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**MacAndrews and Forbes Co. Case—Decision No. 29**

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In my opinion, this should have been considered sufficient to deny treatment as enemy. The majority justifies the opposite conclusion by the fact that the German High Commissioner, who at that time exercised civil power in the Zone of Trieste, confiscated the property shortly after the Armistice, so that in this fact must be found the continuation of the policy initiated by the Italian Government against Jews whose household effects were in Trieste. But it is evident that *proof* of the existence of a measure adopted according to the Italian War Law is being replaced by a mere supposition that the German authority intended to apply Italian law, a supposition which is, moreover, contradicted:

(*a*) by the fact that no reference to Italian law was contained in the order of the German Command, which instead made reference to exigencies of war of the German Army;

(*b*) by the fact that the Italian War Law provided for the sequestration of enemy property but not confiscation as well, which was instead applied by the German Command;

(*c*) (by the fact) that confiscation was the measure provided for by the laws of the German Reich against Jewish property and that the German Command obviously took his inspiration from these laws, also in view of the particular régime applied to Trieste which was then considered by the Germans to be almost a part of the Reich.

By this it is not denied that confiscation is a cause of damage which is compensable within the meaning of Article 78, but only that it constitutes at the same time an action which concretizes treatment as enemy. Not having kept these two concepts accurately separated led the majority of the Commission to a solution which does not seem to me consistent with Article 78 of the Treaty of Peace.

Rome, January 10, 1955.

*The Representative of the Italian Republic*

Antonio SORRENTINO

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## MACANDREWS AND FORBES CO. CASE—DECISION No. 29 OF DECEMBER 1954 [1]

Compensation under Article 78 of Peace Treaty—State responsibility—Sale of enemy property after sequestration—Measure of damages—Request for interest rejected.

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Indemnisation au titre de l'article 78 du Traité de Paix — Responsabilité de l'Etat — Vente de biens ennemis après séquestre — Détermination du montant de l'indemnité — Demande d'intérêts rejetée.

[1] *Collection of decisions*, vol. II, case No. 33. The Collection does not indicate the exact date of the decision.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy under Article 83 of the Treaty of Peace, and composed of Mr. Alexander J. Matturri, representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic, and Mr. Emil Sandström, former Justice of the Swedish Supreme Court, of Stockholm, Third Member, chosen by the two Governments by mutual agreement.

On the Petition filed on March 4, 1953, by the Agent of the Government of the United States in behalf of the MacAndrews & Forbes Co. *versus* the Italian Government.

STATEMENT OF FACTS:

The MacAndrews & Forbes Co., incorporated on May 7, 1902 under the laws of the State of New Jersey with its registered office in Camden, New Jersey, during the season of 1939/1940 purchased a quantity of about 20,000 quintals of green licorice root, which was cured, dried and stacked for storage at the Company's Corigliano Plant awaiting export to the claimant's factory in Camden. Of this quantity there remained in 1941 about 8,200 quintals or 820 metric tons of *dried* root.

On May 31, 1941 the Prefect of Cosenza ordered the blocking of the lot; forbidding its sale in the absence of express orders of the same Prefecture.

After execution of this Decree and after the appointment, at the request of the Ministry of Agriculture and Forests, of a custodian for the lot, the Ministry of Finance by note dated September 13, 1941 pointed out the advisability of the Prefect's appointing a Commissioner for taking the goods into custody and for their sale at the market price in favour of the producers of the category. The custodian was appointed commissioner by Decree of the Prefect dated September 24, 1941.

An inventory having been made of all property belonging to the claimant in Italy, including the licorice root, the Prefect of Cosenza by Decrees dated February 24, 1942 ordered the sequestration of the licorice root in one Decree and the sequestration of the rest of the property in another Decree. Under the first decree, the appointment of the commissioner was revoked and Avv. Italo Le Pera was appointed sequestrator. The Decree instructed the sequestrator to sell the licorice root and to deposit the proceeds in the Banca d'Italia in the account "*Istcambi beni nemici*" (Foreign Exchange Institute—Enemy property).

The Commissioner had already sold 175.24 quintals and the Sequestrator now proceeded to sell the remaining quantity which brought the quantity sold, including what had been sold by the Commissioner, up to 7,764.56 quintals.

On November 27, 1945 the Prefect of Cosenza revoked the sequestration Decree and gave directions for returning to the claimant the property formerly under sequestration. The restitution was performed on January 3, 1946 and included a sum of Lire 4,270,866.45, of which an amount of Lire 3,880,000 corresponded to the net proceeds of the sale of the licorice root.

The Embassy of the United States of America in Rome submitted on December 10, 1948 to the Ministry of the Treasury of the Italian Republic on behalf of MacAndrews & Forbes Co. a claim under Article 78 of the Treaty of Peace with Italy for loss sustained as a result of the sequestration and sale by the Italian authorities of 776.456 metric tons of dried licorice root.

The claim was rejected, the Ministry of the Treasury confirming its rejection

of the same claim which had previously been presented to the Italian authorities directly by the claimant.

Thereupon, the Agent of the United States Government filed the Petition contending that the claimant is entitled to compensation under Article 78 of the Treaty of Peace and the agreements supplemental thereto or interpretative thereof, since the licorice root had been sold and could not be returned to the claimant, and requesting that the Commission

(*a*) Decide that the claimant is entitled to receive from the Italian Republic two-thirds of the sum necessary to purchase 705.3 metric tons of dried licorice root (the quantity calculated on a quantity of 820 metric tons sequestrated, with the deduction of 114.7 metric tons which quantity could have been bought for the amount of 3,880,000 lire returned to the claimant at the time of the restitution), which sum was estimated on November 4, 1948 to be 57,129,300 lire, subject to the necessary adjustment for variations of values between November 4, 1948 and the final date of payment.

(*b*) Grant interest at the rate of 5% per annum on the amount awarded from September 15, 1947, the date of the filing of the original claim, to the date of payment.

(*c*) Order that any necessary expenses which may be incurred for the prosecution of this claim before the Commission be borne by the Italian Republic.

(*d*) Give such further and other relief as may be just and equitable.

The Italian Government Agent having deposited his Answer, the Agent of the Government of the United States submitted a Reply in which the sum claimed under (*a*) was increased to 74,761,800 lire, according to an appraisal as of May 27, 1953.

The Italian Government Agent has submitted a Counter-Reply.

By *procès-verbal* of December 14, 1953, it was stated that discussion in chambers had revealed the disagreement between the Representatives of the Governments with regard to questions both of fact and of law in this case, and it was decided that recourse should be had to a Third Member in order to resolve the dispute in its entirety.

The Governments appointed by common consent Mr. Emil Sandström, former Justice of the Supreme Court of Sweden, as Third Member of the Commission.

The Agents of the two Governments have argued the case before the Commission.

Their arguments are summarized, as far as necessary, in the following legal considerations.

CONSIDERATIONS OF LAW:

On the question of principle whether the claimant is entitled to compensation under Article 78, the defence can be summarized in the following way:

The sale was ordered because the goods were considered to be perishable as regards both the state of transformation and the conditions of preservation in which they were at the time. The lack of restitution therefore was not the result of an act of war but of a measure of the authorities and, as Article 78, paragraph 4 (*a*), requires a causal relation with a specific act of war within the technical meaning of the term, this paragraph would not be applicable to the instant case.

While stressing that other paragraphs of Article 78 had not been invoked in the Petition, the Agent of the Italian Government alleged that the sale was not ordered because the goods were enemy-owned.

The Agent of the United States Government, who in his Petition had based the, claim on the fact that the licorice root had not been returned to the claimant relying on Article 78, paragraph 4 (*a*), contested in his Reply the limiting interpretation which the Italian Government attempted to give to paragraph 4 (*a*), since nowhere in Article 78 is there any limitation in the sense that the cause of the damage must be an act of war. He further contended that the claimant's dry licorice roots had been sequestered as enemy property under the Italian War Law and that such sequestration was patently as a result of the war. Therefore, while the right to compensation clearly exists under paragraph 4 (*a*) it could very well also exist under paragraph 4 (*d*), and the dispute had not been confined to the application only of paragraph 4 (*a*).

In his Counter-Reply, the Agent of the Italian Government maintained that the applicability of paragraph 4 (*d*) could not be considered in this dispute. He further alleged that the sequestration was not the cause of the damage and that the question in dispute is whether the sale was or was not an act of good administration.

Even accepting the presentation of the issue as proposed by the Agent of the Italian Government, it must be held that the Italian Government is responsible.

The Commission cannot sustain the Italian Agent's contention that the sequestration and the sale were effected because the goods were perishable.

The facts of the case lead to a different conclusion.

In a report on his administration dated December 4, 1943, the sequestrator wrote as follows with reference to the blocking of the goods:

> Upon information of the "Federazione Nazionale Industriali Prodotti Chimici" the Ministry of Corporations, by an urgent Government mail communication No. 5273 dated May 12, 1941, directed the local agency to make inquiries in order to ascertain the availability of the lots of licorice root pertaining to the above-mentioned company, and eventually to adopt measures for the blocking of the goods, pending further dispositions intended to guarantee that the product was to be employed in favour of the national industry which needed it for the production and export of the juice.

According to the same report, the letter in which the Ministry of Agriculture and Forests requested the Prefect of Cosenza to appoint a custodian indicated the reason for the request as being "to secure the prompt utilization and valorization of the product".

The preamble of the Decree of February 24, 1942, which ordered the sequestration of the property other than the licorice root belonging to the claimant, reads as follows:

> Having seen Article 296 of the War Law approved by Royal Decree No. 1415 of July 8, 1938; having seen Decree No. 566 of June 10, 1940, which ordered the application of that law in view of the occasion for taking advantage of the power granted by Article 295 of the aforesaid law.

The preamble of the Decree of the same date concerning sequestration of the licorice roots first mentions the Decree appointing the custodian and a letter of the General Accounting Office of the State "by which the sequestration of the above-mentioned licorice root was ordered". The preamble then continues as follows:

> Having seen Decree No. 566 dated June 10, 1940 ordering the application of that law; in view of the occasion for taking advantage of the power provided by Article 295 of the aforesaid law.

It is obvious that the intention was to mention here, as in the other Decree, Article 296 of the War Law but that this part was omitted by mistake.

However, Article 5 of the Decree provides:

> The sums recovered from the sale of the quantity of licorice referred to in Article 2 of the present Decree must be deposited by the sequestrator with the Banca d'Italia in the account "*Istcambi beni nemici*" (Foreign Exchange Institute, Enemy Property), in accordance with Law No. 1994 of December 19, 1940 in the manner indicated in circular No. 152200 of February 21, 1941.

In the inventory it is declared that the stacks of dried licorice root were in "a fair state of preservation". No other examination of the condition of the goods was made and, before the sale, there was nowhere any reference to the licorice root being in a bad state.

Both parties have relied on expert opinions to support their contentions about the perishability of the licorice root.

The Claimant relies upon affidavits of William Sidney Gall and Robert Thompson Sime who have been in the service of the claimant. They describe how green licorice root bought by the claimant in both Italy and Greece has been cured, dried and stacked for storage, and they testify that with this method it has been possible to preserve the licorice root for years, in Greece during the entire period of the war, without deterioration. The only thing necessary would have been supervision, such as that for which the claimant had arranged.

The Agent of the Italian Government relies on a report of Prof. Berna of the General Direction of Agricultural Production, who denies that it is possible to assure the preservation of dried licorice root for several years in the open air on the fields of Corigliano by the method used by the claimant.

In weighing the value of these opinions, it must be kept in mind that, according to other evidence, it is at least doubtful whether the claimant's method of storing licorice roots is used in Italy by others than the claimant, and that consequently, there are here in opposition, on the one hand, the findings of experience and, on the other hand, more theoretical considerations. The Commission attributes more weight to the former.

Taking all of these circumstances into consideration, the Commission finds that the sequestration and sale took place not because of the perishability of the goods but because of their character as enemy property.

Therefore, there can be no doubt that the sale of the licorice root gives rise to a claim for compensation under Article 78, paragraph 4 (*a*).

In view of this conclusion, there is no need to examine the question of admissibility of the claim under paragraph 4 (*d*) of the same article.

As to the amount of compensation, the Agent of the Italian Government denies that it should be calculated for 705.3 metric tons of dry licorice root, on the ground that the quantity of root mentioned in the Decree of Sequestration was not previously weighed but merely estimated to be about 820 tons. The only permissible method of calculating would be to take as a basis the quantity actually sold (776.456 metric tons), deduct the number of tons (114.7) equal to the amount in cash which was returned, and arrive at a result of 661.756 metric tons.

The Agent of the Italian Government further disputes the value, as estimated by the claimant.

The Conciliation Commission agrees with the objection of the Italian Agent with regard to the calculation of the quantity of licorice root. The quantity on which the amount of the loss must be calculated is 661.756 metric tons.

With regard to the compensation to be awarded, the Agent of the Italian Government contends that the claimant replaced the licorice root in question some years ago and that the economic damage suffered is therefore represented by the sum which was expended at that time.

In this respect he relies on a passage in the Petition wherein it is stated that "the licorice in question represented its [the claimant's] total stock of raw material in Italy and had to be replaced after the war at many times the original cost".

The contention of the Italian Agent is not justified in the opinion of the Commission, because the passage in the Petition upon which he relies is merely a general statement and not a statement of a specific fact and therefore there is no proof of the actual replacement of that specific lot of merchandise.

According to Article 78, paragraph 4 (*a*), the compensation must be two-thirds of the sum necessary at the date of payment to purchase the above-mentioned quantity of 661.756 metric tons of dry licorice root.

To arrive at that sum, the Commission adopts the method of calculation used by the claimant and against which no specific objection has been made.

The Commission finds that two and one-half tons of green root are required to produce one ton of dried root, and that the current market price of green root is 29,010 lire per metric ton.

To the price thus obtained must be added the expenses of transportation to the Corigliano plant, cleaning, curing, baling or stacking, with necessary protection from the weather. Such expenses have been declared by the claimant to be, as of October, 1948, 13,500 lire per metric ton of dry root, and, as of May, 1954, 25,375 lire per metric ton of dry root. The elements of such expenses have not been specified in detail, but in the circumstances of the case the Commission finds that 20,000 lire per metric ton can be granted for that item.

The cost of one ton of dry licorice root must therefore be computed as follows:

| | *Lire* |
|---|---|
| Price of 2½ tons of green root . . . . . | 72,525 |
| Expenses of processing per ton of dry root . . . . . | 20,000 |
| TOTAL | 92,525 |

For the quantity of 661.756 metric tons, the compensation should therefore be based on a total value of 61,228,974 lire.

The request under (*b*) of the Petition is rejected, in accordance with Decision No. 24 of July 12, 1954, in the Joseph Fatovich case.[1]

With respect to the request in the Petition under (*c*), the claimant has waived it.

For the reasons set forth above, the Conciliation Commission

DECIDES:

1. The claim is admissible, under Article 78, paragraph 4 (*a*) of the Treaty of Peace;

2. The claimant is entitled to receive from the Government of the Italian Republic the amount of 40,819,316 lire, equal to two-thirds of the sum of 61,228,974 lire.

3. This Decision is final and binding.

[1] *Supra*, p. 190.

This Decision is filed in English and in Italian, both texts being authentic originals.

DONE in Rome at the seat of the Commission, 68 Via Palestro, December 1954.

*The Third Member*

Emil SANDSTRÖM

*The Representative of the United States of America*

Alexander J. MATTURRI

*The Representative of the Italian Republic*

Antonio SORRENTINO

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## ROSASCO CASE (THE *UNIONE*)—DECISION No. 50 OF 19 MAY 1955 [1]

Compensation under Article 78 of the Treaty of Peace—State responsibility—Loss of requisitioned ship—Requisition for use—Requisition of title—Measure of damages—Request for interest denied.

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Indemnisation au titre de l'article 78 du Traité de Paix — Responsabilité de l'Etat — Perte d'un navire requisitionné — Réquisition pour usage — Réquisition du titre de propriété — Détermination du montant de l'indemnité — Demande d'intérêts rejetée.

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The Italian-United States Conciliation Commission composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Republic and José de Yanguas Messia, Professor of International Law at the University of Madrid, Third Member selected by mutual agreement of the United States and Italian Governments.

On the Petition filed on November 24, 1952, by the Agent of the Government of the United States of America *versus* the Italian Government in behalf of the Società Anonima Genovese Armamento e Rappresentanze and/or Harold W. Rosasco and William E. Rosasco, Heirs of A. T. Rosasco.

### I. THE FACTS

1. In 1939 Mr. A. T. Rosasco stipulated a contract for the construction of the motor ship *Unione* (known first as "new construction, No. 255") with

[1] *Collection of decisions*, vol. II, case No. 31.