

Case summary

**Amco Asia Corporation, Pan American Development
Limited, PT Amco Indonesia v Republic of Indonesia
(‘AMCO v Indonesia’)¹**

Year of the award: 1984-1990

Forum: ICSID

Applicable Law: Indonesian law, international law

<p>First Arbitral Tribunal (1984 Award) Prof. Berthold Goldman – President Mr. Edward Rubin Prof. Isi Foighel</p> <p>Annulment Committee (1986 Decision) Prof. Ignaz Seidl-Hohenveldern – Chairman Dr. Florentino Feliciano Prof. Andrea Giardina</p> <p>Second Arbitral Tribunal (1990 Award) Ms. Rosalyn Higgins – President Mr. Marc Lalonde Per Magid</p>	<p>Timeline of the dispute 15 January 1981 – Request for Arbitration 25 September 1983 – Decision on Jurisdiction 20 November 1984 – 1st Arbitral Award 16 May 1986 – Annulment of the 1st Arbitral Award 12 June 1987 – Request for Resubmission 10 May 1988 – Decision on Jurisdiction 31 May 1990 – 2nd Arbitral Award 10 October 1990 – Decision on Rectification of Award</p>
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¹ All relevant decisions and awards are published in (1992) 89 ILR 368.

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I. Executive Summary

In 1968, Amco, an American Corporation, and PT Wisma, an Indonesian company operating under the guidance of the Indonesian government, entered into a Lease and Management Agreement whereby Amco was to invest in, and manage a hotel/office complex for the duration of 30 years, until 1999. In April 1980, after growing differences between the parties, PT Wisma forcibly took over management of the hotel. In July 1980, the Indonesian government revoked Amco's license to engage in business ventures in Indonesia.

Amco initiated ICSID arbitration, claiming compensation for damages incurred due to the unlawful taking of the hotel and the termination of the license. In the First Arbitral Award of 1984, the Tribunal held that Indonesia's actions were in breach of international law and awarded damages of US\$ 3,200,000. However, that Award was annulled in 1986 on the grounds that the Tribunal had failed to state the reasons for its findings on several substantive issues.

Subsequently, Amco resubmitted the dispute to ICSID arbitration, with essentially the same claims. The Second Tribunal (1990 Award) found that both the takeover of the hotel as well as the revocation of the license had been internationally unlawful acts attributable to the Indonesian government. With regard to the question of relevant compensation, the Tribunal decided that to approximate as closely as possible in monetary terms to the principle of *restitutio in integrum*, the measure of damages should include compensation for the 'general disturbance' suffered by Amco due to the Hotel takeover, as well as for the profits lost by it as a result of license revocation.

The Tribunal awarded a discretionary lump sum of US\$ 10,000 for the 'general disturbance' that had occurred in April-July 1980. As for profits lost by Amco from July 1980 onwards, the Tribunal distinguished between two time periods, the first one immediately following the revocation of the license until the year preceding the year of the Award (1980-89), and the second period starting with the year of the Award until the envisioned end of the Lease and Management Agreement (1990-99). To quantify lost profits for the first period, the Tribunal used data already available at the time of deliberations; for the second period, it applied the DCF analysis to determine the present value of future profits. In total, the Tribunal awarded damages in the amount of US\$ 2,696,330 including 6% simple interest to the date of the Award.

II. Factual Background and Claims of the Investor

In 1968, Amco Asia, a US corporation, and PT Wisma, an Indonesian company, entered into a Lease and Management Agreement in relation to a hotel and office block on a site in Jakarta owned by PT Wisma ('Hotel'). PT Wisma was wholly owned by Inkopad, an entity operating under the guidance of the Indonesian government.

Under the 1968 Agreement, Amco Asia undertook to invest up to US\$ 4 million in the construction and development of the Hotel and related property. PT Wisma undertook

to grant Amco Asia a 19-year lease (which was extended in 1969 to a 30-year lease) on the building under a profit-sharing scheme.

In 1967 Indonesia enacted a law, under which tax concessions were made available to approved foreign investors, who had to operate through entities organized under Indonesian law. In May 1968 Amco Asia applied to the Indonesian Government under the 1967 law to establish an Indonesian company, PT Amco Indonesia ('PT Amco'). This application contained *inter alia* an arbitration clause which established ICSID jurisdiction over possible future disputes. The application was approved and PT Amco was established in January 1969, whereupon all Amco's rights under the 1968 Lease and Management Agreement were transferred to PT Amco.

In 1970, PT Amco made a sub-lease agreement with the Aeropacific Group, which maintained and operated the Hotel until 1978. Aeropacific continued and in early 1972 completed the construction of the 11-floor hotel with 331 rooms. However, in light of the subsequent legal skirmishing between PT Amco and the Aeropacific Group, Inkopad took over the management of the Hotel in 1978. After a few months, experiencing difficulties in administering the property without a professional manager, Inkopad authorized PT Wisma to enter with PT Amco into a 'Profit Sharing Agreement for the Management of the Kartika Plaza Land and Building with all its contents'.

Under the Profit Sharing Agreement, PT Amco got the right of management of the entire complex, i.e. the hotel, the offices and shops. A new profit sharing formula was established: in the first six years (1978-1984), the net income of the property was to be shared 65% for PT Amco and 35% for PT Wisma. For the remaining period (1984-1999), the parties were to share the said income on a 50/50 basis. In 1979, PT Amco hired Ramada Group to manage the hotel.

In late 1979 – early 1980, disagreements arose between PT Amco and PT Wisma on a number of matters, particularly concerning the amounts due from PT Amco to PT Wisma under the Profit Sharing Agreement. PT Wisma threatened that if the amount requested was not paid by specified dates, it would take over the management of the Hotel as the owner. A small advance was made by PT Amco but it did not pay the full amount claimed.

On 31 March /1 April 1980 PT Wisma took over management of the Hotel, the Indonesian army and police personnel ensuring the successful seizure. Furthermore, following a request by the Chairman of the Capital Investment Coordinating Board ('BKPM'), the President of Indonesia terminated PT Amco's license to engage in business ventures in Indonesia. On 9 July 1980 BKPM formally revoked the license.

On 15 January 1981, Amco Asia, Pan American Development Limited (a Hong Kong Corporation holding a substantial amount of shares in Amco Asia) and PT Amco initiated ICSID arbitration against the Republic of Indonesia.² The Tribunal established for purposes of that arbitration ('the First Tribunal') rendered an Award on the merits in 1984, which was annulled in 1986. In 1987, Amco resubmitted the dispute to ICSID and brought essentially the same claims as in the first arbitration: (para.23)

² When referred to collectively, the claimant companies will hereafter be designated as 'Amco'.

- by reason of wrongful acts of the Indonesian army and police, it had suffered damage;
- in revoking its license, Amco had been given no proper warning and denied a fair hearing and that the revocation of the license was not substantively justified;
- Indonesia was unjustly enriched as a consequence of these unlawful acts.

AMCO claimed that wrongful conduct attributable to Indonesia resulted in damages of not less than US \$15,000,000.

III. Findings of the First Tribunal (1984)

A. Merits

In accordance with Article 42(1) of the ICSID Convention, the Tribunal applied Indonesian law and applicable rules of international law. The Tribunal found that Indonesia had failed to protect PT Amco against the takeover of the Hotel on 1 April 1980. This constituted a breach of international law obligation to protect aliens against unlawful acts of its citizens. The Tribunal also held that the revocation of the PT Amco business license was done with violations of the principle of due process and that the revocation was unjustified substantively.

The Tribunal referred to Indonesian law and international law principle *pacta sunt servanda* and the doctrine of respect for acquired rights to rule that Indonesia was liable to compensate the claimants for the revocation of the investment license.

B. Damages

1. Prejudice and causal link

The Tribunal held that Indonesia had to compensate for the prejudice caused by:

- The intervention of army and police personnel (1 April 1980);
- Revocation of the license (9 July 1980).

The Tribunal first determined the **nature and extent of the prejudice** suffered by the Claimants as a result of these acts. The Tribunal held that the prejudice consisted of the deprivation of the Claimants of “the right to operate the Hotel”, or of the “loss of incorporeal, patrimonial and potentially profitable rights” for the duration of the Lease and Management Agreement (30 years, until 1999). (1984 Award, paras.252-253)

The Tribunal established a **causal link** between the acts and the prejudice. It stated that the dispossession of 1 April “did not have any legal effect: it merely created a *de facto* situation, which was the actual deprivation of PT Amco of the management and operation of the hotel”. (1984 Award, para.257) This situation “continued” up until 9 July 1980, when the BKPM revoked the license. After the license revocation, PT Amco lost the legal right to operate businesses in Indonesia, which also entailed the loss of its legal right to operate the Hotel. (1984 Award, para.259) The Tribunal did not make a distinction between damages caused by the acts of the army and police and

damages caused by the license revocation. It was a continuous loss caused by two distinct episodes of wrongful conduct.

2. Standard of compensation

The Tribunal awarded damages according to the principles applicable in cases of failure to comply with contractual obligations. The Tribunal deemed this method justified because, in its view, the two episodes of the State's wrongful conduct amounted to the "equivalent of an infringement of a contractual obligation". (1984 Award, para.265)

Having discussed the principles governing damages for contractual liability, the Tribunal concluded that "the full compensation of prejudice, by awarding to the injured party the *damnum emergens* and *lucrum cessans* is a principle common to the main systems of municipal law, and therefore, a general principle of law which may be considered as a source of international law." (1984 Award, para.267) To further support this conclusion, the tribunal referred to the *Chorzow Factory* case and a number of State-State arbitrations.

On this basis, the Tribunal held that its award of damages should "**fully compensate** the prejudice suffered by the Claimants." The Tribunal determined that such full compensation should cover "only the *direct* and *foreseeable* prejudice." (1984 Award, para.268) The Tribunal did not discuss the tests of directness and foreseeability in any detail.

3. Calculation of damages

The Tribunal determined that the prejudice to be taken into account for awarding damages was the loss of the right to operate the Hotel, that is to say the loss of a **going concern**. The Tribunal noted that while there were several methods of valuation of going concerns, the most appropriate one in the present case was to establish the **net present value** of the business, based on a reasonable projection of the foreseeable net cash flow during the period to be considered, said net cash flow being then discounted in order to take into account the assessment of the damages at the date of the prejudice (DCF analysis). Thus, to assess the damages to be awarded to the Claimants, the Tribunal applied the valuation of the net present value of the lost business, as resulting from the discounted net cash flow calculated for the remaining period of the 30-year lease (from 1 April 1980 to September 1999). (1984 Award, paras.271-273)

As a basis to estimate future income stream, the Tribunal used the data on the Hotel income for the period of 1979 and the first quarter of 1980. However, the Tribunal also stated that it did not feel itself bound to making a strict calculation based only on 1979-1980 results and that "certain reasonable adjustments" could be made in arriving at a figure for valuation/compensation purposes. (1984 Award, para.274)

In particular, the Tribunal also took into account rental income from the commercial area, deductions for the replacement reserve, depreciation, income taxes, profit share payable to PT Wisma. To arrive at the present value of future earnings, the Tribunal used a discount rate of 15% (agreed to by parties' experts), being 3% above the estimated annual inflation factor of 12% (1990 Award, para.271). The Tribunal arrived at the final net present value of Rps. 1,717,710,000 but increased it to Rps. 2,000,000,000 to account for the fact that the 1979-1980 base income figure was

based on the use of only 280 rooms out of a possible 331, while it was reasonably foreseeable that the unused rooms would have been brought into use.

4. Currency of compensation

The Tribunal decided that “in order to grant the investor full and effective compensation of the prejudice it suffered, as international law requires, the net value of the taken business as calculated per April 1, 1980, is to be converted in US dollars on the same date.” This conclusion was based on the fact that the investment was made in US dollars or in currencies convertible into US dollars, and the Indonesian domestic law authorized foreign investors to repatriate their capital and earnings. The Tribunal also added that the compensation was to be paid outside Indonesia. (1984 Award, paras.279, 282)

In the Annulment proceedings, Indonesia challenged the decision of the Tribunal to award damages in US dollars outside Indonesia. However, the Annulment rejected this challenge as unsubstantiated. (Decision on the application for annulment, paras.118-119)

5. Interest

The Tribunal held that the Claimants were entitled to the award of interest because the latter was necessary for compensation to come as close as possible to the full compensation prescribed by international law. The Tribunal applied the 6% rate of interest, prescribed by Indonesian law. As for the starting point of interest the Tribunal noted the relevant rule of Indonesian law (the day where the compensation is claimed before the Court) and international law (generally fixed either at the date of the wrong, or at the date of the presentation of the claim to the competent international authority). The Tribunal ordered the interest to run from the date of request for Arbitration. (15 January 1981) until the date of payment. The Tribunal did not provide for compounding of interest, therefore it must be presumed simple. (1984 Award, para.281)

IV. Decision on the Application for Annulment (1986)

The Decision of the Annulment Committee annulled the 1984 Award as a whole. The main reason for the annulment was that, in view of the Annulment Committee, the Tribunal had failed to apply Indonesian law and to state reasons with respect to the episode on revocation of Amco’s license.

The annulment did not extend to the Tribunal’s finding that the action of the army and police personnel on 31 March 31 - 1 April 1980 was illegal. The annulment extended, however, to the findings on the duration of such illegality and on the amount of the indemnity due on this account. In particular, Tribunal’s findings on the amount of damages as a whole were annulled – although not because the Tribunal gave wrong/insufficient reasoning on calculation of compensation but as a consequence of the annulment of relevant findings on merits.

V. Second Tribunal – Findings on Merits (1990)

A. Applicable Law

The Tribunal stated that Article 42(1) ICSID Convention referred to the application of host-State law and international law. It held that this Article implied that, if there are no relevant host-state laws on a particular matter, a search had to be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable, in a ‘supplemental and corrective’ fashion. (para. 40).

B. Conduct of Army and Police Personnel

The Tribunal relied on relevant findings of the First Tribunal and held that it was *res judicata* that during the events of 31 March - 1 April 1980 the army and police acted in breach of international law; that PT Amco suffered prejudice thereby; and that it was the responsibility of Indonesia to compensate for such prejudice. However, the precise nature of the prejudice suffered the period of 1 April up to 9 July 1980, and its quantification remained to be determined by this Tribunal. (paras. 46, 50)

C. The Revocation of PT Amco’s license

Amco’s second claim was that its license had been wrongfully revoked, entitling it to full compensation therefor. The First Tribunal found that, as a matter of Indonesian law and of international law, the procedures leading to the deprivation of PT Amco’s license had violated **due process**. This finding of the First Tribunal was held to be *res judicata*. (para.70) The Second Tribunal further held that procedural irregularities and other background factors surrounding the revocation amounted to a **denial of justice**, regardless of whether BKPM might have had substantive grounds for its action against Amco. The Tribunal held that the circumstances surrounding BKPM’s decision make it unlawful, as a matter of both Indonesian and international law. (paras.137-139)

D. Unjust Enrichment

Amco advanced as its third cause of action the claim that Indonesia would be unjustly enriched if permitted to retain both the benefits of Amco’s investment and the earnings which Amco could have obtained from such investment. The Tribunal rejected this claim. It held that the beneficiary of unjust enrichment would have been PT Wisma and not Indonesia. Any advantage to the Indonesian government was found to be too indeterminate to be identified as an unjust enrichment to the State. (para. 156)

VI. Second Tribunal – Findings on Damages

A. Law Applicable to the Determination of Damages

The Tribunal noted that ‘[t]o seek the relevant principles of compensation the Tribunal has examined both Indonesian law and international law.’ (para.170)

B. Two Periods for Compensation

The Tribunal distinguished between two time periods pertinent for its analysis on damages, namely:

- (1) the period from 1 April 1980 (the army and police intervention) up to 9 July 1980 (the BKPM decision to revoke the license), and
- (2) the period subsequent to this date until the end of the Lease in 1999.

This distinction was due to two separate episodes of wrongful conduct on the part of Indonesia, one being the unlawful acts of army and police personnel, and the other the revocation of PT Amco's business license.

B. Damages Incurred as a Result of the Army and Police Intervention (1 April – 9 July 1980)

Concerning the first period, the Tribunal held it to be *res judicata*³ that there was an obligation to compensate for any damage caused by unlawful intervention of the army and police. The Tribunal determined that the **prejudice** suffered as a result of army and police intervention concerned the rights held by PT Amco in relation to the hotel, in particular the rights of management and control on the one hand, and of participation in the profits on the other.

- On the issue of profits, the Tribunal found that although PT Amco was prevented from exercising its right to management and control due to the events of 31 March 31 – 1 April 1980, it has not been shown that at this time it also lost its entitlement to its share of profits. (para.58)
- On the issue of management rights, the Claimants did not offer any quantification of that loss *per se*. Nor did the Claimants show that they might have achieved higher profit level, had they continued to manage the Hotel. (para.59)
- The Tribunal also found that the loss of access to the daily cash flow of the Hotel, which was part of the management rights loss, could not be compensated for because first, this loss had not been quantified by Amco, and secondly, because control of the daily cash flow was fiduciary in nature and any interest gained was for the benefit of both parties. (paras.60-61)

At the same time, the loss of the right to manage entailed a “general disturbance” caused to Amco. (para.63) To compensate for the loss entailed by such general disturbance, the Tribunal made its “best assessment” and awarded US \$10,000, with 6% (presumably simple) interest from the date of this Award to the date of effective payment. (paras.164-166) The Tribunal did not show how it arrived at the amount of compensation.

³ The finding of the First Tribunal that were treated as *res judicata* by the second tribunal were discussed in the Second Tribunal's Decision on Jurisdiction

C. Damages Incurred as a Result of the License Revocation (10 July 1980 – 30 September 1999)

Damages under this heading included profits lost by the Claimants as a result of license revocation and the consequent loss of management and profit-sharing rights.

1. Mitigation of Damages

BKPM's decision of 9 July 1980 caused PT Amco to lose its license to engage in business ventures in Indonesia. It did not cause PT Amco to lose all its rights under the 1978 Profit-Sharing Agreement or the 1968 Lease and Management Contract. Indonesia contended 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 license. 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 acknowledged the principle of mitigation, but claimed that there was no realistic prospect of it being able to mitigate its loss. (para.167)

The Tribunal found that the evidence indicated that transfer of PT Amco's rights could only have taken place with the consent of PT Wisma. Furthermore, even if PT Amco had 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 therefore found that there was no failure on PT Amco's part to mitigate damages. (para. 168)

2. Foreseeability

The Tribunal held that under international law, "the loss must be attributable to the wrongful act and foreseeable. And non-speculative loss may be recovered." (para.172)

In respect of foreseeability, Indonesia contended that only those foregone profits that could be foreseen in 1980 were compensable. The Tribunal rejected that argument holding that "foreseeability goes to causation and damages, and normally not 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. The principle of foreseeability does not require that the party causing the loss is at that moment of time able to foresee the precise *quantum* of the loss actually sustained." (para.175)

In other words, the Tribunal affirmed that the test of foreseeability does not require that a State foresees the *quantum* of damages that can be caused by the wrongful conduct (and thus that only foreseeable quantum is to be compensated) but rather that this test requires the tortfeasor to foresee that the damage *per se* can/will be caused by his conduct.

3. Standard of compensation

The Tribunal suggested that the measure of damages has to do with the “objectives of compensation”. In this respect the Tribunal referred to *Sapphire International Petroleum v. NIOC*, a case of an unlawful taking, where 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.

In support of the same position, the Tribunal also referred to the *Chorzów Factory* case and some other cases with the conclusion 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*. (paras.183-185)

4. Future profits

The Tribunal noted the existence of the two schools of thought in relation to the possibility of recovering 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. [...] Another school holds that *lucrum cessans* is available for lawful as well as unlawful takings.” (para.176)

The Tribunal took the view that “where there has been an unlawful taking of contract rights, lost profits are in principle recoverable.” The Tribunal did not pronounce on the situation of a lawful taking. The Tribunal’s findings applied to non-speculative profits that would have been due to the Claimants over the remaining period of the contract. (para.178)

5. Relevant date for assessment

Indonesia contended that only those foregone profits that could be foreseen in 1980 were compensable. The Tribunal disagreed:

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. [...] Foreseeability not only bears on 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. [...] 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. (paras.186-187)

In other words, the Tribunal found that in this case, assessment on the date of dispossession would not meet the objectives of compensation, i.e. putting the Claimants in the same position as they would have been if the contract had been performed. The Tribunal decided to take into account all known data, subsequent to

the violation but preceding the Award, which could be useful for the assessment of damages.

6. Causation

Indonesia argued that although there had been procedural irregularities in license revocation (which the Tribunal held to amount to a denial of justice), a “fair BKPM” would still have revoked the license because of Amco’s own shortcomings. The Tribunal rejected this argument and stated that to adopt such approach would be to “misaddress causality”. The Tribunal said that it could not pronounce upon what a “fair BKPM” would have done – this would be speculative. Rather, in the Tribunal’s view, it was required to characterize the acts that BKPM did engage in and to see if those acts, if unlawful, caused damage to Amco. (para.174)

7. ‘Book value’ method – rejected

Indonesia argued that, if damages were to be awarded to PT Amco, they should be established as the ‘**book value**’ of PT Amco’s investment. The Tribunal rejected this approach.

The Tribunal stated that net book value had been described as “assets minus liability without consequential damages”,⁴ and held that ‘it can immediately be seen that it is a method unsuited to placing a party in the position of his contract having been performed’. (para.191) The Tribunal noted further that “the book value basis of valuation seems to have been only used where compensation for prospective earnings was excluded for some reason [...], or because the claimant himself had requested as damages the reimbursement of his invested capital [...], or the liquidation value of its equity interest [...], or again because the claimant's property had never become a “going concern” before the claim for damages arose [...]. (para.193)

Finally, the Tribunal stated that the particular nature of PT Amco’s rights did not make the book value method of valuation an appropriate technique. PT Amco was not the owner of the Hotel. In exchange for its investment in the Hotel, PT Amco obtained long-term contractual rights which consisted of the 1968 Lease and Management Contract of 1968 and the 1978 Profit-Sharing Agreement. “These were not the type of assets to which the book value concept would be applicable.” (para.195)

8. Valuation methods adopted

The Tribunal divided its assessment of profits lost by the Claimants as a result of Indonesia’s wrongful conduct into two periods:

- (1) period preceding the Award (from July 9, 1980 until the end of 1989); and
- (2) period subsequent to the Award (from 1990 until 1999).

⁴ *American International Group Inc. v. Iran*, 4 Iran-US Claims Tribunal Reports, 96 at 104

Different valuation methods were used to quantify lost profits for said periods. As the first period of 1980-89 referred to the past, the Tribunal used **known** data for relevant factors, including the year-by-year inflation rate, as well as actual exchange and taxation rates. (para.196)

From 1 January 1990 (1989 being the last full year for which known factors are available) onwards, the Tribunal found the discounted cash flow (DCF) analysis “appropriate to establish the net present value of PT Amco’s rights for the remaining period of the lease, by capitalizing earnings and expenditures which would otherwise have been spread over the future years of the life of the 1978 Profit Sharing Agreement.” The Tribunal noted that both parties in the present case acknowledged the appropriateness of the DCF method. (paras. 196-198)

The Tribunal also emphasized that the DCF method was “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. (para.199)

For evidence, the Tribunal relied on several reports presented by independent accounting experts hired by parties.

9. Lost profits for the period of 1980-89

The Tribunal based its analysis on the average monthly net profit of the hotel for the fifteen month period beginning 1 January 1979 and ending 31 March 1980, reflecting the period when Amco actually was managing the Hotel. This base period was used to arrive at an annualized figure which constituted the base year. (para.203)

Additionally, the Tribunal considered the following case-specific points and made adjustments where justified:

- The office and store rental income (added to the Hotel profits);
- Replacement reserve (amounts due to be put in this reserve were deducted from the gross income);
- Depreciation (deducted from the gross income; depreciation was calculated on a straight-line method, over a useful life of 20 years, with no salvage value);
- Entitlement to cash flow (found irrelevant);
- The impact of the Ramada contracts (found irrelevant);
- The hotel market in Jakarta: 1980-83 (found irrelevant);
- The treatment of corporate taxes (the gross income was diminished by corporate income taxes);
- The exchange rate (the Rupiah earnings were converted into US dollars each year at the prevailing yearly rate, on the basis of IMF statistics);
- The inflation rate (the actual year-by-year average inflation rate between 1980 and 1990 was applied to the hotel and office store rental profits; data provided by the World Bank);
- Risk factor (no risk factor was reflected in the figures for this first period);
- Discount rate (because of the valuation method to be applied to the past period, the use of a discount rate did not arise).

The Tribunal determined that the amount of damages due up to 1990 was US\$ 1,679,890 plus 6% simple interest from 15 January 1981. (para. 259).

10. Lost profits for the period of 1990-99

The discounted cash flow (DCF) method was applied for this time period. (para.260) The following headings were treated in an identical manner as for the period 1980-89:

- level and the depreciation rate of the replacement reserve;
- entitlement to depreciation;
- entitlement to cash flow;
- the impact of the Ramada contracts;
- the hotel market in Jakarta; and
- the treatment of corporate taxes.

Concerning the Hotel income and office and store rental income, the Tribunal chose to rely on the 1989 figures, which best reflected the value in real terms of the base period relevant of 1990-99. (para.261) As for the **exchange rate**, Rupiah earnings were converted at the 1989 exchange rate, as it appeared to the Tribunal to be the best non-speculative rate available. (para.269)

The determination of the appropriate **discount rate** was an issue of particular importance for this time period, as it is used to establish the value of future income in present terms. The higher the discount rate, the less the present value of the future earnings. The Tribunal determined the discount rate as a sum of the **inflation rate** and the **risk factor** (a corrective factor for any unknown risks that might occur).

The Tribunal used the average **rate of inflation** of the last five years (1985-89) as a projection for the remaining period. The average rate of inflation of 1985-89 was 6.82%. (para.278)

As to the **risk factor**, the Tribunal noted that the particular level of the risk factor was a matter of judgment. The Tribunal adopted a relatively low 4% risk factor – this finding was “heavily influenced by the fact that the level of assumed profit has been kept steady in real terms”. (para.280) The Tribunal also took into account the following facts:

- the projected hotel earnings had been based on known historic results;
- the trend in the US dollar and Rupiah exchange rate;
- Amco was to receive in 1990 compensation paid in US dollars. (para.281)

The Tribunal therefore concluded that a discount factor of 10.82% (4% risk factor plus 6.82% inflation rate) should be used to arrive at the 1980 net present value of the hotel earnings for the period 1990-99. (para. 282).

11. Results

In applying the valuation techniques to each of the periods, the Tribunal took account of the fact that under the 1978 Profit Sharing Agreement, PT Amco’s rights were 65%

of the stream of profits until 30 September 1984; and 50% thereafter until 30 September 1999. (para. 196)

In total for both time-periods the Tribunal awarded US\$ 2,696,330, including the pre-Award interest.

12. Interest

The Tribunal dealt with the question of interest only very briefly. It elucidated the function of interest – to bring the annual sums due to present day values (as opposed to the inflation adjustments which served to maintain the real value of the base year over the assessment period). (para.196)

The Tribunal awarded non-compounded interest of 6% running from the date of the Request for Arbitration (15 January 1981). The interest rate of 6% was fixed in accordance with Indonesian law. (para. 284)

13. Costs

The Tribunal decided that Amco and Indonesia should each bear the costs incurred in the preparation and presentation of their cases; and that the arbitrators' fees and expenses and the charges for the use of the facilities of the Centre shall be shared equally. (para.286)

VII. Implications / Initial Analysis

1984 Award

- An important first step in any award of damages is a determination of the **nature and extent of prejudice** suffered by an investor as a result of the wrongful conduct of a State.
- Full compensation of prejudice to the injured party requires an award of both *damnum emergens* and *lucrum cessans*. The Tribunal determined this to be a general principle of law which may be considered as a source of international law. It has to be kept in mind that this discussion was in the context of contractual liability.
- **Full compensation** is limited to the award of **direct and foreseeable damages**. Other tribunals also added “non-speculative” damages to this list.
- A standard of **full and effective compensation** enables to award damages in a **currency** that would ensure this standard of compensation. The same applies to the manner in which compensation is to be paid (e.g., outside the host country).
- According to the Tribunal, in international law, the **starting point of interest** has been generally fixed either at the date of the wrong, or at the date of the presentation of the claim to the competent international authority.

1990 Award

- The decision of the Tribunal shows intense and **detailed deliberation** concerning the matter of damages and, in particular, lost profits. The roadmap which the Tribunal used to reach its conclusions could prove **helpful guidance** for future tribunals.
- Although this case is a contract case, it may have implications for **treaty disputes**, particularly, in situations when State conduct in violation of a treaty interferes with contractual rights of an investor.
- **Burden of proof.** Despite the fact the Claimants showed the prejudice suffered as a result of the army and police intervention (loss of management rights), they could not quantify the damages, i.e. were not able to prove that by virtue of the loss of these rights they incurred specific monetary loss (neither *damnum emergens*, nor *lucrum cessans*). Therefore, no damages were awarded. At the same time the Tribunal accepted that the army and police intervention caused ‘general disturbance’ to Amco, and although this loss was not specifically quantified either, the Tribunal awarded a small sum of US\$ 10,000, without explaining the basis for its assessment. It appears that the Tribunal simply felt that since it had found a violation, it had to compensate for it somehow but it did not know how to do it, as there was a problem with quantification, so it awarded a discretionary lump sum.
- The Tribunal accepted that under international law there was duty to **mitigate damages**.
- The Tribunal clarified the **concept of foreseeability**. The test of foreseeability does not require that a State foresees the *quantum* of damages that can be caused by its wrongful conduct (and thus that only foreseeable quantum is to be compensated); rather, this test requires the tortfeasor to foresee that the damage *per se* can/will be caused by his conduct. Hence, foreseeability is linked to causation, not to *quantum*.
- **Date of the assessment of damages.** It follows from this case that in cases of unlawful takings (in this case there was no finding of expropriation but the taking of rights occurred as a result of a denial of justice), the assessment of damages does not have to be made on the date of taking (unless required by a treaty, of course). Post-violation data can be taken into account. The main criterion here would be that the relevant date for assessment should be chosen with a view to reach the objectives of compensation.
- On the issue of **causation**, the Tribunal refused to engage in a discussion of what might have happen if there would have been no wrongful conduct (Indonesia argued that Amco would end up in the same position – thus, there was no causal link between the breach and the damage). The Tribunal stuck to a more forthright and simple approach – take the act, see if it is unlawful and if yes, see what damages were incurred. At the same time, Indonesia’s argument is not completely devoid of reason – this approach would allow determining a true causal link that led to a loss of the Claimant. If the Claimant would end up in the same situation of ‘loss’ irrespective of the breach, then there seems to be merit in saying that this loss occurred due to some other cause, not due to the breach.

- The use of the **book value method** is unsuitable when compensating for prospective earnings. When considering the application of this method one should consider the type of assets that are to be compensated for. It might be suitable for tangible property but not for long-term contractual rights.
- This case is particularly notable due to the **methods of valuation** used when evaluating Amco's loss of profits. The Tribunal used two methods, one for lost profits over a time period which has already passed, and one for future profits. For the first period, it relied on a large amount of known data regarding the Hotel. For future profits, it used the DCF analysis.
- Assessing the **past period** (1980-89), the Tribunal did not take actual profits earned by the Hotel management that overtook from Amco, but instead used the profit earned by Amco in 1979-1980 as a basis for all other years and adjusted this base-period profit to account for inflation and other factors, already known at the time of the Award. For the future period, the Tribunal used the 1989 profits figure obtained in this way.
- The lost investment was a **going concern** and the Tribunal considered the **DCF analysis** to be appropriate to assess the net present value of Amco's rights for the **future** remaining period of the lease, by capitalizing earnings and expenditures which would otherwise have been spread over the future years of the life of the contract.
- Lost profits can be quantified through the **DCF analysis**, so the latter is not used exclusively to determine the going concern value of an asset.
- The Tribunal acknowledged that the **DCF method** was not a "mechanical device". Indeed, there are several judgmental factors/variables that influence the outcome – different interpretation of these factors (assigning different values to them) may lead to widely divergent results.