Arbitral Award on Jurisdiction of September 25, 1983

Arbitrators: Prof. Berthold Goldman, Chairman; Prof. Dr. jur. Isi Foighel, Edward W. Rubin

Parties: Claimants: Amco Asia Corp. (U.S.) and others; Respondent: Republic of Indonesia

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Subject matters:
- jurisdiction over parties to the dispute
- jurisdiction over matter in dispute
- jurisdiction: estoppel or waiver

FACTS

In 1968 an agreement was concluded for the construction of the Kartika Plaza Hotel in Indonesia. The investment was authorized for a period of 30 years. For this purpose, an application was made by Amco Asia Corporation, a United States Corporation, to establish P.T. Amco Indonesia, a subsidiary established under Indonesian law. The entire management of P.T. Amco was to be carried out and controlled by Amco Asia. The application contained in Art. IX a clause providing for ICSID arbitration. In 1972, a block of shares of P.T. Amco was transferred from Amco Asia to Pan American Development, Ltd., a Hong Kong company.

Claimants alleged that in 1980, the hotel was seized in an armed military action, that the investment license was revoked by the Indonesian Investment Board and that the Lease and Management Contract concluded with P.T. Wisma (owner of the land on which the hotel was built) was rescinded by the Jakarta Court in an action initiated by P.T. Wisma against P.T. Amco. On January 15, 1981, Amco Asia, Pan American Development Ltd. and P.T. Amco collectively filed a request for arbitration against the Republic of Indonesia. They disputed the right of the Republic to seize the investment and revoke the license.

Following an unsuccessful challenge of an arbitrator by Respondent, Claimants filed a Statement of facts and law, dated June 21, 1982, in which they requested compensation of US$ 12,393,000, together with interest and costs.

In its Counter memorial of December 30, 1982, Respondent raised objections to the Arbitral Tribunal’s jurisdiction over the claims advanced by Amco Asia and Pan American, claiming that Indonesia had not consented to the jurisdiction in respect of a dispute between Indonesia and the two companies, respectively. They further requested the Tribunal to decide whether it had jurisdiction over the claims of P.T. Amco, claiming that there were questions whether Indonesia had effectively
consented that P.T. Amco, a national of the Republic of Indonesia, be treated as a United States national for the purposes of the Convention (Art. 25(2)(b)).

As an alternative objection, should the Tribunal decide that it did have jurisdiction in respect of P.T. Amca, Respondent requested the Tribunal to decide that it did not have jurisdiction over the claims relating to the hotel seizure and the termination of the lease agreements by P.T. Wisma, the latter not being a Contracting State or on agency thereof, and such disputes between private parties being outside the jurisdiction of the Centre. Further, Respondent requested the Tribunal, should it find that P.T. Wisma and Indonesia are one and the same as contended by Claimants, to decide that P.T. Amco is precluded from invoking and relying on consent by Indonesia to jurisdiction regarding the hotel seizure and termination of lease agreements because of its failure to invoke the ICSID arbitration clause in opposition to the Jakarta Court proceedings, and to declare P.T. Amco's claims regarding the termination of the lease agreements as inadmissible.

On April 1, 1983, the Tribunal decided that the "legal objections to jurisdiction raised by Respondent" were to be dealt with as a preliminary matter, proceedings on the merits already having been suspended on January 21, 1983.

The Tribunal declared itself competent to decide on the Respondent's objections, citing the Convention, Art. 41(2) and formulated three sets of issues which it would consider:

A. Has the Tribunal jurisdiction over the parties to the dispute?
B. Has the Tribunal jurisdiction in respect of the matters in dispute, or some or none of them?
C. Are the Claimants estopped from invoking, or did they waive the right to invoke the Tribunals jurisdiction?

EXTRACT

A. JURISDICTION OVER THE PARTIES

A-1. P. T. Amco

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

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

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

[...]

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C. ESTOPPEL AND WAIVER

C-1. Estoppel

"44. The Tribunal notes that four out of the five grounds for estoppel hereabove analysed (namely i, iii, iv and v) relate to the 'lease dispute' between P.T. Amco and P.T. Wisma.

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

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

"Relying on the foregoing the Respondent requests the Tribunal to conclude that the Claimants are now precluded from asserting that P.T. Wisma is the 'alter-ego' of Indonesia, and in consequence that P.T. Wisma and Indonesia are one and the same.

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

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

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

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

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

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

"Another apt definition may be found in the case of Maclaine vs Gatty (1921), A.C. 376 where at page 382 Lord Birkenhead stated:

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

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

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

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

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

"49. For all the above stated reasons,

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

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

"(3) however, the value of the assertions or of the evidence thus produced will have to be decided upon when deciding on
the merits; at that time, the whole behaviour of both parties, and in particular their successive positions or statements
would have to be taken into account."

[...]

1Art. 25(2)(b) of the Convention reads: "(2) 'National of another Contracting State' means: "(b) any juridical person which
had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties
consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the
Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should
be treated as a national of another Contracting State for the purposes of this Convention."

2Art. 41(1) of the Convention reads: "The Tribunal shall be the judge of its own competence."

3Ground i for estoppel was as follows: "(i) The manner in which P.T. Amco has dealt with what has come to be called in
these proceedings the 'alter ego theory' in the Jakarta Court proceedings, and the manner in which the Claimants have
dealt with same during the proceedings herein, namely that in the Jakarta Court proceedings P.T. Amco never attempted
to assert any relationship between P.T. Wisma and Indonesia and/or the Indonesian army, nor according to the
Respondent did the Claimants attempt to do so in the current arbitration until the Claimants' Rejoinder in which the
Claimants put forward the position that P.T. Wisma was the 'alter ego' of the Respondent."

Referring Principles:

- I.1.1 - Good faith and fair dealing in international trade
- I.1.2 - Prohibition of inconsistent behavior
- IV.5.1 - Intentions of the parties
- IV.5.3 - Interpretation in favor of effectiveness of contract