Final award of 5 June 1990 in case no. ARB/81/8 and Decision on Supplemental Decision and Rectification of 17 October 1990

Arbitrators: Rosalyn Higgins, Q.C. (United Kingdom), President, Marc Lalonde, P.C., Q.C. (Canada), Per Magid (Denmark)

Parties: Claimant: Amco Asia Corporation, Pan American Development Ltd. and PT Amco Indonesia (referred to collectively as Amco); Defendant: The Republic of Indonesia.

Place of proceedings: Washington, D.C.

Subject matters:
- law applicable to substance (Art. 42(1) 1965 Washington Convention)
- unlawful revocation for procedurally unlawful act
- denial of justice
- duty to mitigate losses
- lucrum cessans
- "net book value"
- "discounted cash flow" method of valuation

Facts

In 1968 a Lease and Management Agreement was concluded between Amco Asia, a US Corporation, and PT Wisma under which Amco Asia was to complete the construction of the Kartika Plaza Hotel in Indonesia. Amco Asia applied to the Government of Indonesia to establish PT AMCO, a subsidiary established under Indonesian law. The application also proposed that there be an exemption from corporate taxes for three years and an exemption from Import duties with respect to capital goods if PT Amco used "its own foreign exchange or supplemental foreign exchange ... ". The application also contained an ICSID arbitration clause regarding disputes between the Government of Indonesia and PT Amco. The authorised spare capital of PT Amco, as set out in the application, was to be US$ 3,000,000 and all of it was to represent foreign capital. On 29 July 1968, Amco Asia was granted permission by the Minister of Public Works to establish PT Amco. The Articles of Incorporation of PT Amco were approved by the Minister of
and registered with the Central Jakarta District Court on 29 January 1969. The issue of shares, according to the Articles of Incorporation, should have taken place before the end of 1978.

PT Amco entered into a Sub-Lease Agreement with Aeropacific for the financing, construction and management of the hotel. After difficulties arose in respect to this Sub-Lease Agreement, on 16 October 1978, PT Wisma and PT Amco entered into a "Profit-Sharing Agreement for the Management of the Kartika Plaza ... ". Difficulties arose between PT Amco and PT Wisma, particularly concerning the amounts due to the respective parties under the Profit-Sharing Agreement. On 31 March-1 April 1980, the hotel was allegedly seized in an armed military action and the management effectively taken over by PT Wisma. The Indonesian Capital Investment Board (BKPM) revoked PT Amco's Foreign Capital Investment Licence on 9 July 1980. The 1968 Management and Lease Agreement, and the 1978 Profit Sharing Agreement were rescinded by decision of the Jakarta Appellate Court in November 1983 in an action initiated by PT Wisma against PT Amco.

On 15 January 1981, Amco filed a request for arbitration with ICSID, disputing the right of the Republic of Indonesia to seize the investment and cancel the licence, and claiming compensation of US$ 12,393,000, together with interest and costs.

On 25 September 1983, the ICSID Tribunal rendered a decision on the preliminary issue of jurisdiction, finding that it had jurisdiction to hear the case. This decision (erroneously termed "award") is reported in Yearbook X (1985) pp. 61-71.

On 9 December 1983, the Arbitral Tribunal rendered a second award, reported in Yearbook XI (1986) pp. 159-161, denying Indonesia’s Request for Recommendation of Provisional Measures.

On November 1984, the Arbitral Tribunal made its award on the merits (published in 24 International Legal Materials (1985) pp. 1022-1039), awarding damages to Amco in the amount of US$ 3,200,000 plus interest at the rate of 6% from 15 January 1981 until effective payment.

On 18 March 1985, the Republic of Indonesia applied for the annulment of the award. On 16 May 1986, an Ad Hoc Committee annulled the part of the award relating to the illegality of the revocation order and granting PT Amco damages on this account. However, the Tribunals finding as to the illegality of the action by Army and Police personnel and that Amco was entitled to damages therefor from Indonesia was not annulled. The decision of the Ad Hoc Committee is reported in Yearbook XII (1987) pp. 129-148.

The dispute was resubmitted to ICSID and on 10 May 1988, the Second Tribunal rendered a Decision on Jurisdiction deciding on the scope and effect of the. Decision of the Ad Hoc Committee. This Decision is reported in Yearbook XIV (1989) pp. 92-110.

In its Final Award, the Second Tribunal awarded damages for losses caused as a result of the illegal police and army Intervention in the amount of US$10,000. It also held that the circumstances surrounding the BKPM decision revoking the Foreign Capital Investment Licence made it unlawful and that non-speculative profits under the management contract were recoverable.

On 6 August 1990, Amco requested supplemental decisions and rectifications regarding matters on which the Tribunal omitted to decide and the rectification of alleged clerical, arithmetical or similar errors. The Arbitral Tribunal decided that there were no matters on which it had omitted to decide, but issued a rectification due to an error resulting in the amount awarded being increased from US$ 2,567,966.20 to US$ 2,677,126.20 plus interest at the rate of 6% from the date of the award until effective payment.

Excerpt

[...]

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[...]
VII. DAMAGES

[74] "The issue of damages has to be addressed in relation to two different periods: (1) the period between 1 April (the army and police intervention) and 9 July 1980 (the BKPM decision); (2) the period subsequent to 9 July 1980."

A. The Period between 1 April and 9 July 1980

[75] "It is res judicata that there is an obligation to compensate for any damage caused by unlawful intervention of the army and police (Decision on Jurisdiction, para. 48)."

[76] "The present Tribunal has concluded that the events of 1 April 1980 did not cause PT Amco loss of right to a share of the profits under the 1978 ProfitSharing Agreement (which could at that moment still be legally claimed from PT Wisma). The Tribunal further held that access to the Hotel cash flow was fiduciary in nature and, whatever the practice may have been between the parties before 1 April 1980, PT Amco was accountable to PT Wisma for the use of those funds. Financial loss due to diminution of the profit level there might otherwise have been, under PT Amco's own management, is unproven. No other financial loss due to loss of management has been evidenced before the Tribunal.

[77] "The illegal army and police intervention of 1 April 1980 undoubtedly caused disturbance and burdens for Amco. The Tribunals best assessment of the loss entailed by such disturbance and burdens over this period is US$ 10,000. This is awarded with interest at 6% from the date of this Award to the date of effective payment."

B. The Period Subsequent to 9 July 1980

1. Mitigation

[78] "BKPM's decision of 9 July 1980 caused PT Amco to lose its licence to engage in Business ventures in Indonesia. It did not in terms cause PT Amco to lose all its rights under the Profit-Sharing Agreement of 6 October 1978 or the earlier Lease and Management Contract of 22 April 1968. It was contended by Indonesia before the Tribunal that PT Amco could still have sold its interests in these contracts to a third party and should indeed have done so, to mitigate any loss sustained by BKPM's decision to terminate its licence. It was said that both Indonesian and international law pointed to such a duty to mitigate damages. Amco did not contest that Indonesian law and international law both acknowledge the principle of mitigation, but claimed that there was no realistic prospect of it being able to mitigate its loss.

[79] "The Tribunal notes that the 1968 Lease and Management Contract provided in clause 9(4) that 'the shares shall only be possessed by the LOCAL PARTNER and the OVERSEAS PARTNER and shall not be transferred to a third (3rd) party under whatever name or reason'. The Company envisaged under the 1968 contract was never established as the parties decided to proceed on the basis of a simple joint venture. The Tribunal notes that when PT Amco entered into a subcontract on 22 August 1969, and a sublease with Aeropacific Hotel Association on 13 October 1970, the concurrence of PT Wisma was formally provided. This indicates that transfer of PT Amco's rights could only take place with the consent of PT Wisma. Nothing in the 1978 Profit-Sharing Agreement changed the situation. Further, even had PT Amco been entitled to assign its interests the events that had occurred since the beginning of April 1980 would have made it virtually impossible to find interested purchasers. The Tribunal finds that there was no failure on PT Amco's part to mitigate damages."

(....)

2. Principles of compensation

[80] "To seek the relevant principles of compensation the Tribunal has examined both Indonesian law and international law. Amco claimed that Indonesian law requires 'compensation for proximately caused and foreseeable injury, including lost earnings, arising from a tortious act'. Indonesia emphasised that damages would not be awarded for uncertain or speculative loss. The Tribunal has carefully
considered the relevant provisions of the Indonesian Civil Code, especially Arts. 1246 and 1365, as well as the treatises and cases cited by the parties, and the analyses thereon provided in the legal opinions of Dr. Komar and Mrs. Kusnander. Art. 1365 of the Indonesian Civil Code provides: 'Persons responsible for any act in violation of the law which results in a loss of another person are obliged to replace such loss'. Art. 1246 of the Indonesian Civil Code further provides: 'Cost, losses and interest which a claimant may claim shall consist of, in general, losses already suffered and profit which he would otherwise enjoy, subject to the exceptions and qualifications set forth below.' None of the exceptions and qualifications are applicable in this case.

[81] "The following principles are to be found in the 'Indonesian law: damage and loss caused by illegal acts shall be compensated by the wrongdoer. Injury must have been caused by the wrongful act and have been foreseeable. Loss must be proved and there shall be no compensation for losses that are speculative. Lost profits (including forfeited earnings) are compensable to the extent they are not speculative: Said Wachdin v. Perseroan Terbatas N. V. Aniem, cited in the Opinion of Dr. Komar; and Art. 1246 of the Indonesian Civil Code.

[82] "So far as international law is concerned, it is clear that damages are due for harm caused by wrongful acts. The Tribunal has characterised the BKPM revocation as a denial of justice. As with Indonesian law, the loss must be attributable to the wrongful act and foreseeable. And non-speculative loss may be recovered.

[83] "Indonesia contended that the damage to Amco was caused neither by the army and police action, nor by BKPM's procedural irregularities, nor by its revocation of the licence, but rather by Amco's own wrongful actions which entitled BKPM to terminate the licence. Indonesia further claimed that, if damages were due, they could only be in respect of profit levels that were foreseeable. Indonesia also contended that PT Amco should not recover any lost profits beyond the date of this Award. The Tribunal addresses each of the arguments in turn.

[84] "The Tribunal has found that the general background to the BKPM decision constituted a denial of justice, and led to a decision which was indeed the cause of harm to Amco. To argue, as did Indonesia, that although there had been procedural irregularities, a 'fair BKPM' would still have revoked the licence, because of Amco's own shortcomings, is to misaddress causality. The Tribunal cannot pronounce upon what a 'fair BKPM' would have done. This is both speculative, and not the issue before it. Rather, it is required to characterise the acts that BKPM did engage in and to see if those acts, if unlawful, caused damage to Amco. It is not required to see if, had it acted fairly, harm might then have rather been attributed to Amco's own fault.

[85] "As to foreseeability, it appeared to be Indonesia's contention that, if compensation was due at all, only those foregone profits that could be foreseen in 1980 were compensable. But foreseeability goes to causation and damages, and normally not to the quantum of profit. That the revocation of the licence would cause Amco to be unable to secure its share of the profits under the Profit-Sharing Agreement was undoubtedly foreseeable. Indonesia also contended that PT Amco should not recover any lost profits beyond the date of this Award. The Tribunal addresses each of the arguments in turn.

[86] "The Tribunal now turns from causation and foreseeability to the issue of whether compensation allows recovery of future profits. There is one school of thought in contemporary international law that suggests that future profits (lucrum cessans) is not available in the case of a lawful taking, where only damage actually sustained (damnum emergens) is recoverable: see Amoco International Finance Corp. v. Islamic Republic of Iran, [15 Iran-U.S. Claims Tribunal Reports 247; and Liarnco v. Libyan Arab Republic, 7 (62 ILR 140); per Judge Ameli in INA Corp. v. Islamic Republic of Iran, 8 (8 Iran-U.S. Claims Tribunal Reports at 411). Another school holds that lucrum cessans is available for lawful as well as unlawful takings. For cases awarding an element for future lost profits although the taking was lawful, see American International Group Inc. v. Iran, 9 (4 Iran-U.S. Claims Tribunal Reports 96); and Kuwait v. Aminoil, 10 (ILM 1982) 977. See also Judge Brower in Sedco Inc. v. NIOC, 11 (10 Iran-U.S. Claims Tribunal at 197). For useful commentary on this issue, see Gray, Judicial Remedies in International Law (1987), esp. Chap. 5.

[87] "But neither Indonesia (which proclaimed the BKPM action lawful) nor Amco contested that profits could in principle be recovered. The dispute was rather as to what profits could be reasonably certain, and what speculative. In any event, the Tribunal has found the BKPM action unlawful.

[88] "The Tribunal finds that, where there has been an unlawful taking of contract rights, lost profits are in principle recoverable. No position is here taken, or need to be taken, on the situation in a lawful taking. As it was put in the
Shufeldt Claim (USA v. Guatemala) 'The *damnum emergens* is always recoverable, but the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative.' It is equally clear from the *May Case* (Guatemala v. USA), that recovery was to be allowed for profits that would have been over the remaining period of the contract. The arbitrator stated that he could not lay down the law on damages more clearly than it had been put by Guatemala: 'that whoever concludes a contract is bound not only to fulfil it but also to recoup or compensate (the other party) for damages and prejudice which result directly or indirectly from the non-fulfilment or infringement by default or fraud of the party concerned and that such compensation includes both damage suffered and profits lost: *damnum emergens et lucrum cessans.*' The Tribunal concludes that BKPM's action was a denial of justice which effectively deprived Amco of its contract rights, and that non-speculative profits under that contract are recoverable.

[89] "Indonesia advanced the claim that PT Amco 'should not recover expected lost profits beyond the date of judgment'. Cited in support of this was a dictum in the *Chorzow Factory Case* that the compensation due was the loss from the time of dispossession 'to the date of the present judgment'. This dictum is taken quite out of context, as the Permanent Court was considering restitution for an unlawful taking under an international treaty, and, on the particular facts, simply did not address the question of the future profit-generating capacity of the factory (still less of a property right that was only that of a stream of future profits) under general international law.

[90] "Nor is the reference in Indonesia's Counter-Memorial ... of *Amoco International Finance v. Islamic Republic of Iran*, op. cit., supra, at all convincing. The Chamber of the US-Iran Tribunal in that case was examining the *Chorzow Factory Case* (which we have already distinguished), and in terms with which this Tribunal would not necessarily agree."

[91] The tribunal further held that risk "is not a determinant factor in an argument as to whether *lucrum cessans* as well as *damnum emergens* is available."

[92] "It was urged on the Tribunal by Indonesia that, even allowing for non-speculative profits, the methods of valuation must reflect the value of the contract rights as they were perceived in 1980. Thus according to Indonesia, the valuation techniques should include no event or factor that was unknown or unascertainable in 1980.

[93] "However, neither the concept of foreseeability (which has been discussed above) nor that of non-speculation necessarily lead to this conclusion. The Tribunal believes that the key lies in focusing on the objectives of compensation where there has been an unlawful interference with contract rights. In *Sapphire International Petroleum v. NIOC* (35 ILR 136), a case of an unlawful taking, the arbitrator said:

   'According to the generally held view the object is to place the party to whom they are awarded in the same pecuniary position they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion.'

[94] "The Permanent Court of Justice in the *Chorzow Factory Case* held that, in an unlawful nationalisation, there must be restitution to establish the situation that would otherwise have existed, or, 'if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear' (PCIJ Series A, No. 17, at 47). Commenting on this principle as it applies today, Judge Holtzmann wrote: 'While the TOPCO Award [17 ILM (1978) 3]12 directs *restitutio in integrum*, it emphasises, as did the *Chorzow Factory Case*, that awards of damages are intended to place the claimant in the same Position as would restitutio in integrum': Separate Opinion, *INA Corp. v. Islamic Republic of Iran*, 8 Iran-U.S. Claims Tribunal Reports 373 at 395.13

[95] "This principle is well supported. Thus in the same case Judge Lagergren wrote: '[I]t is well settled that the measure of compensation ought to be such as to approximate as closely as possible in monetary terms to the principle of restitutio in integrum...' (INA Corp. Case, op. cit., supra, p. 385). And Judge Ameli of Iran, in the same case, said; 'Where the conduct of a party is held to be unlawful, in terms of its contractual obligations, then the concept of restitutio in integrum may perhaps properly be invoked.' (Ibid., p. 411).

[96] "If the purpose of compensation is to put Amco in the position it would have been in had it received the benefits of the
Profit-Sharing Agreement, then there is no reason of logic that requires that to be done by reference only to data that would have been known to a prudent businessman in 1980. It may, on one view, be the case that in a lawful taking, Amco would have been entitled to the fair market value of the contract at the moment of dispossession. In making such a valuation, a Tribunal in 1990 would necessarily exclude factors subsequent to 1980. But if Amco is to be placed as if the contract had remained in effect, then subsequent known factors bearing on that performance are to be reflected in the valuation technique. (Cf. American International Group Inc. v. Iran, op. cit., supra: but this was a lawful taking.)

Foreseeability not only bears an causation rather than on quantum, but it would anyway be an inappropriate test for damages that approximate to restitutio in integrum. The only subsequent known factors relevant to value which are not to be relied on are those attributable to the illegality itself.

"While subsequent known events of a general nature, unrelated to the Kartika Plaza problems, may appropriately be an element in the valuation process, the effects of the taking itself must be excluded. It is well established in international law that the value of property or contract rights must not be affected by the unlawful act that removed those rights. (For recent affirmation, see Starrett Housing Corporation v. Iran, (4 Iran-U.S. Claims Tribunal Reports, Vol. 3, 176 at 202.)"

3. The method of valuation

"It is the Tribunals intention that its decisions on the method of valuation, and its reasons therefore [sic], should be fully transparent.

"Indonesia has argued that, if damages were to be awarded to PT Amco, they should be established as 'the "book value" of PT Amco's investment or, at most, the value of PT Amco's contract rights less any diminution in their value due to PT Amco's failure to sell promptly to a willing buyer in order to a minimise its losses.' The question of Amco's alleged duty to mitigate its losses has been dealt with above. The appropriateness of the net book value method remains for consideration.

"Net book value has been described as 'assets minus liability without consequential damages'. (American International Group Inc. v. Iran, 4 Iran U.S. Claims Tribunal Reports, 96 at 104). It can immediately be seen that it is a method unsuited to placing a party in the position of his contract having been performed.

"Indonesia argues that PT Amco should be entitled at most to only part of the Hotel's entire net book value of $585,000, and, in any event, to no more than PT Amco’s total investment in the project determined by Bank Indonesia to be $933,992.65.

"While it is true that the value of the assets has been used as the measure of damages in a number of international claims, it is by no means the prevailing method of valuation of damages (see 'L'évaluation des dommages dans les arbitrages transnationaux', Ignaz Seidl-Hohenveldern, Annuaire français de droit international, XXXIII - 1987, pp. 7-31).

Net book value was rejected, inter alia, in the American International Group Case (op. cit., supra); Kuwait v. Aminoil, (op. cit., supra); and in Liamco v. Libyan Arab Republic, (op. cit., supra, para. 176). In fact, the book value basis of valuation seems to have been only used where compensation for prospective earnings was excluded for some reason, either 'in the absence of other evidence' (Claim of Horst, Award of 24 July 1968, U.S. Foreign Claims Settlement Commission, No. Cu-1418, p. 3, or because a claim for prospective profits was 'not compensable under the Act' (Claims of Aris Gloves Inc., Award of 31 January 1962, U.S. Foreign Claims Settlement Commission No. CZ-3035, p. 240, or because the claimant himself had requested as damages the reimbursement of his invested capital (INA Corp. v. Islamic Republic of Iran (op. cit., supra) or the liquidation value of its equity interest (Sedco Inc. v. National Iranian Oil Co., 10 Iran-U.S. Claims Tribunal Reports 180, op. cit., supra), or again because the claimant's property had never become a 'going concern' before the claim for damages arose (Phelps Dodge v. Islamic Republic of Iran, 10 Iran-U.S. Claims Tribunal Reports 121).

None of the above arguments would appear to apply in the present case. Indonesian law specifically recognises the possibility of a claim for lost profits (Art. 1246 of the Indonesian Civil Code, cited above, para. [80]) which envisages recovery for 'profit which he would otherwise enjoy' if it is non-speculative and direct. See also Said Wachdin Case, op.
Finally, the particular nature of PT Amco's rights does not make the book value method of valuation an appropriate technique. PT Amco was not the owner of the Hotel Kartika Plaza. In exchange for its investment in the Hotel, PT Amco obtained long-term contractual rights which consisted of the Lease and Management Contract of 1968 with PT Wisma with its various amendments, and the Profit-Sharing Agreement of 1978. These were not the type of assets to which the book value concept would be applicable.

Taking all the above factors into consideration, the Tribunal will adopt the following methods for valuation of the stream of profits. The assessment will be divided into two periods, from 9 July 1980 until the end of 1989; and from 1990 until 1999. For both of the periods there are some matters of law and some of judgment that the Tribunal must address. But as to valuation techniques, for 1980-1989 the Tribunal will not use the perspective of what the reasonable businessman in 1980 could foresee, because for this period it can use known data for relevant factors, including the year-by-year inflation rate, as provided to the Tribunal by the World Bank, from Laporangan Minggu, Bank Indonesia, as well as actual exchange and taxation rates. For 1980-1989 the Tribunal will increase the value of the base year by the yearly inflation rate (...), in order to maintain the real value of that base year over the period. Interest on the annual sums due will serve to bring them to present day values. However, from 1 January 1990 (1989 being the last full year for which known factors are available) and forwards, the Tribunal finds the DCF [Discounted Cash Flow] method appropriate to establish the net present value of PT Amco's rights for the remaining period of the lease, by capitalising earnings and expenditures which would otherwise have been spread over the future years of the life of the 1978 Profit-Sharing Agreement. In applying these two techniques to each of these periods, the Tribunal is mindful that PT Amco's rights were 65% of the stream of profits until 30 September 1984; and 50% thereafter until 30 September 1999.

The Tribunal has also considered whether the applicable law permits the use of these methods of valuation. As to DCF, it is neither prescribed nor prohibited (nor would one expect it to be) in the Indonesian Civil Code. The DCF method has been used in appropriate international awards: e.g. Starrett Housing Corporation v. Iran (op. cit., supra) and Phillips Petroleum Company Iran v. Iran, 21 Iran-U.S. Claims Tribunal Reports 79. As to the first method to be applied to the period 9 July 1980 until 31 December 1989, it is one that is logically indicated by the finding that the purpose of compensation is to put Amco in the position of having received the benefits of the contract during this period. The Tribunal finds it a method that is entirely consistent with Indonesian law and international law.

The Tribunal notes also that both parties in the present case have acknowledged the appropriateness of the DCF method for the entire valuation, even though there have been contested views as to the application of the component elements, and even though Indonesia has constantly emphasised that the method should not be used in such a way as to allow the inclusion of speculative profit. The several reports by accounting experts introduced by each party before the First Tribunal, as well as before the present Tribunal, all used the discounted cash flow method of valuation ....

While adopting this technique in respect of the period after 31 December 1989, the Tribunal calls attention to the fact that it is not a mechanistic device. The method itself relies on the application of assumptions which are necessarily judgmental. The DCF method is at once a flexible tool, that allows for an application of factors and elements judged as relevant. At the same time, it allows for the application of these judgmental elements to be articulated.

[...]
14 See n. 9.
15 *Note General Editor.* The reference to the Iran-U.S. Claims Tribunal Reports apparently should read: 4 Iran-U.S. Claims Reports, 122 at 177. Also reported in Yearbook X (1985) pp. 231-245.
16 See n. 9.
17 See n. 9.
18 See n. 10.
19 See n. 7.
20 See n. 8.
21 See n. 11.
23 See n. 15.

**Referring Principles:**

- VII.2 - Principle of foreseeability of loss
- VII.4 - Duty to mitigate
- XI.1 - Compensation for expropriation