesian law when it found (Award, para. 258) that that illegality persisted even after issuance of

the interlocutory decree. The Tribunal noted (Award, para. 135) that on July 8, 1980, the Greater Jakarta Court as Appellate Court had granted P.T.Amco's request for postponement of implementation of the interlocutory decree. On August 4, 1980, the Supreme Court of Indonesia reversed the ruling of the Appellate Court and reinstated the interlocutory decree of the District Court (Award, para. 135). On July 9, 1980 - i.e., one day after the Appellate Court had restrained enforcement of the interlocutory decree and almost a month before the Supreme Court reinstated the same decree - the BKPM issued its order revoking Amco's investment license (Award, para. 128). In other words, shortly before issuance of the BKPM revocation order which the Tribunal eventually held unlawful (on this matter, see below, para. 105, acts of the Army and Police personnel which had enabled P.T. Wisma to wrest de facto control of the Hotel from P.T. Amco had in effect been regarded by the Appellate Court as once again illegal. The ad hoc Committee believes that the portion of the Award reaching the above conclusion cannot be annulled for manifest excess of power or for failure to state reasons.

3. The claim that the acts of the Army and Police personnel constitute a tort: jurisdiction

67. In the Vienna hearings (Transcript, p. 56), counsel for Indonesia argued that the acts of the Army and Police personnel on March 31 - April 1, 1980, if illegal under international law, constituted an international tort. A dispute over state responsibility for an international tort is, it was submitted, quite different from an investment dispute. The jurisdiction of the Tribunal conferred by Indonesia's acceptance (Exhibit 18 before the Tribunal) of ICSID arbitration in Article 9 of P.T. Amco's investment application of May 6, 1968 (Exhibit 4 before the Tribunal) was limited to jurisdiction over foreign investment disputes. Counsel for Indonesia urged that the Tribunal had manifestly exceeded its powers by assuming jurisdiction over the matter of legality of the acts of the Army and Police personnel.

68. The ad hoc Committee is unable to accept the above submission of Indonesia's counsel for it does not think of "international tort" and "investment dispute" as comprising mutually exclusive categories. The Tribunal

para. 188, at p.78) considered the acts of the Army and Police personnel involved as a disregard of Indonesia's commitments to foreign investors under Article 21 of Law No. 1 of 1967, Indonesia's Foreign Investment Law. In effect, the Tribunal did not manifestly exceed its powers when it considered the question of the legality of the acts of the Army and Police personnel as an integral part of the investment dispute between Amco and Indonesia. The jurisdiction of the Tribunal is not successfully avoided by applying a different formal characterization to the operative facts of the dispute.

69. The ad hoc Committee believes, moreover, that Indonesia is precluded from thus challenging the jurisdiction of the Tribunal. Indonesia has expressly waived (Memorial, pp. 31-32) the claims of nullity relating to the jurisdiction of the Tribunal which had been raised in the Application for annulment. If the present claim for nullity is correctly regarded as embraced in the Application, it has been effectively waived. If, upon the other hand, this claim of nullity is not covered by the Application, Indonesia is time-barred from presenting it for the first time at the January 1986 Vienna hearings.

B. Claims of Nullity Relating to the Procedure of Revocation of the P.T. Amco License

70. The Tribunal gave two bases for its ruling that BKPM had disregarded the requirements of due process in revoking the investment license issued to P.T. Amco. Firstly, the Tribunal found (Award, paras. 193-198) that P.T.Amco's license was revoked without BKPM giving P.T. Amco prior "warning" as required by Article 13(3) of BKPM decree 01/1977. Article 13(3) provides that revocation of a license "shall be preceded by the warning by the Capital Investment Coordinating Board (BKPM) to the investors concerned maximally 3 (three) times with the 1 (one) month interim period respectively". Secondly, the Tribunal found (Award, paras. 199-200) that in the administrative process leading to revocation of its license, P.T.Amco was given only one hour's hearing.

1. Claims concerning the absence of warning from BKPM

71. Indonesia argued before the Tribunal that a series of letters from t Bank of Indonesia (the Indonesian government agency charged with t registration of foreign investments) to P.T. Amco over the years repeated reminding the latter of the registration, or lack thereof, of the investme made or claimed to have been made by P.T. Amco (Exhibits No. 76, 79, 80, 83 86 to Indonesia's Counter-Memorial before the Tribunal) should be regarded substantially equivalent to the warnings contemplated in BKPM decree 01/197 The Tribunal (Award, paras. 196-197), considering the authorship, dates ar language of those letters refused to regard the letters by the Bank o Indonesia as substantial compliance with Article 13(3) of BKPM decree 01/197 requiring a warning by BKPM. Whatever one may think as to the necessity o propriety of the literalness with which the Tribunal interpreted Article 13(3 of the BKPM decree 01/1977, the ad hoc Committee does not believe itsel justified in annulling this portion of the Award for failure to apply th applicable law.

72. Counsel for Indonesia (Vienna transcript p.111) challenges the Tribuna for having thus applied an administrative regulation issued by BKPM, without the Tribunal having first measured the legality of this regulation in terms of the requirements of the applicable Indonesian law. However, the decree 01/197 of November 3, 1977, was issued by BKPM, an administrative agency of the Republic of Indonesia by virtue of the authority granted to it by the laws of Indonesia, i.e. by Art.6 of Presidential Decree No.54/1977 of October 3, 1977 (Factual Appendix C to the Counter-Memorial before the Tribunal of December 30, 1982, Att. 1, p. 64). For this reason, the ad hoc Committee believes that the Tribunal did not fail to apply the applicable law when it took into consideration also this Indonesian administrative regulation.

73. It is further argued by Indonesia (Memorial, p. 74) that the Tribunal failed to apply the applicable Indonesian law when it annulled or set aside the BKPM order of revocation of P.T.Amco's license for failure of BKPM to observe the three warnings rule.

74. Actually, the Tribunal did not purport to set aside the BKPM revocation order and did not seek to order restitutio in integrum. The Tribunal felt that it lacked the power to suspend or cancel the effects of the BKPM revocation order (Award, para. 202). An Indonesian court could repair procedural defects in a revocation order of an administrative agency by remanding the case back to the administrative agency for new or further proceedings. The Tribunal believed that it had no authority to act in like manner and that it had to accept the BKPM order as a definitive and closed administrative act. The Tribunal, not forming part of the Indonesian judicial system, could only award compensation to P.T. Amco for damages, if any, sustained by it from the definite revocation order. The amount of such compensation was of course dependent on whether or not the revocation was justified on substantive grounds (Award, paras. 191, 194 and 213; cf. infra para. 105).

2. Claims concerning the inadequacy of the hearing given to P.T.Amco

75. In its Award (paras. 199-201), the Tribunal, "quite apart from the issue of the absence of any warning", held in effect that P.T. Amco was denied a fair and adequate hearing in the course of BKPM's revocation procedure, a denial which the Tribunal held to be contrary "to the general and fundamental principle of due process".

76. It is not clear from the Award whether this second basis for the Tribunal's ruling on the illegality of the BKPM revocation order is obiter (cf. Award, beginning on para. 199) or not (cf. Award, second subpara. of para. 201). The ad hoc Committee therefore deems it necessary to examine the claims of Indonesia relating to this issue.

77. Indonesia alleges (Memorial, p. 76) that "the general and fundamental principle of due process" relied upon in the Award (para. 201) has every appearance of being based on equity and not on the law prescribed to be applied by Article 42(1) of the Convention. It is maintained by counsel for Indonesia (Vienna Transcript, pp. 382-384) that Indonesian administrative law does not include any general principles or standards of due process. It

may well be that the words "due process" do not figure in the Constitution of Indonesia. It is, however, affirmed by counsel for Indonesia that a person who regards himself aggrieved by an act of the government or administration may seek redress in the civil courts of Indonesia under Article 1365 of the Indonesian Civil Code. Such redress will be granted, it is further affirmed, if the decision of the administrative agency involved, on a case to case basis, is found to be arbitrary or ultra vires or not in conformity with the concepts of substantial justice prevailing in the community.

78. Moreover, according to counsel for Indonesia (Memorial, p. 75) under Indonesian law, and in the light of all the circumstances of the present case, the procedural defects, if any, in the BKPM process which culminated in the order revoking P.T.Amco's investment license, was not of such a nature or gravity as to compel an Indonesian court to set aside the BKPM revocation order. The general standards which Indonesian counsel affirms are part of Indonesian administrative law and which an Indonesian court would apply in resolving a challenge to the validity of an act of an administrative agency by a private person aggrieved thereby, involve the purpose and tenor of the relevant statute(s) as well as the concepts of reasonableness, proportionality, lack of arbitrariness and conformity with community notions of substantial justice. It appears to the ad hoc Committee that these general standards of Indonesian law are not qualitatively different from, and seem equivalent in a functional sense to, what the Tribunal appears to have had in mind in referring to "the general and fundamental principle of due process". It is true that the Tribunal did not seek to define the conditions for the application of this "general and fundamental principle". Indonesia, relying on certain statements contained in the decision of the Klöckner ad hoc Committee (Memorial, p. 77), claims that this portion of the Award is therefore vitiated by insufficient motivation. Since counsel for Indonesia have conceded that the general principles or standards here involved are applied, in the context of the Indonesian judicial system, on a case-by-case basis (Vienna Transcript, p. 382), the Award can scarcely be challenged for having relied on a general principle without discussing specific rules defining the scope of application of such principle.

"9. For those reasons, the ad hoc Committee holds that this portion of the Award is not vitiated by a failure to apply the applicable law amounting to a manifest excess of power on the part of the Tribunal, nor by failure to state reasons.

3.) Consequences of illegalities in the revocation procedure

80. In this respect Indonesia claims, moreover, (Memorial p.74) that the Tribunal manifestly misinterpreted and misapplied Indonesian law in establishing the legal consequences to be drawn from the procedural irregularities ascertained in the revocation proceedings. In this regard, the Tribunal held (Award, para. 201) that these procedural irregularities were sufficient grounds for concluding that the BKPM revocation order was illegal according to Indonesian law, entailing the further consequence of responsibility of Indonesia for damages towards Amco.

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

82. The ad hoc Committee believes that the Tribunal in its finding (Award para 201 in fine) concerning the illegality of the order because of procedural defects merely intended to state that the order did not fully comply with Indonesian administrative law. This intent is clearly suggested by the fact that the Tribunal immediately found it "necessary" (Award para.202 first line) to deal with the substantive reasons of the revocation, for the assessment of the amount of damages, if any, due because of the revocation.

83. The ad hoc Committee, therefore, rejects Indonesia's claim for annulment and holds that the Tribunal, by affirming the illegality of the revocation procedure while, at the same time, conditioning the award of damages upon the existence of substantive reasons for the revocation, did not manifestly exceed its powers in interpreting and applying Indonesian law in this regard.

C. Claims of Nullity relating to the Substantive Grounds of the Revocation Order of BKPM

84. Indonesia claims (Memorial, p.35) that the Tribunal seriously departed from a fundamental rule of procedure, manifestly exceeded its powers and failed to state reasons in finding the BKPM revocation illegal on substantive grounds as well.

85. The Tribunal held that the grounds set out in the BKPM order did not justify the revocation of P.T. Amco's investment license. These grounds were:

i) that P.T.Amco had not itself managed the Hotel as required in the license but had assigned the management to other persons during the period from October 15,1969 to June 1, 1978 without obtaining the required approval of BKPM (Award, paras. 207 and 217);

and

ii) that P.T.Amco had invested in the Hotel only US $ 1,399,000, of which US $ 1 million was in the form of a loan and US $ 399,000 in the form of "own capital (equity)", while P.T. was obliged to invest a total of US $ 4 million, of which US $ 3 million was to consist of its own capital and US $ 1 million in loan funds (Award, para.220).

The ad hoc Committee will examine the Tribunal's rulings on those two grounds seriatim.

1. Assignment of management functions to Aeropacific

86. In respect of the assignment of management functions by Amco the Tribunal concluded that ,"in principle", 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 license" (Award, para 216). The Tribunal also found, however (Award, para.217), that P.T.Amco had entered into two "sub-lease" agreements by which, with the consent of P.T.Wisma, the management of the Hotel had been transferred (first to Pulitzer-KLM-Garuda and later to P.T.Aerepacific) for nine years (from 1969 to 1978). To the Tribunal, it was "hardly credible that the Government was not informed about the two sublease agreements". The Government, having failed to impose sanctions from 1969 to 1978 and also from 1978 until the dispute broke out in 1980, could not in 1980 base its revocation order on these agreements. In the view of the Tribunal, the failure of P.T.Amco to carry out personally its obligation of management ceased to be material, and indeed had ceased altogether (P.T.Amco having resumed the management) at the time of the revocation (Award, paras.218 and 219). The ad hoc Committee is aware, just as the Tribunal was aware (Award, paras. 214 and 215) that the identity of the foreign investor is not a casual or incidental detail but rather an essential consideration of the host State's approving the investment application. Yet, the ad hoc Committee does not believe that by the above ruling, the Tribunal manifestly exceeded its powers by failing to apply the applicable law (e.g. Presidential Decree No.60/1969, art.4, Factual Appendix C to the Counter-Memorial before the Tribunal, attachment 3; Presidential Decree No.54/1977, art.6, ibid attachment 1, p. 54). Neither did the Tribunal fail to state sufficiently pertinent reasons for its ruling here.

87. Indonesia has also maintained (Memorial, p. 77) that the Tribunal seriously departed from a fundamental rule of procedure by treating the parties unequally in certain respects. One of these, it is alleged (Legal Opinion by Prof. W. Michael Reismen, p.56, Att.2 of Opinions of Legal Experts submitted with the Memorial), relates to above ruling by which the Tribunal effectively attributed to Indonesia the knowledge of P.T.Wisma of the two sublease agreements even though the Tribunal had earlier rejected Amco's argument that P.T.Wisma was an "alter ego" of the Republic of Indonesia and had refused to attribute to the latter the former's take over of the Hotel management (Award, paras.161-163). In contrast, the Tribunal refused to hold P.T.Amco as duly warned because the series of letters on P.T.Amco's continued failure to register its claimed investment emanated from Bank Indonesia rather than the BKPM directly.

88. The ad hoc Committee acknowledges that differing results were reached by the Tribunal in the two above situations. But the ad hoc Committee, after according due regard to the fundamental rule of equality of the parties, is unable to conclude that the Tribunal in evaluating the surrounding facts in the two situations clearly exceeded the scope of discretionary authority granted to it by Arbitration Rule 34 and must consequently refuse Indonesia's claim of nullity in this regard.

2. Shortfall in the investment required from P.T.Amco

89. Indonesia claims that the Tribunal manifestly exceeded its powers, seriously departed from a fundamental rule of procedure and failed to state sufficiently pertinent reasons for its findings that: (i) P.T.Amco had invested US $ 2,472,490, and that (ii) in the circumstances of this case, the shortfall of 1/6 of the required equity investment was not sufficiently material to justify the revocation by BKPM of P.T.Amco's license (Award, paras.240-241).

a) The calculation of the shortfall

90. The Tribunal undertook the task of determining the amount invested by P.T.Amco in the construction, outfitting and furnishing of the Hotel. This task was rendered difficult by the incompleteness of the evidence submitted by Amco as well as that submitted by Indonesia. The Tribunal did not find that P.T.Amco's records and accounts were stolen as P.T.Amco had claimed (Award, para.104) but the fact remains that P.T.Amco was expelled from its business premises under circumstances imposing at least the risk of loss of records. Thus, documents which in the ordinary course of business should have been in the possession of P.T.Amco and presented by it to the Tribunal, were submitted by Indonesia instead. At the same time, however, important documents such as those relating to the registration or the registerability

of foreign exchange supposedly infused into the project were not submitted to the Tribunal by P.T.Amco: a reasonably prudent foreign non-resident investor may be expected in the ordinary course of business to keep copies of such documents outside the host State. The incomplete character of the evidence submitted by Indonesia - e.g., the lack of copies of complete tax returns and financial statements by P.T.Wisma (a company wholly owned by Inkopad, itself controlled by the Government) and of investment reports of P.T.Amco - may also be noted. The relatively low capability of an administrative agency efficiently to store and monitor and enforce the submission of formally required documentation is commonly a reflection of the realities of developing countries, and not an indication of bad faith towards investors, domestic or foreign. It seems to the ad hoc Committee that the Tribunal was aware of all these difficulties and took them into account in distributing the burden of proof between the parties (Award, para.236).

91. Thus, the ad hoc Committee does not consider the claim of Indonesia (Reply, p. 31) of unequal treatment of the parties in the allocation of the burden of proof as successfully established and therefore does not regard annulment as justified in this respect. The assertion that the Tribunal systematically favored P.T.Amco in the evaluation of the evidence (Memorial, p. 90) is negatived by, among other things, the fact that the Tribunal did exclude significant sums (Award, paras.221-230) which, according to P.T.Amco, should have been considered as part of its investment and which, if so counted by the Tribunal, would have brought P.T.Amco's total figure above the critical level of US $ 3 million of equity capital.

92. In this regard, Indonesia argues (Memorial, p. 49-53) that important amounts included in the aggregate sum of US $ 2,472,490 found by the Tribunal to have been invested by P.T.Amco should have been excluded from the calculation of such investment, if the Tribunal had indeed applied Indonesian law.

93. By the end of the Vienna hearings (Transcript pp.62,301 et seq., 330 et seq.) it was firmly established, in the view of the ad hoc Committee, firstly that according to relevant provisions of Indonesian law, only investments recognized and definitely registered as such by the competent Indonesian authority (Bank Indonesia) are investments within the meaning of the Foreign Investment Law (Law No.1/1967). Soon after promulgation of the Foreign Investment Law, a Circular or Announcement of the Foreign Exchange Bureau of Bank Indonesia required foreign investors to submit evidence that the required amounts of foreign capital originating from outside Indonesia had in fact been invested in conformity with the provisions of the Foreign Investment Law (Announcement of the D.L.L.D. [Foreign Exchange Bureau, Bank Indonesia] of July 25, 1967, No.7/Inv./BUD/67 reproduced in Government of the Republic of Indonesia (ed.):"Investment in Indonesia Today" [1968], p.60 Attachment 2 of Factual Appendix C to the Counter-Memorial before the Tribunal). The Announcement went on to state that Bank Indonesia "shall determine by a written statement to the enterprise whether the [imported] goods/foreign exchange will be recognized as invested capital" (Art.III[4] ibid. also: a) Directives for Administering and Reporting Capital Entry in the Framework of Foreign Capital Investment, Bank Indonesia, of January 12, 1973, Attachment 6 of Factual Appendix C to the Counter-Memorial before the Tribunal; and b) Report on the Administration of Foreign Capital in the Framework of Law No.1 year 1967, of July 10, 1975, Circular Letter No.03/PTPm/VI/ED/1971 from the Capital Investment Technical Committee, Attachment 4 of Factual Appendix C to the Counter-Memorial before the Tribunal). This approval and registration requirement is a principal mechanism for implementation of Article 1 of the Foreign Investment Law which limits foreign investment eligible for the incentives provided in that law to direct investment of foreign capital "made in accordance with or based on the provisions of this law".The determination of Bank Indonesia is, under Indonesian law, dispositive of the amount of approved or qualified foreign investment made by a foreign investor in Indonesia, such as P.T.Amco (cf. Legal Opinion of Prof.Komar, in Opinions of Legal Experts submitted by Indonesia with the Memorial, pp.11-12, 18-19).

94. It was also clearly established at the Vienna hearings that P.T.Amco failed to obtain definitive registration with Bank Indonesia of all the amounts claimed to have been invested by it in the Hotel project. It was noted by counsel for Amco (Vienna Transcript, p. 300) that Amco in

the beginning tried to validate the amounts for which it had claimed provisional registration but that Amco soon ceased its efforts in this regard. Amco suggested that Bank Indonesia had been unwilling to register the amounts provisionally claimed by Amco to have been invested. Indonesia's counsel countered (Vienna Transcript, p.505), however, that Article 1365 of the Indonesian Civil Code provided a remedy against any arbitrary refusal of Bank Indonesia to register investment actually made by Amco in conformity with the requirements of the Foreign Investment Law and that Amco through the years never invoked that remedy but had on the contrary disregarded the series of written reminders from Bank Indonesia on registration.

95. The evidence before the Tribunal showed that as late as 1977, Amco's investment of foreign capital duly and definitely registered with Bank Indonesia in accordance with the Foreign Investment Law, amounted to only US $ 993,992 (Exhibit No.83 to Indonesia's Counter-Memorial before the Tribunal). The Tribunal in determining that the investment of Amco had reached the sum of US $ 2,472,490 clearly failed to apply the relevant provisions of Indonesian law. The ad hoc Committee holds that the Tribunal manifestly exceeded its powers in this regard and is compelled to annul this finding.

96. The failure of the Tribunal to seize the critical importance of P.T.Amco's duty to register its claimed inward investment of foreign exchange was, in the impression of the ad hoc Committee, the result of the basic rule on the matter (cf. supra para. 93) having been obscured by the lengthy arguments and counterarguments on accounting principles and problems on, e.g., deductible taxes, undistributed profits and depreciation. Not that such discussions were redundant; they would have been important, for instance, had the Tribunal reached a different conclusion on the issue of the investment shortfall of Amco and come to confront Amco's plea of unjust enrichment on the part of Indonesia (cf. Award, para.149). The basic rule that only approved and registered foreign capital inputs are investments within the contemplation of the Foreign Investment Law was in fact presented in the briefs and hearings before the Tribunal (e.g., Mr.Usman, Washington hearing, Transcript p.1231; Indonesia's Counter-Memorial before the Tribunal p.53; and Factual Appendix C to the Counter-Memorial before the Tribunal p.5). The Tribunal became preoccupied, as it were, with finding its way through the complicated procedures conceived by P.T.Amco for the financing of the construction of the Hotel building and the operation and management of the Hotel. In doing so, the Tribunal was assisted by two firms of accountants specially retained by the respective parties. The accountants' reports were reviewed by the Tribunal, but it is not clear to what extent either firm sought to apply general accounting principles or the rules administered by the Indonesian foreign investment regulatory agencies.

97. It is also necessary to note that the Tribunal in its calculation of the investment of P.T.Amco adopted the total sum set out in the BKPM revocation order as P.T.Amco's investment - i.e., US $ 1,399,000 which is identical with the entry in P.T. Amco's unaudited balance sheet of March 30,1970 of "shares placed and deposited" (Amco's Exhibit No.64 before the Tribunal). The Tribunal apparently, however, overlooked the fact that, according to the BKPM revocation order, "P.T.Amco Indonesia has only desposit (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" (Award para. 204;). If it be assumed that BKPM's finding that P.T.Amco's share capitalization figure of US $ 1,399,000 had in fact included US $ 1,000,000 of loan funds, was correct, then the Tribunal had effectively failed to apply Article 2 of the Foreign Investment Law which limits qualified foreign investment to investment of equity capital. The Tribunal, in any case, failed to state reasons for counting the entire US $ 1,399,000 as equity capital and not merely US $ 399,000 (assuming the BKPM finding was correct). If, upon the other hand, it be assumed that the BKPM finding was not correct and the entire US $ 1,399,000 had somehow become "equity capital", then the Tribunal had still failed to apply Article 2 of the Foreign Investment Law and to state reasons for including the following item: " 6. Unamortized balance of the U.S. $ 1,000,000 ADB loan - [US $] 451,329" (Award, para.238 p.110) as part of the (equity) capital investment of P.T.Amco. Neither P.T. Amco which had originally incurred the US $ 1,000,000 loan from ADB (Award, para. 62) nor P.T.Aerospacific who later assumed the obligation of repaying the dollar loan to ADB (Award, para. 67), pretended to have obtained authorization from

any competent Indonesian public authority to consider such loan funds as equity investment of P.T. Amco (cf. Legal Opinion of Prof. Kaiser, p.17 in Opinions of Legal Experts submitted by Indonesia with the Memorial). The ad hoc Committee acknowledges that the Tribunal was aware of the rule excluding loan funds from the foreign capital investment contemplated by the Foreign Investment Law (Award, paras. 222 and 236, p.107) and therefore concludes that the Tribunal seems to have contradicted itself. At least, this impression is not fully disproved by the text of the Award itself (para. 236i, at p.107).

98. For the above reasons, the ad hoc Committee feels obliged to consider that the Tribunal manifestly exceeded its powers in failing to apply fundamental provisions of Indonesian law and failed to state reasons for its calculation of P.T.Amco's investment.

b) the standard of materiality

99. Indonesia challenges the Tribunal's ruling that the shortfall in Amco's investment - determined by the Tribunal to amount to 1/6 of the required level of investment - was not material and did not therefore justify the revocation of P.T. Amco's investment license. In the view of Indonesia, the Tribunal manifestly exceeded its powers and failed to state reasons for this ruling (Memorial, pp. 41-44; 45-48).

100. Indonesia begins by denying the existence of a materiality rule in Indonesian administrative law while admitting that Indonesian civil or contract law contains such a rule. Indonesia continues by insisting that the Tribunal should have decided the issue of materiality of P.T. Amco's shortfall by referring to Indonesian administrative law (Memorial, p.43). P.T.Amco, on the other hand, affirms that this issue was properly governed by Indonesian civil law (Counter-Memorial, p.74).

101. The Tribunal did not state expressis verbis on whether its ruling on the non-materiality of a shortfall of 1/6 of the prescribed minimum amount rested on Indonesian administrative or civil law. The Tribunal characterized the "application-approval relation" between P.T. Amco and Indonesia as "a sui generis relationship comparable to a contract" (Award, para. 189), a relationship "not identical to a private law contract" but nonfulfillment of the duties of which gives rise to consequences "substantially identical to the parallel rule concerning contracts" (ibid.). This characterization apparently enabled the Tribunal to apply the materiality test considered to form part of Indonesian civil law to the BKPM revocation order, while qualifying such order as an administrative act (Award, p. 192).

102. Indonesia resists this conclusion reached by the Tribunal and maintains that the applicable standards are those of Indonesian administrative law (Reply, p.29). The ad hoc Committee is not able to share the view suggested by Indonesia. It appears to the ad hoc Committee that the general notion of materiality is not alien to Indonesian administrative law, though that notion may bear different names in different contexts. For instance, Indonesia itself invoked the general notion that a lawful reaction to a wrong must be proportionate to the wrong itself. Thus Indonesia pleaded that BKPM's omitting the three warnings to P.T. Amco before revocation of the latter's license was not an error serious enough to render the revocation order automatically illegal (Memorial, p. 74). In the same vein, Indonesia argued that P.T. Amco's failure to register capital investment allegedly brought in by P.T. Amco was not merely a failure to comply with a formalistic requirement but a matter of grave national concern to Indonesia (Memorial, pp. 59-60). Since Indonesia may thus be regarded as conceding the relevance of materiality understood as proportionality in its administrative law, whether the Tribunal applied a materiality test under Indonesian administrative or civil law is basically a moot question.

103. Because the ad hoc Committee has annulled the conclusions of the Tribunal on the calculation (supra para. 90) and on the amount of P.T.Amco's investment (supra para. 95), it follows that the Tribunal's ruling on the non-materiality of the shortfall of P.T.Amco's investment must also fall. Since the duly registered investment of P.T.Amco amounted to only US $ 983,992, the shortfall was US $ 2,016,008 or 67.20% of the requisite equity investment. Upon the hypothesis that the statements made in the BKPM revocation order (US $ 1,000,000 in loan funds, US $ 399,000 in equity funds) are correct, the shortfall would escalate to US $ 2,601,000 or 86.70% of the required equity capital. The ad hoc Committee concludes that whatever standard of statutory intent, substantial justice, materiality,

reasonableness or proportionality, of civil or administrative law, of Indonesian law or international law , be employed, the revocation order must be regarded as a reasonable and proportional, and hence lawful, response.

104. With regard to the reasons given by the Tribunal in holding a shortfall of 1/6 of the required investment not material in the circumstances of this case, Indonesia argues (Memorial, p.47) that whether P.T.Amco (had it be given due warning by BKPM) would have been able to prove a higher amount of investment, was entirely a matter for conjecture. It is also contended by Indonesia (ibid.) that to suppose that BKPM would have been willing to permit P.T. Amco to make good any remaining shortfall after the time-limit for making the investment had expired, was just as speculative . While one may share Indonesia's view about the hypothetical or speculative nature of the reasons adduced by the Tribunal, the ad hoc Committee thinks it unnecessary to deal with these reasons, having already annulled the conclusions of the Tribunal on the amount and calculation of P.T.Amco's investment. It perhaps remains only to note that hypothetical reasons are not *per se* insufficient reasons (Klockner ad hoc Committee Decision, para.125) and an arbitral tribunal may, in some situations, well be entitled to take account of loss of opportunities suffered by a party. Finally, Indonesia complains that the Tribunal's statement "that the Hotel was effectively built and is now a part of the travel and touristic facilities of the City of Jakarta" (Award, para.242) in effect evidences resort to equity as a basis for decision which, to Indonesia, constitutes an excess of power. The statement of the Tribunal is clearly *obiter* and while it would be interesting to examine recourse to equitable considerations as part of the applicable law as distinguished from resort to decision *ex aequo et bono*, the ad hoc Committee believes there is no need to do so.

VI - Consequences of the Annulment of the Part of the Award relating to the Illegality of the Revocation Order

1. On the grant of damages for illegal revocation of the licence

105. For the reasons set out above paras. 95 and 103, the conclusion of the Tribunal (Award para. 241) that BKPM was not justified in revoking Amco's licence on account of the shortfall of the investment, which the Tribunal calculated without regard to the applicable law and held immaterial, has to be annulled.

106. However, if BKPM was not unjustified in revoking the licence on substantive grounds, then, according to the findings of the Award itself (supra para. 74), no compensation was due for the lack of three warnings and for other procedural defects of the revocation order. Therefore, the part of the Award granting P.T. Amco damages on this account has to be annulled.

2. On P.T. Amco's right to manage the hotel

107. 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 Kartika Plaza Hotel as of the day of issuance of the revocation order, (July 9, 1980), whatever would have been the outcome of the litigation begun by P.T.Wisma against P.T. Amco before the Jakarta Courts.

3. On the grant of damages resulting from the action by Army and Police personnel

108. The conclusions of the ad hoc Committee relating to the revocation order do not affect the Tribunal's finding as to the illegality of the action by Army and Police personnel. The ad hoc Committee, therefore, does not annul

VII - Modalities of the Payment of Compensation

118. Indonesia challenges (Memorial p.89) the conclusions of the Tribunal on damages to be paid in US dollars outside Indonesia for failure to state reasons and as a manifest excess of powers. The ad hoc Committee finds that the Tribunal gave sufficiently pertinent reasons both for payment of damages in US dollars as well as for payment outside Indonesia, having based these conclusions, inter alia on its interpretation of the word "repatriation" in Art. 20 of Indonesia's Foreign Investment Law (Award, para 280). The Tribunal's amplification concerning international law on this issue appears obiter to the ad hoc Committee. Moreover, it may be recalled that Indonesia concedes - albeit in the context of the time-bar issue - that the Award's order to pay damages outside Indonesia is a "logical corollary" to payment in US dollars (cf. supra para. 53).

119. For these reasons the ad hoc Committee holds that, in this respect, the Tribunal, since it interpreted and applied Indonesian law, did not manifestly exceed its powers.

120. Indonesia challenges (Memorial p.89), for failure to state reasons, the conclusion of the Tribunal (Award para.280) that the conversion of any amounts due as damages from rupiahs into US dollars should be made as of the date on which the damage occurred. The ad hoc Committee finds that the Tribunal reached that result by referring to several provisions of Law no. 1/1967 (which authorizes "the investor to repatriate its capital and earnings"). Moreover, the ad hoc Committee recalls the provisions of Article 1365 of the Indonesian Civil Code (cited in Award, para. 247) imposing upon a person causing a loss to another in violation of law a duty to "replace" said loss. The reference to international law made by the Tribunal appears obiter to the ad hoc Committee in this regard.

VIII - Consideration of "Other Grounds" Not Mentioned in the Revocation Order

121. The Tribunal refused to consider some other grounds possibly justifying the revocation of P.T. Amco's license which were not mentioned in BKPM's revocation order of July 9, 1980, but which had nonetheless been mentioned in the internal files prepared by BKPM. The most serious of these grounds related to failure by P.T.Amco to report to Bank Indonesia concerning the transfers abroad of large amounts of capital, non-submission of reports to BKPM concerning the realization of P.T. Amco's investment and alleged tax manipulations, in addition to disqualification for tax benefits to which P.T. Amco would have been entitled only if P.T. Amco had indeed completed its investment.

122. Indonesia alleges (Memorial p. 57 ss) that the Tribunal had treated Indonesia and P.T. Amco unequally and thus had violated a fundamental rule of procedure when it refused to consider these other grounds. According to Indonesia (Application p.18), while P.T. Amco was allowed to submit its case to the Tribunal de novo, i.e. adducing arguments not raised by P.T. Amco in the Jakarta Courts, Indonesia received unequal treatment as it was restricted to arguing its case before the Tribunal only on the grounds adduced in BKPM's revocation order.

123. Here, as in other parts of the Award, the ad hoc Committee finds no unequal treatment of the parties. The de novo argument raised by Indonesia is unconvincing since the dispute in the Jakarta Courts involved P.T. Wisma and P.T. Amco, whereas the revocation order as well as the arbitration proceedings before the Tribunal concerned P.T. Amco and Indonesia.

VII - Modalities of the Payment of Compensation

118. Indonesia challenges (Memorial p.89) the conclusions of the Tribunal on damages to be paid in US dollars outside Indonesia for failure to state reasons and as a manifest excess of powers. The ad hoc Committee finds that the Tribunal gave sufficiently pertinent reasons both for payment of damages in US dollars as well as for payment outside Indonesia, having based these conclusions, inter alia on its interpretation of the word "repatriation" in Art. 20 of Indonesia's Foreign Investment Law (Award, para 280). The Tribunal's amplification concerning international law on this issue appears obiter to the ad hoc Committee. Moreover, it may be recalled that Indonesia concedes - albeit in the context of the time-bar issue - that the Award's order to pay damages outside Indonesia is a "logical corollary" to payment in US dollars (cf. supra para. 53).

119. For these reasons the ad hoc Committee holds that, in this respect, the Tribunal, since it interpreted and applied Indonesian law, did not manifestly exceed its powers.

120. Indonesia challenges (Memorial p.89), for failure to state reasons, the conclusion of the Tribunal (Award para.280) that the conversion of any amounts due as damages from rupiahs into US dollars should be made as of the date on which the damage occurred. The ad hoc Committee finds that the Tribunal reached that result by referring to several provisions of Law no. 1/1967 (which authorizes "the investor to repatriate its capital and earnings"). Moreover, the ad hoc Committee recalls the provisions of Article 1365 of the Indonesian Civil Code (cited in Award, para. 247) imposing upon a person causing a loss to another in violation of law a duty to "replace" said loss. The reference to international law made by the Tribunal appears obiter to the ad hoc Committee in this regard.

VIII - Consideration of "Other Grounds" Not Mentioned in the Revocation Order

121. The Tribunal refused to consider some other grounds possibly justifying the revocation of P.T. Amco's license which were not mentioned in BKPM's revocation order of July 9, 1980, but which had nonetheless been mentioned in the internal files prepared by BKPM. The most serious of these grounds related to failure by P.T.Amco to report to Bank Indonesia concerning the transfers abroad of large amounts of capital, non-submission of reports to BKPM concerning the realization of P.T. Amco's investment and alleged tax manipulations, in addition to disqualification for tax benefits to which P.T. Amco would have been entitled only if P.T. Amco had indeed completed its investment.

122. Indonesia alleges (Memorial p. 57 ss) that the Tribunal had treated Indonesia and P.T. Amco unequally and thus had violated a fundamental rule of procedure when it refused to consider these other grounds. According to Indonesia (Application p.18), while P.T. Amco was allowed to submit its case to the Tribunal de novo, i.e. adducing arguments not raised by P.T. Amco in the Jakarta Courts, Indonesia received unequal treatment as it was restricted to arguing its case before the Tribunal only on the grounds adduced in BKPM's revocation order.

123. Here, as in other parts of the Award, the ad hoc Committee finds no unequal treatment of the parties. The de novo argument raised by Indonesia is unconvincing since the dispute in the Jakarta Courts involved P.T. Wisma and P.T. Amco, whereas the revocation order as well as the arbitration proceedings before the Tribunal concerned P.T. Amco and Indonesia.

122. In so far as Indonesia alleges these other grounds as hypothetical justification for the lawfulness of BNTH's revocation order, the ad hoc Committee believes that the Tribunal gave sufficient reasons for holding these grounds irrelevant for this purpose (Award para. 204). Moreover, these other grounds do not figure in Indonesia's counter-claim as independent claims in addition to the recovery of tax and import facilities granted to P.T.Amco. In this respect, too, the ad hoc Committe believes that the Tribunal did not violate fundamental rules of procedure in considering these grounds irrelevant. However, the ad hoc Committee notes that, since the Tribunal did not find it necessary to rule on the possible additional grounds for the revocation order, there was no substantive decision of the Tribunal on these points.

IX - Costs

125. In view of the fact that both parties showed equal diligence in helping the ad hoc Committee to reach its conclusions, the ad hoc Committee finds that each of the parties should contribute in equal parts to the costs of the ad hoc Committee and that each party should bear its own costs for legal counsel.

X - Award

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 finding that the action of Army and Police personnel on March 31 - April 1, 1980 was illegal. The annulment extends, however, to the findings on the duration of such illegality and on the amount of the indemnity due on this account. The bank guarantee issued by Indonesia on July 3, 1985 (cf. supra para 8) will expire in accordance with its terms.

Done in Paris, May 16, 1986

Ignaz Seidl-Hohenveldern

Florentino P. Feliciano

Andreas Giardina