REPORTS OF INTERNATIONAL ARBITRAL AWARDS

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Italian-United States Conciliation Commission

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ITALIAN-UNITED STATES CONCILIATION COMMISSION [1]

[1] For the Rules of procedure of this Commission and other relevant documents, see Volume XIV of these *Reports*.

DE PASCALE CASE — DECISION NO. MD/1018 OF 24 JUNE 1961 [1]

Compensation for war damages — Whether indemnity owned under Peace Treaty exempted from inheritance tax — Scope of provision on tax exemption stipulated in Peace Treaty — Interpretation of treaties — Restrictive interpretation — Preparatory work — Jurisdiction of Commission.

Indemnité pour dommages de guerre — Question de l'applicabilité des droits de succession à l'indemnité due en vertu du Traité de Paix — Portée de la disposition du Traité portant exemption de tous prélèvements, impôts ou autres charges — Interprétation des traités — Interprétation restrictive — Compétence de la Commission.

[1] *Collection of decisions*, vol. VII, case No. MP/943. The De Pascale Claim was listed under the Memorandum of Understanding of March 29, 1957. For this reason, the De Pascale claim has a case number and decision number which do not follow the numbering pattern of other decisions of the Conciliation Commission.

The Italian-United States Conciliation Commission established under Article 83 of the Treaty of Peace signed on February 10, 1947 between the Allied and Associated Powers and Italy, composed of Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Government, Mr. Alexander Matturri, Representative of the Government of the United States of America at Rome, and of Mr. Paul Guggenheim, Professor at the University of Geneva and at "Institut Universitaire de Hautes Etudes Internationales" at Geneva, Third Member chosen by mutual agreement between the Italian and United States Governments,

In the case pending, following the Petition filed on behalf of the abovenamed claimants, for the purpose of receiving compensation, included in the special list annexed to the Memorandum of Understanding between the Government of the United States of America and the Government of Italy regarding war damage claims, signed at Rome on March 29, 1957;

STATEMENT OF FACTS

A. Vincenzo De Pascale, a United States national who died on December 27th, 1952, sustained war damage at Vitulazio, Via Roma 55 (first damage): other property consisting of a rural building and plots of land located in an area in the vicinity of San Angelo also sustained damage. The amounts claimed are 1,560,087 lire and 773,094 respectively while the aggregate total amounts to 2,333,181 lire.

The Agent of the Government of the United States of America and the Agent of the Government of the Italian Republic agreed to include claim No. 943 (Pascale, Mary, Josephine, Yolanda, Nicholas, John Angelo and Vincent Jr.) in the special list referred to in the Memorandum of Understanding between the Government of the United States and the Government of the Italian Republic concerning war damages signed at Rome on March 29, 1957. In the first list of claims the Agent of the Government of the United States and the Agent of the Government of the Italian Republic point out that claim No. 943 was to be settled by the payment of an award amounting to 800,000 lire, under the following reservation: "(Subject to proof by claimants that inheritance taxes owing to the Italian Government by the estate of the late Vincenzo De Pascale (who died in Ashtabula, Ohio on Dec. 27, 1952) have been paid with respect to the amount of this award)"; and "(provided claimants submit a declaration by the usufructuary Giovanni De Pascale showing his consent that payment of this award be made to them)". In a new list, following reconsideration of the claims referred to in the first list, the Agents of the two Governments, on January 5, 1960, proposed that the Commission make an award of 900,000 lire to the claimants. At the bottom of the aforesaid list there appears, however, the following note: "It is understood that the condition requiring proof of the payment of inheritance taxes in connection with the claim of De Pascale, Mary, Josephine, Yolanda, Nicholas, John, Angelo and Vincent Jr. (No. 943) and in all other claims listed in the Memorandum of Understanding of March 29, 1957 is without

prejudice to the contention of the United States Agent that compensation is owing by the Italian Government under Article 78 of the Treaty of Peace to the claimants' heirs and successors free and clear of any inheritance taxes. The issue is accordingly hereby submitted to this Honorable Conciliation Commission for decision."

B. On January 27, 1960, hence a few days after the partial agreement reached in the De Pascale case on January 6, 1960, the Italian-United States Conciliation Commission, completed by its Third Member, Mr. Plinio Bolla, former President of the Swiss Federal Court, decided in a case which had not been subjected to the special provisions governing the Memorandum of Understanding (Case No. 152, Miss Harriet Louise Self [1]), that Miss Self was entitled to receive from the Italian Government the sum of 3,250,000 lire under Article 78, paragraph 4 a) of the Treaty of Peace, as war damage compensation, net of all imposts, taxes and other fiscal charges, in particular, net of any Italian succession tax on the estate of Mr. Edward Danforth Self, of whom she was the heir and who was the owner of the damaged property.

Following this majority decision of the Commission, to which there is attached a dissenting Opinion drawn up by the Italian Member on the Commission, on February 15, 1960, the Agent of the Government of the United States submitted a request to the Commission which reads as follows:

> The United States Agent requests that this Honorable Commission issue an Instruction informing the Banca Nazionale del Lavoro (1) that the Italian-United States Conciliation Commission has decided that the heirs of a deceased claimant are entitled to receive compensation free of any levies, taxes or other charges, and particularly net of the Italian inheritance tax on the amount of such compensation, and (2) that the Banca Nazionale del Lavoro should so notify the heirs of every deceased claimant to whom said bank has not yet paid any award made by the Italian-United States Conciliation Commission pursuant to the Memorandum of Understanding of March 29, 1957.

On April 5, 1960 the Agent of the Italian Government submitted to the Conciliation Commission a letter written by the Ministry of the Treasury on March 29, 1960 containing the answer of the Italian Administration to the United States Agent's request. In this communication the Italian Government indicates that it opposes extending the decision rendered in the Harriet Louise Self case to the claims examined within the sphere of the Memorandum of Understanding of March 29, 1957.

C. In the circumstances, the dispute was submitted to the Conciliation Commission. As the Representatives of the two Governments would not agree on the interpretation to be given to Article 78, paragraph 4 a), which provides: "Compensation shall be paid free of any levies, taxes or other charges," they signed a Proces-Verbal of Non-Agreement on April 28, 1960. The Italian and United States Governments agreed to complete the Conciliation Commission by calling upon Prof. Paul Guggenheim, Professor at the University of Geneva and at the Institut Universitaire de Hautes Etudes Internationales and requested him to act as Third Member. Professor Guggenheim accepted.

D. The Conciliation Commission, so completed, on Thursday, February 16, 1961, heard the oral pleadings and defenses of the Agents of both Parties, as well as the arguments of Mr. Cesare Tumedei, counsellor and professor at Rome, as an expert for the American Agent.

[1] Volume XIV of these *Reports*, p. 435.

CONSIDERATIONS OF LAW

1. The American Government and the Italian Government are in disagreement on the question as to whether or not the indemnity established by mutual agreement in the amount of 900,000 lire, on January 6, 1960, within the sphere of the Memorandum of Understanding dated March 29, 1957 must be paid to the party in interest by the "Banca Nazionale del Lavoro", following withdrawal thereof from the special account opened in the name of the Joint Secretariat of the Conciliation Commission, without the Italian Government deducting from the aforesaid amount — before or after payment is effected — the inheritance tax on the indemnity so paid. As the solution of this issue at the time when the claims coming under the Memorandum of Understanding dated March 29, 1957, had been reserved to the Commission, namely, on January 5, 1960 and following the American and Italian communications dated March 11 and April 5, 1960 respectively, the Commission expressed the following thoughts:

2. The question submitted to the Conciliation Commission can be viewed as follows: on the one hand it should be ascertained whether or not a deduction of Italian inheritance tax is compatible with the fact that Article 78, paragraph 4 (c) of the Treaty of Peace — a paragraph wholly consistent with the solution adopted in the other Treaties of Peace concluded at Paris — provides that compensation for damage caused during the war or for a loss suffered because of damage caused to property in Italy as a result of the war shall be paid net of any levies, taxes or other fiscal charges. On the one hand, should the Commission reach the conclusion that the indemnity must be paid without deductions for Italian inheritance tax, it should be ascertained whether this tax could at least be collected from the amount of the indemnity once this is paid.

3. The prohibition contained in the provision requiring that compensation must be paid net of all levies, taxes and other fiscal charges, contemplated in Article 78, paragraph 4 (c) of the Treaty of Peace can be construed in three different ways. In the first place, a strict interpretation of the provision allows one to conclude that any deduction for levies, taxes or other fiscal charges is inadmissible, at any time. If one were to accept this interpretation, the indemnity would be exempt from all levies, taxes or other charges even if it had become part of the estate of the party in interest or of his successor. There would be thus involved a permanent obligation incumbent on the contracting States. It would lead to according an unlimited fiscal immunity on the amount paid as compensation. The Commission is of the opinion that there are no grounds for stopping at this excessive and untenable construction, which at all events has never been contended during the course of the oral discussions before the Commission. Such an interpretation would lead to the permanent fiscal exemption of an estate — difficult to be determined subsequently — incompatible with the general principles of law recognized in fiscal matters by all the legal systems of civilized States.

4. A second interpretation of Article 78, paragraph 4 (c) is that prohibiting the Italian State from effecting any deduction for levies, taxes or other charges — therefore also an inheritance tax — from the indemnity *as such*, and this either before or after payment thereof. This solution would not exclude that the indemnity, when paid and forming part of the estate of the party in interest, would be liable to be subjected to all fiscal charges *in the future*. This is the theory that was accepted by the Conciliation Commission

in the aforementioned Case No. 152,[1] Miss Harriet Louise Self. The decision in this case reads as follows:

> . . . the Treaty of Peace, for the purpose of the application of direct taxes, does not consider the property of United Nations nationals, damaged by the war and indemnified, to be permanently reduced by a sum equal to the amount of the indemnity nor does it accord, for purposes of assessing and levying indirect taxes on the transfer of wealth, a perpetual franchise to the whole chain of property transactions, (purchases, investments, mortgages etc.), the first link of which was the paid indemnity. But a franchise is granted to property transactions, determined by inheritance, in that these transfers occur before the indemnity is paid to the person entitled thereto; if the indemnity is paid to the person entitled thereto, his heir cannot avail himself of the exemption provided for in Article 78, paragraph 4 c) of the Treaty of Peace which can be invoked by the successor only insofar as the indemnity has not been settled and paid to his predecessor in interest. . . .

The Commission is of the opinion that this construction does not give sufficient consideration to the fact that an imposition on the inheritance does not obligatorily take the form of a collection from the indemnity as such but that the Italian Government claims it has the right to subject to taxation an expectancy or credit which already existed in the property of the party in interest entitled to receive compensation, which property was transferred to the successors following the death of such party in interest.

5. In the circumstances, the Commission must examine a *third* interpretation of Article 78, paragraph 4 (c) of the Treaty of Peace. Under this latter interpretation, two stages are to be envisaged.

The first refers to the payment of the indemnity as such. The Italian State is hence the debtor of the party in interest, who sustained damage, as well as of his successors, and the payment of this indemnity is to be effected in conformity with the conditions set forth in Article 78, paragraph 9 (b) and in Article 78 paragraph 4 (c).

The second, on the other hand, concerns the question of the transfer from the original owner to the heirs or successors of the credit, or expectancy, related to the indemnity. In point of fact, at the time of his death, the original owner possessed, among other items forming the bulk of his property, and by virtue of the Treaty of Peace, a credit, or an expectancy to be indemnified, a credit or expectancy which, because of his demise, was transferred to his successors. It is the transfer of this credit or expectancy from the decedent to the heirs that the Italian State would like to subject to inheritance tax.

From the foregoing it therefore appears that one must very carefully make a distinction between the situation represented by the payment of compensation on the one hand which, by virtue of Article 78, paragraph 4 (c) is net of "all levies, taxes and other fiscal charges", and that represented by the transfer to his successors of the credit, or the expectancy, of the original owner who sustained the damage.

The Commission holds that this transfer is not covered by the prohibition against making any deductions for taxes, levies or other fiscal charges contained in Article 78, paragraph 4 (c) of the Treaty of Peace, because this article merely refers to the payment of the indemnity as such, and not to the entirely different operation of a possible levying of taxes on the transfer of the credit, or the expectancy, from the original owner to his successor to whom the indemnity is actually paid.

[1] Volume XIV of these *Reports*, p. 435.

6. Doubtless, the credit corresponding to the amount of the indemnity is definitely established only after a final determination of the indemnity itself, in accordance with Article 78, paragraph 4 (a) of the Treaty of Peace, and the rules laid down by the two Parties in the Memorandum of Understanding dated March 29, 1957.

It follows that, until the indemnity is determined the amount thereof is uncertain. Nevertheless, this circumstance does not deprive the Italian Government of the right to subject to the payment of Italian inheritance tax the transfer of the original owner's credit or expectancy to his successors, because the Treaty of Peace merely prohibits subjecting to the Italian inheritance taxes the payment of the indemnity as such. (Article 78, paragraph 4 (c).)

7. The construction of Article 78, paragraph 4 (c) to which the Commission believes it should give preference leads to an *equitable* settlement because of the fact that the indemnity paid to the successors can be dealt with from the point of view of collection of inheritance taxes in the same manner as the indemnity paid to the original owner, the individual who sustained the damage, is dealt with. If, in point of fact, the indemnity had been paid to the original owner prior to his demise, it could be subjected to the Italian inheritance taxes because of the fact that it was incorporated into his property prior to his demise. There is no ground for dealing in a different manner with the indemnity paid to the original creditor's successor after his death, all the more because, according to the Italian contention, the aforesaid credit or expectancy should be considered as having been incorporated in the original owner's property prior to his demise.

8. Furthermore, little does it matter that Article 78, paragraph 4 (a) limits the indemnity "to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered."

This provision which leads to the result that the *indemnified* owner is treated less fairly than the owner to whom the property is *returned* in "complete good order" (Article 78, paragraph 4 (a)), in no ways rules out the fact that the operation of the transfer of the credit, or the expectancy of the indemnity, from the original owner who is to receive compensation, to his successors, can be subjected to inheritance taxes in the same way as the right to receive restitution of property does not rule out that the latter be subjected to inheritance taxes if the original owner dies before restitution is made. It is only restitution as such that should not give rise to the collection of any sum whatever by the Italian Government, and must be free of all encumbrances or charges (Article 78, paragraph 2). In a corresponding manner, the indemnity must be paid "free of any levies, taxes or other charges".

9. The fact that Article 78, paragraph 4 (a) fixes the indemnity at "compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered" entails a prohibition to subject to inheritance tax the operation of the transfer of the credit or of the expectancy of the original owner to his successor. Nevertheless, it has been stated during the course of those proceedings that such would be the case, in that the succession tax would reduce the indemnity to such an extent that the beneficiary would no longer have at his disposal two-thirds of the sum necessary to purchase similar property or to make good the loss suffered, as required by Article 78, paragraph 4 (a) of the Treaty of Peace. This rule, the sole purpose of which is to determine the criteria on the basis of which the amount of the indemnity shall be fixed, does not contain,

however, any prohibition against making deductions for inheritance taxes on the operation of the transfer from the original owner to his successors of the credit or of the expectancy, provided that these inheritance taxes are not levied on the payment of the indemnity itself.

10. The third interpretation, which is the construction preferred by the Commission, is not only compatible with Article 78, paragraph 4 (c) of the Treaty of Peace. It is controlling because of the fact that it is the most literal of the three interpretations analyzed and is the most restrictive upon the provision in question. The international legal system is in favor of the freedom of the subjects involved. The principle of interpretation that preserves this freedom harmonizes with the prevailing tendency of international intercourse, a fact which also flows, among other things, from the jurisprudence of the Permanent Court of International Justice (for instance Serie A. No. 10, p. 18, Serie A. No. 1, pp. 24, 25, 26; Serie A/B. No. 46, p. 167).

11. This — restrictive — interpretation of Article 78, paragraph 4 (c) of the Treaty of Peace is not, in any event, in conflict with the preparatory work of the Peace Conference, which should, however, be given consideration in the interpretation of an international treaty only insofar as it reflects a mutual consent of all the contracting parties to a given text; whether by a resolution inserted in the Minutes of the Conference, or by an entirely different manner (cf. *Lord McNair*, Annuaire de l'Institut de droit international, 1950, I, 451). As is stated with reason in the Department of State Instruction 751, unclassified, No. A 106, September 10, 1957, referred to during the proceedings by the Government of the United States: "The records of the negotiations leading to acceptance of Article 78 of the Treaty of Peace with Italy, and the comparable articles of the treaties of peace with Bulgaria, Hungary and Rumania, contain little helpful discussion of *taxes* or *charges* which should or should not be excepted."

12. The Commission's opinion on the matter leads to the following conclusions:

(a) The indemnity due to the De Pascale heirs must be paid net of all taxes, levies or other fiscal charges. It is therefore excluded that the amount of the indemnity can be reduced by the amount of the inheritance taxes for which the Italian Government possibly contends to be the creditor, following the death of the original owner of the property which sustained damage, compensation for which is paid to his successors.

(b) The Treaty of Peace contains no provision with regard to the transfer of the credit or the expectancy of the original "owner" of the property which sustained damage to his heirs, to whom the indemnity is actually paid. The Treaty is satisfied, in point of fact, with restricting, on the one hand, the number of persons entitled to claim indemnity, to Nationals of one of the United Nations, in conformity with Article 78, paragraph 9 (a) of the Treaty of Peace, and on the other hand with prohibiting any deductions for taxes, levies or other fiscal charges from the payment of the indemnity. However, both the question of ascertaining who are the legitimate heirs entitled to claim the indemnity that has not been paid to the "owner" who personally sustained the damage, and the question of ascertaining whether or not the transfer of the credit or the expectancy can be subjected to inheritance taxes are not established by the Treaty of Peace. The result is that the freedom of the States in this field is complete and that the answer to be given to this question can only be found by resorting to municipal law. While the question of establishing who are the legitimate successors entitled to claim the unpaid

indemnity is a matter that is governed by United States law, that regarding the question of levying taxes on the transfer of the credit or the expectancy thereof concerning property located in Italian territory, as well as the question as to whether a credit or an expectancy thereof is involved, is a matter that is governed by Italian fiscal law, in that no rule of general international law precludes the imposition of fiscal charges on the transfer of property in the locality where this property is located. (Cf. *Hyde*, International Law, chiefly as interpreted by the United States of America, second edition, t. I, 1947, p. 666. *Udina*, Il diritto internazionale tributario, 1949, p. 58.)

(c) It is not within the Conciliation Commission's jurisdiction to decide upon the question as to whether or not Italian law *actually* subjects to inheritance taxes the transfer of the credit or of the expectancy thereof, relating to an indemnity that was owned by Vincenzo Pascale, the owner who sustained damage, to his successors, Mary, Josephine, Yolanda, Nicholas, John, Angelo and Vincent Jr. Pascale, to whom the indemnity shall be paid. In point of fact, Article 2 of the Rules of Procedure of the Conciliation Commission limits its jurisdiction to disputes that may arise between the Italian Government and the Government of the United States of America regarding the application or interpretation of Articles 75 and 78 of the Treaty of Peace, and of the Annexes and Exchanges of Notes referred to in these provisions, as well as of every other agreement reached or liable to be reached between the United States of America and Italy insofar as they refer to the articles and annexes referred to by the Treaty of Peace. In the circumstances, the question as to whether or not Italian law actually subjects the transfer of the credit, or the expectancy thereof, provided for in Article 78, paragraph 4 (c) of the Treaty of Peace, from Vincenzo Pascale to his successors, which was not finally determined at the time of death of the original creditor, is not within the jurisdiction of the Conciliation Commission, which cannot pass on matters governed by municipal law, excepting only those of an incidental nature and governed by municipal law for the purpose of applying the rules of international law provided for in aforementioned Rules of Procedure of the Conciliation Commission. It therefore follows that the Conciliation Commission cannot render an opinion on the question as to whether or not, from the Italian municipal law viewpoint, the Italian authorities have the right to collect inheritance taxes on the transfer from Vincenzo Pascale to his successors of the expectancy or the credit relating to the indemnity.

DECIDES

1. The Petition submitted on February 15, 1960 by the Government of the United States of America on behalf of Mary, Josephine, Yolanda, Nicholas, John, Angelo and Vincent Pascale Jr., is admitted only in part, meaning that:

(a) The Banca Nazionale del Lavoro shall be informed through the Joint Secretariat that the Commission has decided that Mary, Josephine, Yolanda, Nicholas, John, Angelo and Vincent Pascale Jr. as heirs of Vincent Pascale senior, are authorized to receive the amount of 900,000 lire as indemnity. This indemnity shall be paid net of all levies, taxes or other fiscal charges, and this in conformity with the agreement reached on January 5, 1960 between the Agents of the Government of Italy and the Government of the United States of America, on the basis of the Memorandum of Understanding dated March 29, 1957.

(b) The Italian Government does not have the right to condition the payment of this indemnity on the submission of proof that Mary, Josephine, Yolanda, Nicholas, John, Angelo and Vincent Jr. Pascale have paid the Italian inheritance tax on the transfer to themselves of the expectancy or the credit of the indemnity due to Vincenzo De Pascale, who died at Ashtabula, Ohio, on December 27, 1952.

(c) The sum of 900,000 lire referred to in sub-paragraph a) above shall be paid in the form of a check drawn by the Joint Secretariat of the Conciliation Commission on the Banca Nazionale del Lavoro, in conformity with the Memorandum of Understanding dated March 29, 1957.

(d) The Conciliation Commission lacks the necessary jurisdiction to pass on the question as to whether or not, following the payment of the indemnity net of all taxes, levies and other fiscal charges referred to above, the Italian Government has the right to collect inheritance tax on the transfer of the expectancy, or the credit to the indemnity, of Vincenzo De Pascale to his successors, Mary, Josephine, Yolanda, Nicholas, John, Angelo and Vincent Jr. Pascale, as the answer to this question is a matter which comes exclusively under the jurisdiction of the Italian authorities.

GENEVA, June 24, 1961.

The Third Member

(GUGGENHEIM)

The Representative of the Italian Republic

(A. SORRENTINO)

The present decision is not signed by Mr. Matturri as is shown by the following letter:

Milan, June 22, 1961.

Prof. Paul Guggenheim,
1, Bout du Monde,
Genève, Suisse.

Dear Prof. Guggenheim,

I received the decision which you proposed in the De Pascale case and gave it careful consideration.

Since that time I wrote you stating that I had resigned as United States Representative on the Italian-United States Conciliation Commission and that I was being replaced by Mr. Leslie L. Rood, effective May 1, 1961.

Although there is some doubt whether I am now qualified to take any further official acts in the De Pascale case, I would like to inform you that I had decided to disagree with the proposed decision because it did not follow the Self case. Accordingly, I would have felt obliged to dissent from your proposed decision had I continued as the United States Representative.

May I again express my pleasure in our association on the Commission.

sign. A. MATTURRI

Mr. Rood the successor United States Representative on the Commission is present at the signing of the decision and confirms the opinion expressed by Mr. Matturri in the letter above.

sign. Leslie L. ROOD

The Representative of the Government of Italy has no objection to this procedure.

GENEVA, 24th June 1961. sign. A. SORRENTINO

ARTHUR DE LEON CASE — DECISIONS NOS. 218 AND 227 OF 15 MAY 1962 AND 8 APRIL 1963 [1]

Claim under Article 78 of Peace Treaty — Status of a "United Nations national" — Applicability of second part of paragraph 9 (*a*) of Article 78 of Peace Treaty — Treatment as enemy — Jurisprudence of Conciliation Commissions — Interpretation of treaties — Restrictive interpretation — War damages — Nature and extent of — Damage to Italian company — Exercise of right to compensation — Simulation — Measure of damages.

Réclamation présentée au titre de l'article 78 du Traité de paix — Qualité de « ressortissant des Nations Unies » — Applicabilité de la seconde partie du paragraphe 9, *a*, de l'article 78 — Traitement comme ennemi — Jurisprudence des Commissions de conciliation — Interprétation des traités — Interprétation restrictive — Dommages de guerre — Nature et limites — Dommages subis par une compagnie italienne — Exercice du droit à dommage — Simulation Détermination du montant de l'indemnité à verser.

[1] *Collection of decisions*, vol. VII, case No. 274.

DECISION NO. 218 OF 15 MAY 1962

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic, pursuant to Article 83 of the Treaty of Peace with Italy dated February 10, 1947, and composed of Messrs. Leslie L. Rood, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Government, and Georges Sauser-Hall, Professor *Emeritus* of International Law at the Universities of Geneva and Neuchatel, Switzerland, Third Member chosen by mutual agreement between the United States and Italian Governments,

Having seen the Petition dated February 11, 1957, filed on the same date with the Joint Secretariat of the Commission by the Agent of the Government of the United States of America,

v.

The Government of the Italian Republic
in behalf of
Arthur De Leon, claimant,

Having seen the Answer of the Agent of the Italian Government dated May 22, 1957;

Having seen the Proces Verbal of Non-Agreement dated June 4, 1957, signed by the Representatives of the Parties to this dispute, in which it was decided to resort to a Third Member, as provided for in Article 83 of the Treaty of Peace with Italy and the Rules of Procedure of the Commission, for the purpose of resolving the disputed issues raised by the instant case;

Having seen the Request dated November 18, 1959, in which the Agent of the United States demanded that the claimant, De Leon, and seven witnesses be heard on three of the controversial points set forth in the Petition;

Having seen the Order issued by the Commission on November 20, 1959 granting this request and directing that certain documentary evidence be produced, all questions of law being reserved;

Having heard the testimony under oath of three witnesses, Messrs. Pietro Comparini, Alessandro De Giorgis and Mario Boffa, during the session of the Commission held in Rome on December 10, 1959, the Plaintiff Government having waived the right to have other witnesses heard and to examine the claimant, and, having seen the stenographic recordings of the statements made by the witnesses during the aforesaid session;

Having seen the documents filed with the Joint Secretariat on December 15, 1959 by the Agent of the Plaintiff Government;

Having seen the Order issued by the Commission on December 11, 1959 directing the Agents of both Governments to file with the Joint Secretariat, within a time limit of thirty days beginning from the date on which the aforesaid Order was notified to them, their observations on the questions of law involved in the controversial issues of the instant case, and, within a time limit of sixty days beginning from the date of notification referred to above, their final observations (this latter time limit was extended, by Order, to March 11, 1960);

Having seen the Observations on the questions of law submitted by both Parties, namely, the Rebuttal of the Agent of the United States Government and the Brief of the Agent of the Italian Republic, filed with the Joint Secretariat of the Commission;

Having considered that the Agents of both Parties renounced oral hearings, but that in his Brief of March 5, 1960 the Agent of the Italian Government nevertheless requested that the Commission order a hearing to be held, if in the Commission's opinion such an oral discussion was warranted; and that the Commission, on the strength of the fact that a new Representative of the United States had taken office beginning on May 1, 1961, following the resignation of his predecessor and that he had not attended the session of December 10, 1959, the Commission held that a final oral discussion was necessary;

Having noted that this final session was scheduled to be held on October 16, 1961 in Rome, where in point of fact it was held;

Having heard, on the aforementioned date, the oral arguments of the Representatives of both Parties;

Having considered that the Agent of the United States Government reached the conclusions set out hereunder, which conclusions were further confirmed by him in both written and oral proceedings, namely that this Commission:

(a) Decide that the claimant is a United Nations national within the meaning of the second sentence of paragraph 9 (a) of Article 78 of the Treaty of Peace;

(b) Decide that the claimant is entitled to receive from the Italian Government under Article 78 of the Treaty of Peace and the agreements supplemental thereto and interpretative thereof two-thirds of the sum necessary at the time of payment to make good the losses suffered by him, which sums were estimated as of February 1947 to be in total 243,450,930 lire, divided as follows:

	Lire
Turin building	24,774,056
Turin plant	166,874,602
Turin installations	11,439,790
Milan branch	40,362,482
TOTAL	243,450,930

subject to any necessary adjustment for variation of values between that date and the date of final payment;

(c) Decide that the claimant is entitled to receive from the Italian Government the entire sum of 1,200,000 lire, representing the reasonable expenses incurred by him in Italy in establishing his claim.

Having noted that in his Answer the Agent of the Italian Government concludes by requesting that the Petition be declared inadmissible; and that during the proceedings he insisted on its inadmissibility, in that only the "Fratelli De Leon" corporation would eventually be entitled to take action;

Having noted that during the final session the Agent of the Plaintiff Government advised that the claimant had died at San Remo on May 4, 1960, without however producing formal evidence of this demise, and submitted a request relating to the exemption from all inheritance taxes on any indemnity eventually paid by the Italian Government; that this request was in point of fact filed with the Joint Secretariat of the Commission on October 19, 1961, following the completion of all written and oral proceedings.

A. CONSIDERATIONS OF FACT

1. The claimant, Arthur De Leon, of Italian origin and of the Jewish faith, left Italy in order to avoid the racial persecutions foreshadowed by the antisemitic campaign conducted by the Fascist Government beginning in

1938. He went to the United States on July 31, 1939 and acquired American nationality on November 7, 1945; he never changed this nationality thereafter, as appears from the certificate of naturalization, the accuracy of which is not denied, and which is attached to the records of the case. He was domiciled at New York, 18 West 27th Street.

The Commission's jurisdiction to pass on his claim cannot be doubted and has given rise to no objection on the part of the defendant Party.

2. The losses sustained by the claimant during the war arise out of the confiscation of a part of his property in Italy, and, mainly, from true and proper war damage caused by air bombardments which destroyed a building and industrial installations which he claims to own in Turin and in Milan.

3. The measure of confiscation directed against his property affected only a very small portion of his belongings. By decree No. 23520/488, dated September 4, 1944, implementing Decree-Law No. 2 of January 4, 1944, enacted by the Italian Social Republic, also known as the Republic of Salo', the Chief of the Province of Turin directed that Arthur De Leon, though at that time an Italian national, be considered as an enemy national because he belonged to the Jewish race and that his property, consisting of a credit in the sum of 2,279.05 lire in a free banking account, be confiscated. (Petition, Annex 2, Exhibit 2.)

4. The real property and the industrial installations he claims to have owned in Italy, were not subjected to any measure of seizure or attachment on the part of the Italian authorities, but were extensively damaged by the air bombardments which occurred between November 28 and December 5, 1942 at Turin and on February 14, 1943 at Milan.

This property so damaged and partly destroyed, comprised:

(a) a building located at Collegno, Turin, Corso Savoia 179, used as dwelling quarters and as industrial premises; claimant had acquired ownership title thereof by purchase on March 29, 1934, and was, personally, the sole owner;

(b) an industrial plant, with a complete stock of tools and implements for automobiles and trucks, usable in performing eleven different types of services, located at Collegno, Turin, Corso Savoia No. 179;

(c) a branch establishment located at Milan, Corso Sempione 33.

The items of property referred to in sub-paragraphs b) and c) were owned, during a period of eleven years, by Arthur De Leon personally, but, subsequently, by several corporations, as the claimant had tried to conceal them from the cognizance of the Italian authorities by a transfer to corporation composed of third parties who, being Aryans, were not considered as suspects in Italy.

5. It appears from the documents submitted to the Commission that, in this connection, the items of property referred to in sub-paragraphs (b) and (c) were subjected to the various legal arrangements which are set out below:

(a) A partnership of unlimited liability was established on December 15, 1924 under the style of "*Fratelli De Leon*" with head office at Turin, by the brothers Attilio, Arturo and Giorgio De Leon; the power to sign for and represent the corporation belonged to Arthur De Leon alone (Petition, Annex 2, Exhibit 3; declaration of the Chamber of Commerce of Turin of September 3, 1951).

(b) On June 14, 1929, the brothers Attilio and Giorgio withdrew from the partnership and Arthur De Leon became sole owner ("consolidatario") of the enterprise; the place of the partnership of unlimited liability was taken

by a personal company under the style of "*Fratelli De Leon di Arturo De Leon*", and was recorded as such with the Chamber of Commerce of Turin; the claimant purchased and paid for his brothers' shares. (Petition, Annex 2, Exhibit 3; declaration by the Chamber of Commerce of Turin dated September 3, 1951 and declaration by Counselor Cuniberti dated January 20, 1956; Boffa testimony during the session of December 10, 1959.) Throughout the above period, Arthur De Leon's brothers were merely his employees and did not receive any share of the enterprise's revenue.

(c) On October 20, 1940 the Arthur De Leon's personal company was converted into a *de facto* company, that is to say, into an irregular company of the type provided for in Articles 98 and 99 of the Trade Code of 1882, at that time in force in Italy, and entailing a joint management of the business. This alteration was brought about by the addition, in the quality of associates, of the brothers Emilio and Attilio De Leon; the purpose was to facilitate the future establishment of a joint-stock company. This *de facto* company lasted only two months and its existence was therefore of an ephemeral and transitory nature.

(d) On December 20, 1940, by instrument drawn up by notary Dr. Silvio Mandelli of Turin, registered under No. 4274 on December 24, 1940, and approved by the Civil and Criminal Court of Turin by Decree of December 23, 1940, a joint stock company was established, effective January 1, 1941 and for the duration of thirty years, that is, until December 31, 1970, under the style of "*Fratelli De Leon S.A.*" (Foglio Annunzi Legali della R. Prefettura di Torino", dated January 3, 1941, recorded under No. 54, p. 1088, insertion No. 1788; "Bollettino Ufficiale delle Società per Azioni", dated January 16, 1941, file No. 3, 1st part).

The company's head office was established at Turin, Corso Vittorio Emanuele 38; its purpose was the same as that of its predecessor and its main plant was also located at Collegno. On February 21, 1941 it advised the Chamber of Commerce of Turin that it had two branch establishments, one in Milan and the other in Rome (Register of Meetings, p. 10).

Under act of November 17, 1941, the company changed its style to "*Elettrauto Società Anonima*" (Register of Meetings, p. 10). When German occupation of Italy came to an end, once again, by resolution of the General Meeting of the Stockholders of July 3, 1945, the style of the Corporation was changed back to the style that had been selected at the time of its establishment, namely, "*Società per Azioni Fratelli De Leon*"; it exists even today under this denomination (Petition, Annex 2, Exhibit 4, Declaration of the Chamber of Commerce of Turin dated August 31, 1951, Exhibit 5, Cuniberti's declaration of June 20, 1956, Register of Meetings, p. 44).

6. The Register of Meetings and a certificate dated June 14, 1946 prepared by notary Silvio Mandelli of Turin, who drew up the articles of incorporation of the Corporation, as well as the subsequent acts modifying its organization, show that:

(a) The Joint Stock Corporation "Fratelli De Leon", established on December 20, 1940 had a capital of 990,000 lire, divided into 990 shares of stock of 1,000 lire each, of which Arthur, Attilio and Emilio De Leon each possessed 330, namely 330,000 lire.

These shares were registered shares with the possibility of being converted into bearer shares at the shareholder's expense (art. 5 of the Articles of Incorporation); beginning with Italian Decree No. 1148 of October 25, 1941, all shares of stock became obligatorily registered shares.

The nature and value of the contributions made by each associate were not specified. The minutes of the Stockholders' Meeting of the joint stock corporation disclose (p. 2) that the contributions did not include any real property (art. 2 of the Memorandum of Association) a fact which is categorically confirmed by Mario Boffa's testimony during the Commission's hearing of December 10, 1959. The corporation sustained no real property war damage.

The Corporation's balance sheet does not show any real property assets at the beginning of its existence (Register of Meetings, pp. 2, 15, 26, 34). For the first time an item "building" appears in the balance sheet of June 30, 1944 in the amount of 600,000 lire (ibid. pp. 40, 55); in the balance sheets as late as December 31, 1958, the figure shown for real property is 25,203,910 lire.

(b) By notarial act dated May 15, 1942, the corporation's capital was brought to 1,990,000 lire, an increase which was necessitated by the merging of "Elettrauto S.A." with "Restat, Resine Stampate Torino", a joint stock corporation whose capital amounted to 1,000,000 lire, and whose shares of stock had been purchased by Arthur De Leon in 1936 (Boffa's testimony, pp. 101-102); this merger had been decided upon by the stockholders at their Special Meeting of December 15, 1941 (Register of Meetings, p. 13); one thousand new shares of the denomination of 1,000 lire each were issued on that occasion and assigned to new stockholders.

On the date of October 15, 1942, the entire corporate capital stock, in the form of registered shares, was distributed among eight persons, all of them Aryans, as follows:

	Shares
Canova, Luciana	20
De Giorgis, Alessandro	380
Comparini, Pietro	400
Alpozzo, Italo	300
Parolini, Bardo	125
Bruna, Giovanni	150
Gaggiari, Vanda	175
Vigozzi, Camillo	440
	1,990

in the denomination of 1,000 lire each, namely 1,990,000 lire.

Arthur De Leon did not participate in this Corporation.

(c) Following the conclusion of the War, the Corporation, by resolution of the stockholders at their General Meeting of October 26, 1945, raised the corporate capital stock to 2,090,000 lire, by issuing 100 new shares in the denomination of 1,000 lire each, an increase necessitated by the merging of the "Società per Azioni Fratelli De Leon" with "S.A. Officine Meccaniche Colombatto" in Turin which was also owned by Arthur De Leon (Register of Meetings, pp. 57 et seq.; Boffa's testimony, p. 108).

The stockholders at their General Meeting of June 5, 1946, proceeded with a third capital increase, raising the corporate capital stock to 5,225,000 lire by the issuance of 3,135 registered shares in the denomination of 1,000 lire each; they also decided to do away with the rights of the registered stockholders to participate in this issue, thus permitting Arthur De Leon to purchase all the new shares (Register of Meetings, p. 63) thereby becoming once more a stockholder.

(d) The claimant sent to his brother Giorgio De Leon, from the United States, a general power of attorney, notarized on June 1, 1940 by Notary

Public Joseph Drago of New York, which was deposited on November 28, 1940 with notary Mandelli at Turin, because the aforesaid brother Giorgio, until the establishment of the Italian Social Republic known as the Republic of Salo', did not come under the restrictive provisions of the antisemitic laws by reason of the fact that he had participated in Gabriele D'Annunzio's expedition at Fiume during World War I. He was thus able to hold the position of President of the Board of Directors and of Managing Director of the "Fratelli De Leon S.A."; but when in his turn he was obliged to escape racial persecutions his duties were turned over to Italo Alpozzo, another shareholder.

Arthur De Leon reappeared on the scene for the first time after the war on October 31, 1958, at the General Meeting of the corporation's stockholders; he was at that time a United States national; he held several offices, namely, that of President and Managing Director of the Corporation (Register of Meetings, p. 76) and presided over all subsequent meetings, with the exception of the meeting of June 9, 1952. During this latter assembly the Articles of Association of the corporation were amended (Articles 10, 13 to 15 and 18); the Board of Directors was dispensed with and replaced by one single director; following the resignation of the entire Board of Directors, Arthur De Leon became a sole director.

On May 15, 1952, the claimant presented to the corporation his complete set of certificates of stock of the corporation's capital stock, as they had been endorsed over to him by stock broker Mantalcini, on the basis of written statements, the signatures of which were duly legalized, by the shareholders. Consequently, Arthur De Leon became the owner of the entire capital stock after the war. (Petition, Annex 2, Exhibit 6.)

(e) By a fourth capital increase the Corporation's capital stock, following a resolution passed during the General Meeting of October 19, 1957, was raised to 50,000,000 lire (amendment of Art. 5 of the Articles of Incorporation; Register of Meetings II, p. 74).

The Articles of Incorporation were again amended by the stockholders at their General Meeting of March 25, 1958 (Register of Meetings II, pp. 89 et seq.); the sole director was dispensed with and was again replaced by a Board of four members, composed of Arthur De Leon, Giorgio De Leon, Mario Boffa and Servi (Register of Meetings, II, p. 87).

7. Such were the transformations of the property of which the claimant alleges to be the owner; in the first place, owner of a partnership of unlimited liability, then of a company in his name, which was converted into a *de facto* corporation, and finally into a joint stock corporation which changed its style several times, merged with other joint stock companies, increased its capital stock several times, the shares of which, almost invariably registered shares, were assigned to eight persons, who in 1952 through Mr. Giorgio De Leon's agent handed over to Arthur De Leon the certificates of the registered shares of stock that had been delivered to them; the claimant became sole owner of the corporation and was sole director thereof from 1952 to 1958, in view of the fact that a four-member Board of Directors was established thereafter (Petition, Annex 2, exhibits 3 to 6, Register of Meetings II, 87).

The Plaintiff Party explains and justifies these repeated changes by stating that they were due to the claimant's conviction that the only manner in which he could avoid the measures adopted against the Jews in Italy was to interpose third parties of the Aryan race. His property was constantly exposed to a material threat of confiscation because, though his flight from Italy had sheltered his person from the physical dangers such as those to which one of

his associates, his brother Attilio, became a victim — (his brother was arrested some years later by the Germans and deported to Germany from where he never returned) — , it did not protect him from the dangers of the economic measures directed at that time against the property and interests of persons of the Jewish race.

8. The Plaintiff Government contends it was only because of these measures that Arthur De Leon managed to save the bulk of his property in Italy.

The corporation's industrial installations, of which the claimant is in fact sole shareholder, sustained considerable war damage, and the party in interest believes he is entitled to receive compensation therefor.

During the war the Italian authorities recognized the "Elettrauto" joint stock company as a legal person and paid the global sum of 3,500,000 lire under Italian legislation as advance payment on the compensation due for these damages; this sum was received without reservation by the company which thereby accepted treatment on the same footing as other Italian corporations. The aforementioned sum is made up as follows:

(a) by the Intendenza di Finanza of Turin, 2,000,000 lire on May 31, 1943, and 500,000 lire on March 24, 1945, these payments concern only the damages sustained by the industrial establishment located at Corso Savoia 179 at Collegno, but not the damages sustained by the building itself;

(b) by the Intendenza di Finanza of Milan, 1,000,000 lire on December 30, 1943, for the damages sustained by the branch establishment at Corso Sempione, 33, Milan.

9. The claimant has estimated that the total amount of the damages that he sustained either directly, where his personal property was affected, or indirectly, where the corporation's property was affected — his estimate is supported by expert advice — reaches the figure of 243,450,930.—.

On August 29, 1952, the Embassy of the United States in Rome applied to the Ministry of the Treasury for the purpose of obtaining full compensation in behalf of Arthur De Leon, a national of the United States, on the grounds that Italy was responsible for the payment of such compensation under the provisions of Article 78 of the Treaty of Peace.

In its letter dated May 25, 1955 (No. 404503), the Italian Ministry of the Treasury rejected this claim, on the grounds that the claimant was not a United States national either on the date of the air bombardments or on the date of the Armistice, September 3, 1943, and that he had not been created as enemy under the Italian legislation in force during the war. Up to the final stages of the proceedings the Agent of the Defendant Government persisted in these conclusions.

B. Considerations of law

10. Arthur De Leon manifestly does not fulfill, and this point is not denied by the Plaintiff Party, the conditions of Article 78, paragraph 9 (a), sub-paragraph 1 of the Treaty of Peace in the sense that the United States nationality with which he is now vested cannot authorize him to receive war damage compensation as a national of the United States of America.

As he was naturalized in 1945 in the United States, he does not fulfil the condition of having already been in possession of this nationality on September 3, 1943, the date of the Armistice with Italy, although he did possess the status of a United States national on September 15, 1947, the date of the coming into force of the Treaty of Peace.

The claim submitted to the Commission's judgment can therefore only be based on Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of

Peace which provides that the expression "United Nations nationals" includes also individuals who, under the laws in force in Italy during the war, were treated as enemy.

11. In this connection, the Commission cannot refrain from noting that Arthur De Leon, as a person belonging to the Jewish race, suffered only a very nominal direct damage as a result of the confiscation of his bank deposit of 2,279.05 lire; this is the only item of his personal property that the Italian Fascist authorities seized; the real property that belonged to him personally was never subjected to any measure of sequestration or confiscation, and the same thing can be said with regard to the property representing part of the assets of the corporation.

This disproportion between the wrong actually done to the claimant by the measures adopted against him by the Italian authorities in implementing the laws in force in Italy during the war, and the benefits he now claims, places on this Commission the obligation of investigating whether or not the compensation for war damages he is said to have suffered indirectly can be accorded to him under the provisions of Article 78, paragraph 4 (a) and (b) of the Treaty of Peace.

In an unvarying jurisprudence the Commission has decided that Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace, does not have the effect of including in the "United Nations nationals" persons who had been considered as enemies in the abstract under the terms of the laws in force in Italy during the war and who had not materially been treated as such by the Italian authorities (Cases: Bacharach, No. 22;[1] Flegenheimer, No. 20;[2] Treves, No. 95;[3] Wollemborg, No. 109;[4] Società Generale dei Metalli Preziosi, No. 167;[5] this latter decision is in the "Recueil des Decisions de la Commission de Conciliation Franco-Italienne", 5e fascicule, p. 12).

The Commission has conceded that this provision of the Treaty of Peace is a rule of an exceptional nature in that it extends the protection of the United Nations to individuals who do not actually fulfil the conditions of nationality required by the Treaty, but who, by the operation of a legal fiction, are considered as "United Nations nationals". The Commission believes that, like all exceptions, this provision must be interpreted strictly in that it deviates from the general rules of the law of nations on the international protection of injured persons.

Does the confiscation of the sum of Lire 2,279.05 belonging to the claimant represent the hostile treatment required by Article 78, paragraph 9 (a), sub-paragraph 2 in order that he be allowed to benefit by the status of "United Nations national"? Or should one refuse to consider as a "United Nations national" a claimant who demands compensation of a size that is out of all proportion to the very slight loss sustained by the bulk of his property merely because he was treated as enemy during the war under the laws in force in Italy at that time? Particularly, since there are here involved true and proper war damages, caused by air bombardments directed against both the Italian people, who sustained personal injury and property losses, and aliens in Italy, should one reject a claim formulated in the aforesaid terms because of the general principle of law which permits one to construe international treaties in a manner which avoids an unjust result?

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[1] Volume XIV of these *Reports*, p. 187.
[2] Ibid., p. 327.
[3] Ibid., p. 262.
[4] Ibid., p. 283.
[5] Volume XIII of these *Reports*, p. 578.

12. The Commission must, however, note that the Treaty of Peace does not establish any minimum limit on the amount of damage a party in interest must have sustained in order to be permitted to benefit thereby; it is enough that he sustained such damage as a person who was considered as enemy, in his quality of "United Nations national"; the Commission holds that it can still less, on the basis of "*de minimis non curat lex*", refuse to consider the claimant on the same footing as a "United Nations national", because the application of this maxim is implicitly ruled out by several provisions of the Treaty of Peace to which it is expedient to refer.

Article 78, paragraph 3 provides that "the Italian Government shall invalidate transfers involving property, rights and interests of any *description* belonging to United Nations nationals where such transfers resulted from force or duress exerted by Axis governments or their agencies during the war."

Paragraph 4 (b) of this same article provides that "United Nations nationals who hold *directly* or *indirectly* ownership in corporations or associations which are not United Nations nationals within the meaning of paragraph 9 (a) of this article, but which have suffered a loss by reason of injury or damage in Italy, shall receive compensation in accordance with sub-paragraph (a) above".

And finally, paragraph 9 (c) of this same article 78, in defining the expression "property", states that this expression is intended to mean not only "all movable or immovable property, whether tangible or intangible, including industrial, literary and artistic property", but also "all rights and interests of *any kind* in property".

It follows from those texts that any impairment of the property, rights and interests of a United Nations national, whatever its nature and extent, is considered as hostile treatment which entitles an individual treated as enemy to benefit by the status of "United Nations national", even if he was not such on the relevant dates of the Treaty of Peace, and to claim the compensation provided by Article 78 thereof.

The Commission refers to its unvarying jurisprudence on the matter concerning the ascertainment of the fact that the legislative measures enacted by the Salo' Republic against persons belonging to the Jewish race, were laws in force in Italy within the meaning of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace (Cases: Treves, No. 95;[1] Levi, No. 96;[2] Willemborg, No. 109;[3] Falco Bolasco, No. 270;[4] Fubini, No. 272;[5] and Baer, No. 264[6]).

On the basis of treaty provisions whose application has been entrusted to it by the signatory Powers of the Treaty of Peace, the Commission must therefore acknowledge the fact that Arthur De Leon possesses the status of a United Nations national.

13. Among the various elements forming the claim submitted by Arthur De Leon, a distinction should be made with regard to those concerning the war damages sustained by:

(a) the building located at Collegno, Turin, Corso Savoia 179 (formerly Corso Francia 179) of which claimant is sole owner in his own name, as ap-

[1] Volume XIV of these *Reports*, p. 262.
[2] Ibid., p. 272.
[3] Ibid., p. 283.
[4] Ibid., p. 408.
[5] Ibid., p. 420.
[6] Ibid., p. 402.

pears from the Plaintiff Government's petition, a fact which is not denied by the Defendant Government (Brief of January 22, 1960, p. 28) and from the documents attached to the records of the case; (Petition, Annex 2, exhibits 7 and 8; Cadastral Certificate dated July 30, 1951 and Certificate of the "Conservatoria dei Registri Immobiliari" of Turin dated August 8, 1951). In December 1956 the party in interest valued the damages sustained by this building at *24,774,056.*— on the basis of a coefficient of 3, established by the "Centro per la Statistica Aziendale" of Florence;

(b) the property owned by *Società Fratelli De Leon S.A.* (formerly Elettrauto S.A.) namely: an industrial plant, also located at Collegno, Turin, Corso Savoia 179, with a complete specialized stock of tools, and a branch establishment at Milan, Corso Sempione 33, which sustained war damages estimated, in December 1952, at *218,676,874* lire globally, after deduction of the following amounts already paid by the Italian Government as part payment of the indemnities due to "Elettrauto S.A." Corporation as an Italian establishment: 2,500,000 lire for the Turin plant, re-evaluated by the factor of 29,48, equals 73,700,000 lire, and 1,000,000 lire for the Milan establishment, re-evaluated by the factor of 18,29, equals 18,290,000 lire.

Although prices have increased since 1952, the claimant has accepted this basis of calculation.

14. Regarding the first figure of 24,774,056, since the Commission recognizes that Arthur De Leon possesses the status of a "United Nations national" it is merely a question of applying purely and simply Article 78, paragraph 4 (a) of the Treaty of Peace which provides:

> . . . In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered.

The claimant is therefore entitled to receive compensation from the Italian Government in the amount of two thirds of the damages sustained by his personal property.

15. On the other hand, the second figure of 218,676,874 has given rise to a heated argument between the Parties to this dispute. The Agent of the Government of the United States contends that the industrial property damaged actually is and always has been owned by the claimant, while the Agent of the Italian Government maintains that this property was owned, at the time it was hit by bombs, namely on November 28 and December 5, 1942, and February 14, 1943, by a corporation, which, though a change in style has occurred several times, has always been legally the same and that the property of this corporation does not come within Arthur De Leon's personal property.

16. The arguments of the Plaintiff Party are not always consistent. They dwell at considerable length on the genesis of the aforesaid corporation and lay stress on the fact that claimant always has been sole owner of the corporation's property: at first after the dissolution of the partnership of unlimited liability "Fratelli De Leon" and the substitution thereof by the company "Fratelli De Leon di Arturo De Leon" which lasted from 1929 to 1940; and later when this latter company was converted into a *de facto* corporation, and still later changed into a joint stock corporation under the style of "Fratelli De Leon S.A." on December 20, 1940. This latter corporation was

established only for the purpose of permitting the claimant to screen his personal property from the antisemitic persecution measures adopted by the Fascist Government in Italy, especially after Royal Law Decree No. 1728 of November 17, 1938, concerning the protection of the Italian race, and Royal Law Decree no. 126, dated February 9, 1939, completing and implementing the former, which required among other things, the obligatory sale or disposal of all commercial and industrial enterprises owned by Jews in Italy. The proceeds of the sale or disposal of these enterprises were to be invested in non-transferrable Government bonds, Jews still being able to be the owners of shares of stock of corporations.

Under the terms of the general power of attorney issued by the claimant to his brother, Giorgio De Leon, the latter was authorized "to purchase and transfer ownership title of commercial enterprises, liquidate them, establish corporations in any form, invest capital in these enterprises or add shares to the capital stock of corporations belonging in part or in whole to the principal, represent him at meetings, vote at meetings, and in every way act at these meetings as the principal himself would if he were present, transfer head offices of commercial enterprises, merge them in whole or in part with other enterprises including joint stock corporations, accept shares of stock in payment or stipulate any pertinent condition."

It was in his capacity as the claimant's general Agent, for the purpose of saving the latter's property, that Giorgio De Leon, his brother, took the initiative of establishing the joint stock corporation, which at the outset consisted of only the three De Leon brothers without their respective contributions ever being specified. The shares of stock, registered shares in the beginning, were converted into bearer-shares immediately after the establishment of the corporation (Boffa testimony, p. 100). But following the enactment of Royal Law Decree of October 25, 1941 relating to the obligation that all shares were to be converted into registered shares, Giorgio De Leon hastened to find eight persons of the Aryan race, relatives or friends of the claimant, who would consent to have the shares "fictitiously" registered under their names. However, each one of the new shareholders entered an "endorsement" on each of the certificates of the shares turned over to him "in favor of Giorgio De Leon"; they never received the shares themselves, which remained in the possession of Giorgio De Leon who administered them in behalf of his principal (testimonies of Comparini, De Giorgio and Boffa, pp. 26 to 30, 47-48, 54-55, 90-91, 95).

The Plaintiff Party reaches the conclusion that straw-men were here involved as name lenders who consented purely as a matter of courtesy to become a screen on behalf of an Italian individual belonging to the Jewish faith; a person who, in actual fact, had never ceased to be the sole owner during the War of all the shares of stock of "Società Elettrauto S.A.", subsequently "Fratelli De Leon S.A.", and who, consequently, had preserved the right to claim compensation from the Italian Government for the war damages sustained under Article 78 of the Treaty of Peace (Rebuttal of the United States of January 22, 1960, p. 27).

Nevertheless, the Agent of the Plaintiff Government tried to deny that only a fictitious corporation was involved and stated that he had "never contended that it [the corporation] had never existed legally or that it were . . . something fictitious" but that he had confined himself to maintaining "that the claimant was forced to establish the company in order to preserve his business from the measures that threatened to be adopted against it as a result of the racial laws and that the shareholders appearing in the company's book of shareholders were merely a number of obliging dummies who

had not been and could not be swastika branded by the anti-Jewish persecution . . ." (Rebuttal of the United States of January 22, 1960, p. 28).

Subsequently, however, in his Rebuttal Observations ("Riassunto in Replica") of April 6, 1960, the Agent of the Government of the United States bases his entire argument on the simulated character of the enterprise from the very first change of the company into a *de facto* corporation which occurred on October 20, 1940, and the subsequent change, which occurred on December 20, 1940 from a *de facto* corporation into a joint stock company. He contends that simulation in matters of contracts of corporations is not ruled out by Italian law, and supports his contention by a considerable documentary material consisting of authoritative legal writings and jurisprudence (Rebuttal Observations, pp. 8-9 and 13). He concludes by saying that as the simulated contract produces no effect between the parties (Art. 1414 Italian Civil Code) and that as the Italian Government cannot be considered as a Third party, within the meaning of Article 1415 of the Italian civil code, under the public international law relationship submitted to this Commission for consideration, the property belonging to Arthur De Leon could not have been legally transferred to the Corporation and the claimant remained legal owner; as such he is entitled to receive compensation for the war damages sustained by him. (Rebuttal Observations p. 13, 19-20).

17. In opposition to the foregoing the Agent of the Italian Government is of the opinion that the damaged industrial plants are not the property of Arthur De Leon, but of the joint stock corporation itself which was regularly established; the claimant's Petition, he believes, should therefore be rejected for lack of qualification, in view of the fact that it was not submitted on behalf of the corporation.

In his defense of January 16, 1960, he takes an outright position even against the mere possibility of simulation in matters of corporations; he stresses the fact that even if one were to consider the theory of his opponent purely as a matter of hypothesis, it is undoubted that under Italian law the simulated contract does not have any effect whatever between the parties, since simulation can never be opposed to a *bona fide* third party (Article 1415 of the Italian civil code); he contends that the Italian Government should be considered as a *bona fide* third party, as it stayed outside not only of the corporation's contract but also of the several acts stipulated between the claimant's agent and the straw-man stockholders; as it (the Italian Government) was not an assignee of one of the contracting parties, the exception of simulation cannot be opposed to it in order to deny the grounds of its refusal to pay compensation to the claimant. (Defense cited p. 6.)

In abandoning this hypothesis which he considers to be incorrect, the Agent of the Italian Government goes still further in considering that there is no simulation in the instant case, but a legal fiduciary act (*fiducia cum amico*) in which certain interposed persons are not the fictitious members of a joint stock corporation but are the effective members of an existing corporation, fulfilling all the requirements of Italian law, and the registration of which in Italian public registers is of a nature giving rise to a right (Article 2331 of the Italian Civil Code). He concludes by asserting categorically that there is not involved in the instant case a simulated transfer but an indirect legal act of the fiduciary type, and that "during the period of time that is of interest, the Italian Government must not and cannot consider Arthur De Leon as having a direct or indirect ownership in the subject corporation, but merely as a creditor, under a concealed pact, of the apparent associates". (Defense of January 16, 1960, pp. 13-14.)

18. This Commission, in performing the task that has been entrusted to it by the signatory Powers of the Treaty of Peace, must merely make sure that certain provisions of this Treaty are applied; in the instant case it must only investigate if, under the provisions of Article 78, paragraphs 4 (a) and (b) of the Treaty of Peace, Arthur De Leon is or is not entitled to receive compensation for the war damages sustained by the two sets of property specified above.

In the fulfilment of this task it cannot be denied that it has the necessary jurisdiction for passing on the preliminary questions involving domestic law on the solution of which may depend the application or interpretation of the provisions of the Treaty of Peace and the acts related thereto over which the Commission has jurisdiction as set forth in Article 2 of its Rules of Procedure. It cannot exempt itself from this investigation in the instant case where the qualification, the validity and the effects of the contracts of corporations are disputed issues between the Parties. These questions which are not governed either by the Treaty of Peace or by the law of nations in general, must manifestly be determined in accordance with Italian law as there are here involved contracts that were entered into in Italy, between individuals who were Italian nationals at the date of their conclusion, and which were to be executed in Italy. Particularly, Arthur De Leon's change of nationality on November 17, 1945 can in no way affect the determination as to which law is applicable to the subject contracts, to the establishment of the "Fratelli De Leon S.A." joint stock corporation and to the various changes this corporation underwent in its earlier stages.

19. It is primarily important to establish whether or not it is possible that claimant resorted to the process of simulation, or whether this process should be automatically excluded in matters involving joint stock corporations.

According to Article 1414 of the Italian Civil Code, simulation can flow from either of two cases:

(a) from a seeming agreement covering no reality at all, and, consequently, outright fictitious; a simulation described as absolute in authoritative Italian legal writings;

(b) from two agreements made between the same contracting parties, one of them only apparent, the other real and intended by the parties, even though it remained secret, to amend or cancel the effects of the former (concealed contract, counter-deed in French law; a simulation described as relative simulation in authoritative Italian legal writings). In the former of the foregoing cases the agreement has no effect between the parties.

In the latter case the seeming agreement has no effect between the parties, but they are bound by the secret act — the concealed contract — provided that the facts and form of that contract actually materialize in a manner which would make the contract valid if it had been openly made.

Under the terms of Article 1415 of the Italian Civil Code, in both cases *bona fide* third parties are protected and simulation cannot be opposed to them either by the contracting parties or by their assignees, or by the creditors of a simulated transferee, when they have acquired rights from an apparent owner.

20. The process of simulation which Arthur De Leon claims to have resorted to is that of creating a fictitious corporation by means of contracts of fictitious corporations, but these contracts do not constitute a real agreement (absolute simulation).

Simulated corporations are dealt with both in qualified legal writings and case law of a considerable number of States; their Courts have been frequently called upon to pass on matters relating to seeming corporations (in France,

Planiol-Ripert, "Traité pratique de droit civil français," volume VI, 1930, paragraph 334, p. 460; Abeille "La simulation dans la vie juridique et particulièrement dans le droit des sociétés", 1938; pp. 54-55, paragraphs 131 et seq.; J. Rousseau "Essai sur la notion de simulation", 1937, p. 27).

The possibility of simulating a corporation contract is also extensively recognized in authoritative Italian legal writings and case law; it is recognized by the Supreme Court ("Corte di Cassazione") in its decisions of February 12, 1945 ("Giurisprudenza Italiana 1945, I. 1, 105") and of September 18, 1948 No. 1616, as well as by a number of Italian Courts of Appeal, amongst which noteworthy are the decisions rendered by the Turin Court of July 8, 1948 and March 29, 1949 (Diritto Fallimentare, 1948, II, p. 225, and 1949, II, p. 226). An opposite tendency is noted in the decisions rendered by the lower Courts (Tribunal of Florence, March 20, 1956, v. "Banca, Borsa e Titoli di Credito 1956" II, 417; Tribunal of Milan, March 4, 1957, v. "Foro Padano XII, 1957, p. 614). These latter decisions rejected the concept of simulated corporation, either for the purpose of ensuring third parties the protection of their rights against the corporation (Article 2332 Italian civil code), or because Article 2331 of the Civil Code confers a presumption of regularity on the recording of a joint stock company in the register.

This Commission holds that simulation of a corporation contract is not rejected by Italian civil law, because a corporation can be declared null on grounds of simulation, but the effects thereof are limited with regard to *bona fide* third parties. A simulated memorandum of association is not productive of effects between the parties, but it cannot be opposed to a *bona fide* third party, and it is not therefore completely void and of no effect. The Commission's view is supported by the jurisprudence of the Italian Supreme Court especially by the decision of July 28, 1943 (Fabrizio vs. Giardino Case) wherein it was ruled that "with regard to *bona fide* third parties who have had dealings with a duly established corporation, which was subsequently declared to be fictitious, the subject corporation is considered to be actually in existence until such time as it is formally declared to be null. This nullity with regard to the corporation's *bona fide* creditors operates *ex nunc*, and the simulated acts must be considered as real and proper acts with regard to the individual who has acquired certain rights on the basis thereof". (Rivista del diritto commerciale, vol. XXIII, 1945, 2nd part, p. 63.) It also refers to the opinion of another especially authoritative Italian writer and states that: "A nullity in the true sense of the word is not envisaged in this case. Between nullity and the possibility of nullity a *tertium genus* is inserted which consists in *relative inefficacy*." (Brunetti, Trattato del diritto delle società', vol. II Società per azioni, 1948, No. 545, p. 276.)

21. We must now investigate whether the corporation contracts made by Arthur De Leon, either directly, or on his behalf through the intermediary of his general agent, Giorgio De Leon, can be considered as simulated contracts which, under the terms of Article 1414, paragraph 1 of the Italian Civil Code, are unproductive of effects between the parties.

In principle, a corporation is simulated when the parties never intended to consider themselves as co-associates (J. Rousseau, op. cit. p. 27). In this connection the Commission cannot refrain from noting that the purpose the contracting parties had in mind was not that of creating a commercial corporation, but of screening Arthur De Leon's real property from the serious threats of confiscation which loomed ahead in view of the antisemitic policy followed by the Italian authorities. The only decisions rendered in Italy in similar matters are those of the Court of Appeals of Turin dated July 8, 1948 and March 29, 1949, already mentioned above, which have accepted the

theory of simulation where corporations are involved, and have stressed that contracts made for the purpose of escaping racial persecution have been distinctly described by Italian legislation itself as simulated contracts and made subject by it, in an unequivocal manner, to the provisions of the Civil Code on simulated contracts. In fact, in Article 4 of Law Decree No. 222 of April 12, 1945, entitled: "Supplementary rules implementing decree No. 26 dated January 20, 1944 of Lieutenant of the Realm, for restoring the rights of Italian and alien nationals whose property rights were affected by the racial provisions", it is stated that "The provisions of the civil code are applicable to simulated contracts regarding acts of transfer, whether for a valuable consideration or gratuitously, of real property, personal property, shares of stock, leases or any other act fictitiously brought into being for the purpose of escaping racial persecutions by persons specified in Article 8 of Royal Law Decree no. 1728 of November 17, 1938, converted into law No. 274 of February 5, 1939. Testimonial proof is admitted without any limit as to value." (Official Gazette No. 61, May 22, 1945, p. 741.)

In examining the various changes undergone by Arthur De Leon's industrial enterprise, this Commission must believe that beginning with the dissolution of the "Fratelli De Leon" partnership of unlimited liability and the substitution therefor of a company on June 14, 1929, claimant became the sole and full owner of the corporation's assets.

The establishment of a *de facto* corporation, on October 20, 1940, did not fulfil the essential elements of a corporation contract and already had a fictitious character. Claimant's brothers, Emilio and Attilio De Leon, brought no assets to the corporation; the purpose of the corporation is thus also lacking the intent of jointly running an enterprise, the claimant preserving the free disposal of all the corporation's property and continuing to direct the enterprise from the United States through his general agent; finally, also the *affectio societatis*, namely the intent to co-operate which must appear in all stages of the corporation's life, is also lacking. Matters, in actual fact, remained in the state they were previously which means that Arthur De Leon continued to be sole owner of the enterprise. The *de facto* corporation was only an outward show, intended to make possible two months later on December 20, 1940, the establishment of a joint stock corporation.

The latter, also established for the purpose of avoiding the rigors of the anti-semitic laws in force in Italy, has certain peculiarities because it must establish, to the full satisfaction of law, the indisputable existance of the corporation. It was created between the same three brothers each one of whom was holder of a certain number of registered shares of stock, subsequently converted into non-registered shares and held as such up to the time of the enactment of Italian Royal Decree No. 1148, dated October 25, 1941 making the registration of all shares of stock obligatory. But Emilio and Attilio De Leon made no financial contribution whatever to the corporation; they took no interest in its management; the *affectio societatis* was also lacking; Arthur De Leon continued to manage the enterprise through the intermediary of his general agent who acted as President of the Board of Directors and as Managing Director.

These precautions no longer sufficed when it became obligatory in Italy to register all shares of stock. In order to conceal the Jewish ownership of the enterprise, the registered shares were distributed by Giorgio De Leon, on October 15, 1942, among eight new shareholders of the Aryan race, and De Leon's brothers ceased to appear as shareholders.

The witnesses have given concordant testimony before the Commission in this connection. They all declared that they had signed documents stating

that they were the owners of the shares assigned to them, but that they never had material possession of these shares; they asserted that they were fully aware that a fictitious operation was involved. They denied that they had ever signed a statement binding themselves to return these shares to the claimant's general agent, but they admitted that they had handed Giorgio De Leon a power of attorney authorizing him to use these shares in the manner he deemed best (testimony of Dr. Alessandro de Giorgis, pp. 47 and 54-55). It is quite clear that they never had any real interest in the joint stock corporation, that they never paid anything to have the shares assigned to them, nor did they ever attend any general meeting; they all asserted that no benefit whatever was received by them from the corporation's activities; and that the claimant withdrew all and any such sums as he needed from the corporation's assets; the corporation's profits, whenever they materialized, were not distributed as dividends among the shareholders but were invested in the enterprise itself (Boffa testimony pp. 86-87 and 115).

When some of these interposed third parties had, later, in 1952, certain difficulties with the Italian fiscal authorities, as the result of not having declared their registered shares, Arthur De Leon undertook himself to pay all arrears of taxes, as is revealed by the correspondence exchanged between himself and Dr. Pietro Comparini, who attended the Commission's hearing (Comparini testimony; p. 27, and Boffa, p. 119), thus acknowledging that the subject shares were part of his personal property and that the assignment thereof to these interposed persons was merely a fiction, and that it was incumbent upon him to shoulder the fiscal consequences.

The conditions existing prior to the establishment of the joint stock company are therefore unaltered and the *affectio societatis* has also been completely lacking in both the new and the old shareholders. They took no interest whatever in the enterprise, to the point that they promptly endorsed their registered shares over to Giorgio De Leon, claimant's general agent. These endorsements, which were part of the recording of the Aryan race shareholders in the stockholders' register, clearly establishes the intent of the parties to the contract to bring a sham corporation into being, concealing Arthur De Leon's ownership title to the enterprise in order to avoid confiscation.

The corporation's activities were constantly carried out in accordance with the claimant's determination, expressed by his general agent in resolutions apparently adopted in the name of the fictitious associates.

22. The Commission cannot avoid noting the evidence of these findings of fact and reaches the conclusion, in conformity with Article 1414, subparagraph 1 of the Italian Civil Code, that the corporation's contract is simulated and produces no effect between the parties.

But this does not lead to the result that the corporation is *ipso jure* null and non-existent. Under the Italian system of municipal law, the articles of incorporation of the company received by a notary must be recorded with the "Register of Enterprises", and, by virtue of Article 2331 of the Italian Civil Code, "by the recording in the register, the corporation becomes a legal person". As Brunetti writes (op. cit., No. 545, p. 276-277) "in the first place the corporation — a legal person — is a third party vis-à-vis the simulating stock-holders who have participated in its establishment so that the defect is not opposable to it (Art. 1415); in the second place, simulation does not produce the complete nullity referred to in Article 2332, but merely a condition of relative inefficacy wherefore the act continues to exist with respect to third parties and creditors. . . A conflict between the intent and the declaration of the parties is not possible in cases where, having been made public the declaration is decisive and the intent irrelevant."

This point of view is confirmed by a decision of the Italian Supreme Court ("Corte di Cassazione") wherein it is ruled that "the fact that a joint stock corporation is established with the determination to pursue a given purpose, whatever this may be, necessarily implies the knowing and deliberate intent to create the corporation in order to reach the desired purpose. As soon as the corporation is established in accordance with the rules of law in force, it exists *ope legis* irrespective of the intent of the stockholders, as a subject of law and distinct from the person of these stockholders. With respect to some of them, in the event that they acted as straw-men in someone else's behalf, there would be a relative simulation involved which would exert its influence exclusively in the relationship between the straw-man and his principal but would have no influence whatever on the existence of the corporation which has a life of its own" (cited by Brunetti, loc. cit. p. 277).

In the instant case, it is certain that Arthur De Leon and his brothers intended to create a joint stock corporation for the purpose of avoiding the provisions of the Italian anti-semitic laws, considered as iniquitous and generative of damages for which compensation is provided by the Treaty of Peace in Article 78, paragraph 9 (a), sub-paragraph 2, so that the purpose which the stockholders had intended to pursue, although contrary to the law in force in Italy at the date the corporation was established, lost its illicit character immediately after the downfall of the Fascist regime. Arthur de Leon was thus enabled to successfully safeguard his real property in Italy, and it must be admitted that if he wanted to pursue this purpose he also intended to resort to the means to achieve his aims; the joint stock corporation which he created was therefore validly established and its existence cannot be placed in doubt merely because the corporation contract was simulated.

Furthermore, it should be noted that simulation is invoked against a third party by the very person who was the instigator thereof, for the purpose of establishing that he had retained ownership title to the corporation's property, while the Defendant Party denies this statement and reaches the opposite conclusion. The Plaintiff Party's point of view opposes the customary rule of law followed in judicial practice, whereby who, while enjoying his complete civil capacity, makes, in the form that is customary in commercial relationship, a declaration intended for the public in general, must suffer all the consequences thereof (Wieland, Handelsrecht, 1931, vol. I, p. 125), a principle which corresponds to the Roman maxim of "*nemo contra factum suum venire potest*". The Italian Supreme Court, in its decision of July 28, 1943, came to the following conclusion: "By virtue of an apparent right whoever has reasonably relied on a legal manifestation and comported himself in harmony therewith, is entitled to rely on this manifestation even if it does not correspond to the truth." (Rep. Foro Italiano 1943, col. 1082, No. 30.)

On the above grounds, this Commission is of the opinion that the evidence regarding the simulation of the corporation contract cannot entail the disappearance of the corporation's ownership title to certain industrial installations, and so much the less can the restitution of the shares of stock to the claimant by the sundry stockholders entail a modification of the corporate ownership title, because the shares are merely proof of association with the corporation, an association which includes several rights (such as the right to attend meetings, the right to vote, the right to share in the benefits and in the settlement of an eventual liquidation), but not a right to the corporation's property. (Brunetti, op. cit., No. 454, p. 155.)

23. As in Italian law simulation merely entails a relative inefficacy of the contract, which continues to have effect with respect to *bona fide* third parties,

it is necessary to specify what consequences are entailed for the Italian Government, the Defendant in this dispute.

The Agent of this Government contends that *bona fide* persons must be considered all these persons, both physical and legal, who did not partake in the elaboration of the simulated contract or who were not aware of its existence, and that, therefore, the Italian State is a third party with respect to the agreements that resulted in the establishment of the "Fratelli De Leon S.A." joint stock corporation. He denies that the Plaintiff Party can oppose to the Italian Government the simulation of the corporation and that the latter cannot be considered as the true owner of the damaged buildings.

In order to judge the relevancy of this argument one must refer to the text of Article 1415 of the Italian Civil Code, which reads as follows (in translation):

> Simulation cannot be opposed either by the contracting parties, or by the successors or creditors of the simulated transferor, to third parties who have *bona fide* acquired rights from the apparent owner, except for the effects of the registration of the simulated act. (Sub-paragraph 1.)
>
> Third parties can assert simulation with respect to the parties in interest, in cases where it injures their rights. (Sub-paragraph 2.)

This provision was instituted primarily for private law relationships. But it cannot be denied that it is applicable to a State in cases where the State acts as a fiscal agency and is exposed to damage by a simulated act between private persons. Examples thereof can be found in Italy and in France where jurisprudence permits the government administration to collect fees on the apparent act, without taking into consideration any proved simulation" (Planiol-Riport, "Traité pratique de droit civil français, Vol. VI, 1930, paragraph 337, p. 464, note 7, wherein several decisions are cited: Req. October 20, 1926, S. 1927 1. 73; cassaz. civ., July 25, 1923, S. 1926 1. 328 and June 27, 1899, S. 1899, 1. 527). In Italian jurisprudence noteworthy is the decision of July 4, 1950 rendered by the Supreme Court, which asserted: "In matters of simulation, the concept of third parties is very broad and comprises all those who have no connection with the contract" (Giurisprudenza completa della Corte di Cassazione, 1950, p. 605, No. 1679); likewise, in its decision of July 31, 1950, the Court held that: "Third parties are all those who never had any connection with the contract, who never, in any way, partook therein, and who are not sole successors of the holders of the contractual relationship." (*Ibid.*, 1950, p. 750, No. 2044.) It is obvious that, on the basis of this jurisprudence, the Italian Government finds itself in the position of a third party who, having had no connection with a simulated contract stipulated between other subjects of law, can ignore a simulation which was intended to have the effect of preserving Arthur De Leon's ownership title to the corporation's property, and which would obligate it to pay the claimant, by virtue of Article 78 of the Treaty of Peace, a higher compensation than that which the corporation has already received and could, possibly, still receive, under Italian municipal law.

It is of no avail for the Plaintiff Party to argue that claimant did not resort to simulation in order to benefit by the indemnities provided for by the Treaty of Peace which he could not foresee at the time the joint stock corporation was established, but to escape the application of the Fascist laws which were of an oppressive nature; this Party contends that the Italian Government, which is responsible for the resulting situation, cannot invoke the benefits of *bona fide*. In point of fact, the *bona fide* that is required from a third party, under Italian law, is that connected with the simulated act itself, and not

with the motives that led the contracting parties to stipulate the aforesaid act. The third party who in no way participated in this act, who was not aware of its existence, who derived no benefit therefrom, either directly or indirectly, is protected, and he is doubly so under Italian law, in the sense that he can, on the one hand, declare that simulation is not opposable to him, and on the other hand, himself invoke the simulated act in the event that it is prejudicial to his rights (Article 1415, sub-paragraph 20, Italian Civil Code). With respect to the simulated corporation contract which was concluded, the Italian State has been requested to pay war damage compensation by and in favor of a stockholder who invokes the corporation's simulation for the purpose of asserting his right; the corporation which is neither null nor non-existent, has itself invoked its quality of an Italian legal person for the purpose of claiming from the Italian Government, already during the war, indemnities running into several million lire which the Italian Government awarded, unaware as it was of the simulation of the corporation contract, therefore in *bona fide*.

The Commission attaches a particular importance to this circumstance. In soliciting and accepting from the Italian Government, in its quality of Italian legal person, an amount of 3,500,000 lire as partial compensation for war damages sustained in 1943-1945, the corporation asserted, in a manner which binds its stockholders, the regularity and validity of its establishment; and since the Italian Government then acted on the basis of these declarations, neither the legal person nor the associated members can repudiate the attitude which they adopted and which was determinant in fixing the position of the Italian Government. They are unable now to contest the sincerity and truth of their declarations because they cannot appeal from the situation they created — created either to maintain the undoubted existence of the corporation for the purpose of obtaining an indemnity, or to entrench themselves behind the simulated character of this corporation in order to give the stockholder a higher indemnity.

The Roman maxim "*nemo contra factum proprium venire potest*" forbids the existence of such contradictory attitudes particularly because it is clear that the Italian Government was entirely ignorant of all the simulation proceedings used by the interested parties.

Therefore the Commission must consider the Defendant Party as a *bona fide* third party, protected by Article 1415 of the Italian Civil Code in so far as it concerns the simulated acts which the Plaintiff Party now asserts against him.

24. The question as to whether or not the conclusions of the Defendant Party, namely that the fiduciary contract between the claimant and his co-contractors leads to the result that only the duly established joint stock corporation would be entitled to act and claim war damage compensation, is to be considered as valid can be left open.

It is undeniable that a distinction between a simulated contract and a fiduciary contract is often a delicate matter, as both categories have certain features in common and the difference between them must be searched for in each individual case, by analyzing the declarations of intent of the contracting parties.

The Commission fails to find in the changes which were made by the De Leon brothers in their property relationships any such elements as could pertain to a fiduciary contract; it can see in those which resulted in the creation of what in appearance was a joint stock corporation merely multiple processes of simulation.

Furthermore, it can but recognize that the existence of the category of

fiduciary contract in the Italian legal system is very uncertain and that an important part of Italian authoritative legal writings rejects this theory, either on the ground that rules of positive law referring thereto are lacking or on the ground of incompatibility between the reason for a fiduciary contract and that for every other contract (Cariota-Ferrara, "I negezi fiduciary 1933, p. 128; Grassetti, "Rivista di diritto commerciale", 1936, I, pp. 345 et seq.: De Martini, "Giurisprudenza italiana" 1945, I, 1, p. 221; Santoro Passarelli, "Istituzioni di diritto civile", 1946, No. 39, p. 161; Carraro, "Il mandato di alienare", 1947, pp. 139 et seq.; Stolfi, "Negozio Giuridico", 1946, p. 121). This consideration supports the opinion of the Commission when it refuses to consider whether the corporation contracts, which are at the basis of this dispute, are fiduciary contracts. Italian rules of law relating to simulation suffice to protect any *bona fide* third party.

25. One should nevertheless also examine whether the claimant, Arthur De Leon, as a result of the endorsement over to him of the shares of stock on the part of the stockholders at the conclusion of the war has absorbed all the rights of the joint stock corporation and whether his position as sole owner and proprietor of all the shares of the "Fratelli De Leon" joint stock corporation, confers on him the right to receive compensation for the war damages sustained by the corporation.

The fact that all the shares of stock are possessed by one shareholder alone, does not have the effect of entailing an *ipso jure* dissolution of the joint stock corporation, although statutory laws have adopted different solutions in this connection; corporations which have one shareholder (*Einmangesellschaft*) only are not unknown either in qualified legal writings or in jurisprudence.

In Italian law, if the establishment of a single shareholder joint stock corporation is inconceivable, a corporation which is reduced during the course of its existence to a single shareholder continues and preserves its legal personality. (Brunetti op. cit., 400, p. 60, note 4.)

Article 2362 of the Italian Civil Code is not unaware of the existence of single shareholder joint stock corporations, because it assigns to them certain legal effects when this condition materializes during the life of the corporation, in providing that: "(Sole shareholder). In case of insolvency of a corporation, as the result of liabilities which arose during the period in which the shares were possessed by one person only, this person's responsibility is unlimited."

It appears from the foregoing text that a single shareholder corporation is not impossible and Article 2448 of the Italian Civil Code does not list this fact as one of the causes for dissolution; the Italian legislation has, however, regulated only one of the consequences of this legal condition, namely that of the corporation's insolvency. The other problems which this condition can give rise to must, however, equally be solved by applying the same concept, implicitly contained in this article, that the sole shareholder concentrates in his person all the corporation's rights and obligations, and that a strict separation between the personality of the shareholder and that of the corporation cannot be brought to its extreme limits, because the two sets of property are dependent on the same and sole will, that of the shareholder who alone manages the corporation's property and his personal property and disposes of it freely. It is therefore inevitable that in all procedural questions, especially in those concerning the necessary quality entitling one to take legal action, the formal point of view which lays all stress on the legal separation between the shareholder's personal property and the corporation's property is blotted out by the real coincidence of interests of which they are composed. (Wieland, op. cit., vol. II, 1931, paragraph 124, p. 385 et seq., especially p. 396.)

In the instant case it is not denied that, beginning from 1952, and particularly the date on which the Petition was filed, Arthur De Leon became the sole owner of all the shares of stock and that his personal property was merged completely with the joint stock corporation's property; in his capacity as shareholder he was thus entitled to manage the enterprise according to his own choice, and, in the event of liquidation, he could claim the whole of the corporation's assets net.

It therefore follows that it is unavailing to make a separation between the two sets of property, and that, in the instant case, the claimant should be considered as entitled to claim, personally, with respect to the corporate rights accruing to him in their entirety. But can the legal action begun in his behalf before the Commission be pursued if only the corporation itself is entitled to receive compensation? This is a point which must still be gone into.

26. Article 78, paragraph 4 (b) of the Treaty of Peace specifically invoked by the Plaintiff Party, provides that compensation shall be paid to United Nations nationals for losses or damages sustained in Italy by corporations or associations in which they had ownership interests, even in the event that these corporations or associations are not themselves United Nations nationals, that is, that they do not fulfil the conditions required by Article 78, paragraph 9 (a), sub-paragraphs 1 and 2.

Under the terms of this latter provision, associations or corporations established under the laws in force in one of the United Nations on the date of the coming into force of the Treaty of Peace, namely September 15, 1947, and who already fulfilled this legal condition on September 3, 1943, the date of the Armistice with Italy, have the status of "United Nations nationals"; the same thing can be said for those corporations or associations which, though not having been established under the laws in force in one of the United Nations, or not possessing this status on the dates specified in the Treaty of Peace, were treated as enemy in application of the laws in force in Italy during the war.

The joint stock corporation established by the claimant under the laws in force in Italy is an Italian corporation which, as such, cannot invoke the protective provisions of the Treaty of Peace for the purpose of obtaining compensation for the damages it sustained during the war. On the other hand the aforesaid corporation was never treated as enemy by the Italian authorities who never adopted any discriminatory measure against it during the War; it does not, therefore, fulfil the conditions required by Article 78, paragraph 9 (a), sub-paragraph 2 and cannot be considered as vested with the nationality of the United Nations. On no grounds whatever is this corporation entitled to receive compensation from Italy on the basis of the Treaty of Peace. The question hence arises as to whether or not its sole shareholder, in whom the quality of United Nations national must be acknowledged, can have more rights than the corporation itself.

The French-Italian Conciliation Commission has held that the Treaty of Peace affords protection to the shareholder as such. It has held that the principal shareholder is entitled to act in order that the joint stock corporation in which his ownership interests are dominant may benefit by any such restoration or compensation as may be provided for by the Treaty; the first claim submitted to the Italian authorities can emanate either from the claimant himself or, in his behalf, from the Government of the United Nations of which he is a national, and this is in contrast with the Italian Government's viewpoint which contended that only the owner corporation is entitled to act. (Decision no. 82 of December 1, 1950, "Tessitura Serica Piemontese"

Case,[1] "Recueil des décisions", 3e fascicule p. 13.)

The foregoing decision was rendered in a case where the corporation involved was subjected to discriminatory measures during the war on the part of the Italian Government; although the aforesaid Commission left open the question in cases where "the capital stock entirely, or almost entirely, belongs directly or through interposed persons to one individual alone who *de facto* controls the joint stock corporation," this Commission holds that this solution should be extended, by analogy to cases of war damages sustained by a single shareholder corporation, because the motive and the purpose of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace, in the final analysis, is not the protection of the corporation established under Italian laws, but of the associates, who are United Nations nationals within the meaning of the aforesaid sub-paragraphs 1 and 2 of paragraph 9 (a). That which is valid for the United Nations national who is the principal shareholder of a corporation which does not have the status of a United Nations national, is also valid for the single stockholder who is a United Nations national within the meaning of Article 78 paragraph 9 (a) sub-paragraph 2 of the Treaty, of a corporation that is solely Italian.

The Commission could not reject the Petition of the United States Government merely on the grounds that the corporation is not entitled to receive war damage compensation; in order for the claimant to recover it would also be necessary that the claimant have been indirectly affected in his ownership interest in the joint stock corporation as a stockholder thereof, because, if the stockholder sustained no loss as a United Nations national, the Commission does not find in the Treaty, and especially in the principles set forth in Chapter VII, any positive legal basis on which to order payment of compensation.

The single stockholder who became such by the transfer of all the corporation's shares of stock over to him only after the war damages had been sustained by the corporation's property, cannot, in the opinion of the Commission, invoke his personal status of United Nations national, on the grounds of the treatment as enemy that was meted out to him in Italy during the war, for the purpose of obtaining benefits in favor of an Italian corporation which did not fulfil this condition.

27. It will therefore serve the Plaintiff Party no purpose to contend that the claimant is entitled to receive compensation for the damages caused by air bombardments which partly destroyed certain buildings owned by a corporation of which he has held all the shares of stock since 1952, by invoking Article 78, paragraph 4 (b), of the Treaty of Peace which reads as follows:

> United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9 (a) of this Article, but which have suffered a loss by reason of injury or damage to property in Italy, shall receive compensation in accordance with sub-paragraph (a) above.

Broad as the field of application of Chapter VII of the Treaty of Peace may be, it must be limited to the cases contemplated by its text, and it is still further less admissible to extend, by interpretation, the burden of reparation imposed on the Defendant Party. The contracting States were careful to prevent abuse and therefore did not confine themselves to requiring that all claimants be vested with the nationality of the United Nations at the date of the coming

[1] Volume XIII of these *Reports*, p. 78.

into force of the Treaty, but also required that they possess this nationality on the date of the Armistice with Italy: this was done to prevent third parties, by transfer of rights or through convenient naturalizations, from being permitted to benefit by indemnities for damages which occurred during the war but at a time when they did not fulfil the other requirements of the Treaty of Peace.

The claimant does not fulfil any of these conditions. In fact, because he has an ownership interest in an Italian joint stock company which does not have the status of a United Nations national, he could claim compensation only in the event that he had sustained damage in the corporation "by reason of injury or damage to property in Italy".

The exact meaning of these terms was carefully determined in decision no. 95 of March 8, 1951 rendered by the French-Italian Conciliation Commission, in the Società Minoraria o Metallurgica di Pertusola case [1] (Recueil 3e fascicule pp. 67 et seq., particularly p. 75 to p. 91). The result of the thorough grammatical and exegetic research work in the aforementioned decision, and which this Commission espouses, reveals that the expression "loss by reason of injury" implies discriminatory measures adopted by the Government of Italy against property, rights and interests of a United Nations national within the meaning of Article 78, paragraph 9 (a) of the Treaty of Peace and that the expression "loss by reason of damage" implies damages sustained as a result of acts of war, and that these be performed by the armed forces of Italy, of the Allied and Associated Powers or those of Germany during the partial occupation of Italian territory.

Undoubtedly ownership interests of United Nations nationals, or those deemed to be such, in Italian or neutral corporations are protected in cases where they sustained war damages in Italy; the Treaty of Peace limits their right to receive compensation to the extent of these ownership interests such as they existed on June 10, 1940 (Article 78, paragraph 1). The Treaty does not provide for cases in which these interests have changed owners and which no longer existed on the date on which the damage occurred. Arthur De Leon was no longer either in December 1942 or in February 1943 a shareholder of the joint stock corporation which sustained property injury; in point of fact, on October 15, 1942 and June 5, 1946, all the shares of stock had been transferred to eight stockholders of the Aryan race, as specified in the statement of facts (see above, no. 6, letter b), and he regained possession of them only after the cessation of hostilities in Italy. It therefore follows that the damages were sustained by a corporation which was completely Italian and none of whose stockholders was either vested with the nationality of the United Nations or could be considered to be vested therewith as the result of treatment as enemy under the laws in force in Italy during the war, the claimant himself, furthermore, not having yet suffered, at the dates under consideration, the slight hostile treatment making him a United Nations national, inflicted on him only as late as September 4, 1944.

The Commission cannot extend the scope of Article 78, paragraph 4 (b) of the Treaty of Peace beyond its terms, in view of the fact that there is here involved a provision of an exceptional nature the principle of which is extremely rigorous. Under the circumstances it holds it must apply the principle of "*in obscuris quod minimum sequimur*".

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[1] Volume XIII of these *Reports*, p. 179.

On the above grounds

DECIDES

(1) The claimant, Arthur De Leon, was treated as enemy during the war and he is therefore vested with the status of "United Nations national" within the meaning of Article 78, paragraph 9 (a), second sub-paragraph of the Treaty of Peace with Italy of February 10, 1947.

(2) Consequently, he, or his successors, are entitled to receive in lire from the Italian Government, under Article 78, paragraph 4 (a) of the Treaty of Peace, two thirds of the sum necessary, at the date of payment, to make good the losses resulting from war damages sustained by the building he owned in Turin, Corso Savoia no. 179.

(3) The Agent of the Italian Government shall submit to this Commission, within a time limit of thirty days, beginning from the date on which this decision is notified to him, his observations on the amount to be awarded to the claimant, or his successors, as compensation for the damages specified in paragraph (2) above, as well as on the amount of the reasonable expenses sustained by party in interest, Arthur De Leon, reimbursement for which is also being requested.

(4) The remainder of the Petition submitted by the Plaintiff Party in behalf of Arthur De Leon is rejected.

(5) This decision is definitive and binding.

(6) It shall be notified to the Agents of the interested Governments.

Signed at Rome, at the seat of the Conciliation Commission, Via Palestro 68, on May 15, 1962.

The Third Member

(G. SAUSER-HALL)

The Representative of the United States of America

(Leslie L. ROOD)

The Representative of the Italian Republic

(Antonio SORRENTINO)

DECISION NO. 227 OF 8 APRIL 1963

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy, pursuant to Article 83 of the Treaty of Peace with Italy of February 10, 1947, composed of Messrs. Leslie L. Rood, Representative of the Government of the United States, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Government, and Georges Sauser-Hall, Honorary President of International Law at the Universities of Geneva and Neuchatel, Switzerland, Third Member chosen by mutual agreement between the United States and Italian Governments,

Having seen the Commission's Decision No. 218 dated May 15, 1962 in the case of Arthur De Leon (No. 274), allowing thirty days' time from the date of notice thereof, or May 22, 1962, for the Italian Government to submit to the Commission its comments concerning the amount to be allocated to the claimant or to his heirs or assignees in compensation for the war damages

suffered by the building located at 179 Corso Savoia, Turin, Italy, as well as the amount of reasonable expenses incurred in preparing the said claim;

Having seen the letter No. 401927 (no date) of the Italian Ministry of the Treasury, estimating the amount of the said war damages at 10,871,700 lire, plus an additional amount not to exceed 30 per cent;

Having seen the Assessment Report of the Turin Ufficio Tecnico Erariale dated March 29, 1954 and its Annex A, filed with the Joint Secretariat of the Commission on December 12, 1962;

WHEREAS the Agent of the claimant Government has requested for the damages suffered by the building in Turin an amount estimated in February 1957 to be 24,774,000 lire, in round figures, subject to any necessary adjustment for variation of values at the date of final payment;

WHEREAS this amount should at first be reduced by 2,952,000 lire for depreciation because of the old age of the property, then the amount of 21,822,000 lire remaining after such deduction should be increased by 30 per cent to allow for the increase in prices at the date of the actual payment, so that, on the basis of these computations, the amount of the claimed loss should be established at 28,368,000 lire;

WHEREAS, on the other hand, it appears from the latest documents submitted by the defendant Government that the damages suffered by the above building, taking into consideration the same depreciation for old age above indicated, were estimated, according to expert advice, in January 1954 to be 11,809,000 lire, but such figure should be also increased by 30 per cent to allow for the increase in prices at the date on which actual payment is to be made, so that the compensation estimated on the basis of the data of the Italian Government should be estimated at 15,351,000 lire, in round figures;

WHEREAS, in consideration of the difference between the evaluation resulting from the elements submitted by the two Parties, the Commission deems it equitable to establish at *21,900,000 lire*, in round figures, the damage to real property suffered by the claimant, two thirds of which sum is to be paid by the defendant Government, i.e. *14,600,000 lire*;

WHEREAS only a portion of the claimant's demands was allowed by the Commission, the latter deems it equitable to establish at *500,000 lire* the amount of the expenses which the said claimant has reasonably incurred in Italy in determining the amount of compensation to which he is entitled, payable by the Italian Government,

For these reasons

DECIDES

1. Within two months from the notification of this Decision, the Italian Government shall pay, pursuant to Article 78, paragraph 4 (a) of the Treaty of Peace, to the claimant Arthur De Leon or to his heirs or assignees, the sum of *14,600,000 lire*, representing two thirds of the sum necessary, at the date

of payment, to compensate for the damages suffered by the building located at 179 Corso Savoia, Turin, Italy.

2. The payment of the said sum shall be made to the claimant Arthur De Leon or to his heirs or assignees or to their duly authorized representatives, pursuant to Article 78, paragraph 4 (c) of the Treaty of Peace, free of all levies, from all taxes or other charges.

3. The Government of Italy shall pay within the same period of two months (to the claimant or to his heirs or assignees), or to their duly authorized representatives, the sum of *500,000 lire*, representing the expenses reasonably incurred in Italy for the preparation of the claim.

4. This decision is definitive and binding. Its execution is incumbent upon the Italian Government.

Done at Geneva, at the home of the Third Member, Avenue de Champel 29, this day eight of April 1963.

The Third Member

(Georges SAUSER-HALL)

The Representative of the United States of America

(Leslie L. ROOD)

The Representative of the Italian Republic

(Antonio SORRENTINO)

GIORGIO UZIELLI CASE — DECISION NO. 229 OF 29 JULY 1963 [1]

Exemption from extraordinary progressive tax on property — Active right to claim — Applicability of second part of paragraph 9 (*a*) of Article 78 of Peace Treaty — Treatment as enemy — Exhaustion of local remedies — Non-application of general principle of — Expiration of time limit established in Memorandum of Understanding of 29 March 1957.

Exemption d'un impôt extraordinaire progressif sur le patrimoine — Droit d'action — Applicabilité de la second partie du paragraphe 9, *a*, de l'article 78 du Traité de Paix — Traitement comme ennemi — Epuisement des recours internes — Non-application de la règle générale — Expiration de la période prévue pour la présentation des réclamations au titre de l'article 78 du Traité de Paix.

[1] *Collection* of *Decisions*, vol. VII, case no. 311.

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace with Italy of February 10, 1947, composed of Messrs. Leslie L. Rood, Representative of the Government of the United States of America, Antonio Sorrentino, Representative of the Government of the Italian Republic, and José de Yanguas Messia, Professor of International Law at the University of Madrid, designated as Third Member of the Commission by agreement between the two Governments,

Having considered the Petition, dated March 23, 1961, of the Agent of the Government of the United States of America filed on behalf of Giorgio Uzielli against the Government of the Italian Republic;

Having considered the Answer of the Agent of the Italian Government, dated November 8, 1961, and all other pleadings and documents filed by both Agents;

Having heard the oral arguments of the interested parties, holds:

I. Consideration of fact

1. Mr. Giorgio Uzielli submitted a claim to the Intendenza di Finanza of Florence, requesting exemption from the Extraordinary Progressive Patrimonial Tax because he was a national of the United Nations and invoking Article 78 of the Treaty of Peace in support of his request.

2. On July 5, 1948 the Intendenza di Finanza rejected the claim, whereupon, on January 8, 1960, the claimant submitted a claim to the Ministry of the Treasury (UBAN) and on March 15, 1960 he made an application to the Ministry of Finance, Direction of Special Finance.

3. In his Petition the Agent of the United States requested that the claimant be exempted from the payment of the Patrimonial Tax on the following grounds:

(a) That the claimant is an American national, naturalized on April 4, 1945;

(b) That the claimant was treated as enemy under the anti-semitic laws in force in Italy during the war in that the Prefect of Grosseto, under these discriminatory laws, issued Decree No. 3833 on November 16, 1943 which stated that it was urgently necessary to proceed with the immediate sequestration of all the property located in the province owned by nationals of the Jewish race. Following this decree the "Paganico Farm" owned by the "Società Civile Paganico" located at Civitella Paganico was sequestered. Mr. Giorgio Uzielli owned a considerable number of shares of stock of this Corporation.

4. In his Answer the Agent of the Italian Government contended that the Petition was inadmissible inasmuch as the claim submitted by Mr. Uzielli to the Intendenza di Finanza of Florence had been rejected and because a new claim was not submitted until after the time limit of June 28, 1957, established by the Memorandum of Understanding of March 29, 1957, for

the submission of claims, including requests for tax exemption, of United States nationals under Article 78 of the Treaty of Peace.

The Italian Answer added *ad cautelam* that "the foregoing exonerates us from examining another aspect of the claim, namely whether once the normal procedure for fiscal claims has been initiated but has not yet been closed (District Commission, Provincial Commission) and domestic fiscal offices have already taken under examination the merits of the claim, it is permissible to interrupt the normal evolution of the domestic procedure by resorting to an international jurisdiction."

II. Considerations of law

1. *The eligibility of the claimants*

The Commission notes that the claimant became a United States national on April 4, 1945, that is, before the date of the Treaty of Peace but after the date of the Armistice. However, in the instant case, the eligibility of the claimant to avail himself of the benefits of the Treaty is based upon paragraph 9 (a) of Article 78 which states: "The term 'United Nations nationals' also includes all inviduals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy."

This was the case of individuals belonging to the Jewish race. Decree No. 2 of January 4, 1944 of the Republic of Salo' ruled that "real property and annexes thereto, personal property, commercial enterprises and any other resource existing in the territory of the State and owned by nationals of the Jewish race . . . are confiscated in favor of the State." This decree was applied to the claimant by the sequestration of the Paganico Farm.

2. *Claims presented pursuant to Italian law and the Petition before the Commission*

There is no doubt that resort to the remedies provided by Italian law by the damaged claimant, does not rule out the right of the claiming Government to present the controversy before the Conciliation Commission under Articles 78 and 83 of the Treaty of Peace.

A doubt, however, can arise and has been submitted to the Commission, with respect to the legal possibility of starting proceedings before the Commission without having previously exhausted the possibilities offered by Italian law.

> "Le dommage subi par une personne privée, qu'il ait sa source dans la violation d'un contrat, ou dans un délit," — Witenberg stated at the Academy of International Law at the Hague — "ne peut faire l'objet d'une réclamation recevable que si la personne privée lésée n'avait devant les Tribunaux de l'Etat défendeur aucune voie de droit qui lui permît d'obtenir réparation ou si celles qui étaient effectivement ouvertes ont été inutilement épuisées." (Witenberg, *Recueil des cours à l'Académie de droit international de La Haye*, vol. 41, p. 50.)

International proceedings in that case were, however, merely subsidiary to the domestic proceedings, and consequently were subordinate to the exhaustion of the remedies provided by the domestic legislation of the State in question; this was because, the claim being of a private domestic nature, international proceedings were admissible only in the case of denial of justice by the appropriate agencies of the State.

The case before us is entirely different. The normal jurisdiction for disputes arising in the implementation of Article 78 of the Treaty of Peace is

the Conciliation Commission established under Article 83 of the Treaty which reads: "Any disputes which may arise in giving effect to Articles 75 and 78 and Annexes XIV, XV, XVI, XVII, part B, of the present Treaty shall be referred to a Conciliation Commission consisting of . . ."

The jurisdiction of the Commission is therefore specific and direct, and not merely subsidiary to domestic Italian jurisdiction. To subordinate this *ad hoc* international jurisdiction to the requirement of the prior exhaustion of the remedies provided by Italian laws, would be contrary to any sound legal criterion.

3. *The Memorandum of Understanding of March 29, 1957 as it affects this case*

The Memorandum of Understanding of March 29, 1957 evidently met the joint requirements of both Governments of putting an end within a short time to the disputes arising out of the implementation of Article 78. And this, besides assuring decisions and payments, also guaranteed the Italian Government against the uncertainty of possible new claims so many years after the signing of the Treaty of Peace.

All claims filed prior to June 28, 1957, the time limit established in the Memorandum, whether with the domestic agencies or with the Commission, were known to the Italian Government and therefore have to be considered admissible for the purpose of the Memorandum.

Inversely, claims not falling within those referred to in the preceding paragraph are not admissible, for the reasons set forth above and in view of the fact that the sum of 950 million lire, which the Italian Government promised to pay within the time limit of three months, under paragraph 2 of the Memorandum, was logically calculated on the basis of the claims already known and claims which would be filed within the established time limit, and not on the basis of claims which were completely new and impossible to foresee.

In consideration of the foregoing, the Commission,

HEREBY DECIDES

1. That the claimant was treated as enemy under the laws in force in Italy during the war and is a United Nations national within the meaning of paragraph 9 (a) of Article 78 of the Treaty of Peace.
2. That the Italian Government, under paragraph 6 of Article 78 of the Treaty of Peace, shall exempt the claimant from the payment of Extraordinary Progressive Patrimonial Tax on any of his property in Italy and shall, within 60 days from the date of notification of the decision, refund any sum paid by the claimant on account of the tax.
3. That this decision is definitive and binding and its execution is incumbent upon the Italian Government.

MADRID, July 29, 1963

The Third Member

(José DE YANGUAS MESSIA)

The Representative of the United States of America

(Leslie L. ROOD)

The Representative of the Italian Republic

(Antonio SORRENTINO)

DROUTZKOY CASE — DECISIONS NOS. 232 AND 235 OF 29 JULY 1963 AND 26 FEBRUARY 1965 [1]

Compensation for war damages — Question of applicability of Italian succession taxes to compensation allowed under Peace Treaty — Supremacy of Treaty over domestic law — Jurisdiction of Commission — Scope of provision on tax exemption stipulated in Peace Treaty — Interpretation of treaties — Clear and precise provisions — Comparison of languages of text of Treaty — Reference to subsequent agreements between Parties — Intention of drafters — Ordinary and natural meaning of the words — Preparatory work.

Indemnité pour dommages de guerre — Question de l'applicabilité des droits de succession à l'indemnité due en vertu du Traité de Paix — Primauté du Traité sur le droit interne — Compétence de la Commission — Portée de la disposition du Traité de Paix portant exemption de tous prélèvements, impôts ou autres charges — Interprétation des traités — Dispositions claires et précises — Comparaison des textes anglais et français du Traité — Référence à des accords ultérieurs entre les parties — Intention des rédacteurs du Traité — Sens ordinaire et naturel des mots — Travaux préparatoires.

DECISION NO. 232 OF 2 JULY 1963

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic pursuant to Article 83 of the Treaty of Peace with Italy of February 10, 1947, composed of Messrs. Leslie L. Rood, Representative of the Government of the United States of America, Antonio Sorrentino, Representative of the Government of the Italian Republic, and José de Yanguas Messia, Professor of International Law at the University of Madrid, designated as Third Member of the Commission by agreement between the two Governments,

Having seen the Commission's Decision No. 170 dated May 15, 1957 in the case of Maria Theresa Droutzkoy (No. 26),[2]

Having seen the pleadings and documents filed by the two Agents;

Having heard the oral arguments of the interested parties, holds;

The facts of the case are set forth in an earlier decision of the Commission which decided the question of the nationality of the owner of the property

[1] *Collection of decisions*, vol. VII, cases Nos. 26 and 319.

[2] Volume XIV of these *Reports*, p. 314.

and her eligibility to present a claim under Article 78 of the Treaty of Peace. The present decision is concerned only with establishing the amount of the damages and losses to the real property (castle, park and gardens) and to the personal property (personal effects, furniture, art objects and paintings) for which the claim was made.

The Commission has considered:

1. With respect to the real property there is an existing basis for the determination of damages but with respect to the personal property there is a very weak basis because the property was almost completely destroyed or lost.

2. With respect to the real property, it is necessary first to determine what damages are entitled to indemnity and then to estimate the present prices necessary to restore or replace it.

3. There is no dispute as to the pre-existence in the castle of paintings, furniture, art objects and personal effects and the controversy hinges on their artistic and consequently economic value.

4. The only bases for itemizing the personal property which was in the castle are the Berardi inventory and the Tinivelli supplemental inventory, both of which are only summary and enumerative lists of items.

5. The subsequent Goffi and McCune appraisals, prepared at the request of the claimant, were made on the basis of the previous inventories which, in themselves, did not contain sufficient detail for an objective determination of the artistic and economic value of the personal property.

6. The Goffi appraisal was brief and room by room, showing a total value for the contents of each room without specifying a value for each item; the McCune appraisal was detailed but the minutiae of its description, the statements concerning age of the objects and the attribution to specific painters were not supported by the vague Berardi inventory; nor was there proof of the origin of the information used to fill out the additional details and the subsequent evaluations.

7. In the Berardi inventory only 20 paintings are attributed to specific painters, while in the McCune appraisal 100 paintings are attributed to specific painters and almost all the others to schools.

8. The few salvaged paintings can not serve as a standard of value for the lost paintings since it is impossible to ascertain that they were approximately of the same category.

9. The Berardi inventory does not show the measurements of the paintings but merely says of a painting that it is small, large, oval or rectangular; on the contrary, the McCune appraisal gives the measurements in centimeters of each painting without justifying the source used.

10. The personal property presents the greater task of evaluation since it constitutes 711.6 million lire of the 940 million lire requested, or about three fourths of the total.

11. The visit of the Commission to the Castle enabled it to see the poor condition of the building after the damage and also gave it the opportunity to observe, among other things:

(a) on the one hand the rather rustic nature of the flooring of the apartments and of some other parts of the building;

(b) on the other hand the noble shape of the building, the proportions of the representational rooms and the remains of the ancient decorations.

12. From the foregoing it may be argued that it would not be correct to regard all of the construction of the building as being of the best quality, nor would it be correct to regard it as a country house. The dignity of the building requires restoration commensurate with its antiquity. On the basis of this criterion it is suitable to establish the indemnity.

13. The personal property was almost completely lost and the best proof concerning it is the vague Berardi inventory which has been accepted by both parties. The Goffi and McCune appraisals must be examined with the reservations mentioned above.

14. There is insufficient concrete evidence to justify an evaluation of the personal property as being very good or of great value but the structure of the castle itself and the level of life connected with it — partially confirmed by the photographs of some of the apartments — show that the castle cannot be considered as a mediocre residence.

15. The estimate of the "Sopraintendenza alle Gallerie e alle Opere d'Arte" dated November 29, 1956 (see the Italian Supplemental Reply of 1960, p. 17) estimated the loss at 20 % of the amount claimed and the Reply itself (p. 17) estimated the loss at 10 % of the amount claimed.

16. The Italian evaluation of 1960 (Supplemental Reply, p. 18) was 111,147,400 lire and the Italian evaluation of 1962 (Brief, p. 120) was reduced to 56,406,000 lire, while on the other hand the total American estimate, after the subsequent increases and additions to the request of 1948 was raised to 940 million lire (Reply Brief of 1962). These are two extreme positions which emphasize the zeal of the Agents and lawyers of both parties in their desire to justify their respective theses.

17. The eligibility of the claimant has already been recognized in the previous decision of this Commission and it is now time to decide the case on its merits.

18. The expenses of preparing this claim have exceeded the expenses usually incurred in the past disputes.

The Commission, in the light of the criteria established in the considerations stated above and after a careful, detailed, item by item, analysis of both real and personal property, and after having particularly examined the paintings in order to reach a reasonable evaluation,

HEREBY DECIDES

1. The Petition of the Agent of the Government of the United States of America is granted in the measure stated by this decision.

2. The total amount of the damages and losses of the real and personal property involved in this case is 270,000,000 lire.

3. The amount of all the expenses incurred in the preparation of the claim is 10,000,000 lire.

4. Within two months from the notice of this decision, the Italian Government shall pay the claimant or her successors in interest, pursuant to Article 78 of the Treaty of Peace the sum of 180,000,000 lire, representing two thirds of the sum necessary at the date of payment, to make good the loss and damages to the Castle of Nemi and its contents suffered by the claimant.

5. Within two months from the notice of this decision, the Italian Government shall pay the claimant or her successors in interest, pursuant to Article

78 of the Treaty of Peace the sum of 10,000,000 lire, as expenses incurred in Italy in establishing the claim.

6. This decision is definitive and binding and its execution is incumbent upon the Italian Government.

MADRID, July 29, 1963

The Third Member

(José DE YANGUAS MESSIA)

The Representative of the United States of America

(Leslie L. ROOD)

The Representative of the Italian Republic

(Antonio SORRENTINO)

DECISION NO. 235 OF 26 FEBRUARY 1965

The Italian-United States Conciliation Commission, established by the Government of the Italian Republic and the Government of the United States of America pursuant to Article 83 of the Treaty of Peace with Italy of February 10, 1947, composed of Georges Sauser-Hall, Professor *Emeritus* at the Universities of Geneva and Neuchatel, doctor *honoris causa* at the University of Lausanne, Third Member chosen by mutual agreement between the Government of the Italian Republic and the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Government and Leslie L. Rood, Counselor of Embassy, Representative of the Government of the United States of America,

In the case which is the subject of the Petition dated December 19, 1962 submitted by the Agent of the Government of the United States of America versus the Government of the Italian Republic, and filed on the same day with the Secretariat of this Commission

on behalf of

Mrs. Maria Theresa Droutzkoy, formerly Maria Theresa Berry Ruspoli, heir of Eugenia Berry Ruspoli

Concerning the claimant's request to receive from the Italian Government the compensation provided for in Article 78, paragraph 4, sub-paragraph (c) of the Treaty of Peace, free from all taxes, levies and other charges, including the succession taxes that may have been envisaged by Italian law.

STATEMENT OF FACTS

A. In 1948 Mrs. Eugenia Berry Ruspoli submitted an application to the Italian Ministry of the Treasury requesting that she be paid compensation, as provided for in Article 78 of the Treaty of Peace with Italy of February 10, 1947, for the damages sustained as a result of the war by her real and personal property at the Castle of Nemi (Italy).

Mrs. Eugenia Berry Ruspoli died on January 26, 1951, before a decision was rendered on her claim and the Agent of the Government of the United States submitted to this Commission, in 1952, a Petition on behalf of Mrs. Maria Theresa Droutzkoy, formerly Maria Theresa Berry Ruspoli, adopted daughter and heir by will of Mrs. Eugenia Berry Ruspoli. This Petition, registered as No. 26 by the Secretariat of the Commission, estimated the

damages sustained by the owner of the Castle of Nemi at 739,494,010 lire, on the date December 10, 1948, an estimate which was subsequently increased during the proceedings to 872,826,411 lire, and later in 1962 to Lire 958,742,402 in order to take into consideration, in some measure, the devaluation of the lira.

By its decision No. 232 dated July 29, 1963 in this case No. 26, the Italian-United States Conciliation Commission, following investigations made and pleadings submitted by the parties to the dispute, established that the damages and losses sustained by the claimant as to both the Castle of Nemi and the personal property located therein amounted to the total value of 270,000,000 lire, and that two thirds of this sum, 180,000,000 lire, represented the amount of compensation due from the Italian Government; the Commission also allowed the claimant the sum of 10,000,000 lire for the expenses sustained by her in the preparation of her claim; the Commission ordered the Italian Government to pay these sums within a time-limit of two months beginning from the day on which the decision was notified, free of all taxes, levies and other charges; the decision specifically stated that it was definitive and binding and that it was incumbent upon the Italian Government to comply with it.

The Italian Government, nevertheless, advanced the same view it had set forth in other cases, notably in the Self Case (No. 152) [1] and the De Pascale Case (No. MP/943),[2] that is, that Article 78, paragraph 4, subparagraph (c) of the Treaty of Peace does not nullify the requirement that the Italian succession taxes must be paid on the amounts received as compensation for war damages (although not on the reimbursement for the expenses sustained in the preparation of the claim) by the heirs of deceased claimants who died before receiving compensation.

The Italian Ministry of Foreign Affairs expressly confirmed this point of view in the Ruspoli-Droutzkoy case in its Note Verbale of November 15, 1963, by conveying to the Embassy of the United States the opinion rendered by the Commission (established under Article 6 of the law No. 908 of December 1, 1949) during the meeting of October 9, 1963, an opinion which was approved by the Ministry of the Treasury:

> The Commission:
>
> Whereas, by letter dated October 3, 1963, transmitted to the Office . . . the Embassy of the United States of America, on behalf of its Government, has requested that there be put into effect the Decision No. 232 of July 29, 1963, whereby the Italian-United States Conciliation Commission has granted to the United States national Mrs. Maria Theresa Berry Ruspoli Droutzkoy, as heir of Mrs. Eugenia Berry Ruspoli, an indemnity of 190,000,000 lire — inclusive of the sum of 10,000,000 lire to cover costs for the preparation of the claim — in settlement of the claim filed by the latter pursuant to Article 78 of the Treaty of Peace for the war damages suffered by the property located in the Commune of Nemi;
>
> Whereas, it appears that the above named Mrs. Maria Theresa Berry Ruspoli Droutzkoy has not fulfilled the obligations, the performance of which, under Italy's internal legislation, is a required condition for the payment of the State's debts to the creditor's heirs;
>
> Whereas there is now pending before the Italian-United States Conciliation Commission a case, recorded under No. 319, concerning the United States Government's contention, opposed by the Italian Government, that the indemnity

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[1] Volume XIV of these *Reports*, p. 435.

[2] *Supra.*

payable to the above named Mrs. Maria Theresa Berry Ruspoli Droutzkoy should not be subject to payment of the inheritance tax;

Considering that the possibility of paying the indemnity to the party concerned without compliance with the tax and accounting provisions envisaged in the Italian legal system is conditioned upon the outcome of the aforesaid case;

Expresses the opinion that, under the present condition, payment of the indemnity in the amount of 190,000,000 lire granted to Mrs. Maria Theresa Berry Ruspoli Droutzkoy by the aforesaid decision No. 232 of July 29, 1963, of the Italian-United States Conciliation Commission, should be conditional upon prior compliance with the provisions of the Tax and General State Accounting Laws.

B. This opposition in principle of the Italian Government had been already made clear during the proceedings in the Self and De Pascale cases, as well as in the claims settled by direct agreement between the Ministry of the Treasury and the heirs of the original claimants under Article 78, paragraph 8 of the Treaty of Peace; in order to obtain actual payment of the compensation that had been awarded to them, these heirs were required to supply evidence of the payment of the succession tax on the amount of these indemnities.

Since other cases of this nature had arisen and since the Italian Government's position was well known, the Agent of the United States submitted, on December 19, 1962, a new Petition to the Commission on behalf of Maria Theresa Droutzkoy and concluded by requesting the Commission to decide that the Italian Government was obligated to pay the claimant the indemnity due to her under Article 78 of the Treaty of Peace, free of any taxes, levies and other charges, including the Italian succession taxes.

This new request was registered by the Joint Secretariat as No. 319 and it concerns only the question specified in the aforesaid Petition of December 19, 1962. Indeed, all the facts of the case were established in the proceedings of the previous cases, and were stated in Decision No. 232, July 29, 1963, which concerned the merits of Case No. 26. The present decision consequently has the sole purpose of settling the difficulty that has arisen in connection with the execution of Decision No. 232 of July 29, 1963, a difficulty which plainly appeared in the Italian Note Verbale of November 15, 1963, cited above.

Upon being submitted to the judgment of the Representatives of the two Governments, Petition No. 319, dated December 19, 1962, of the Agent of the United States gave rise to a Proces Verbal of Non-Agreement on February 27, 1963; the Government of the United States on the one hand, and the Government of Italy on the other, acting pursuant to Article 83, paragraph 1, of the Treaty of Peace, chose as Third Member of the Commission, on April 3, 1963, Professor Georges Sauser-Hall of Geneva. Therefore, the jurisdiction of the Commission is not to be questioned.

The Conciliation Commission, thus completed, issued an Order on May 26, 1963, establishing time limits for the submission of written pleadings and defenses and reserving to itself the right to fix the date for an oral hearing in the case.

C. The provisions of the Treaty of Peace that are invoked by both sides in this dispute and which are differently construed by the Parties, are the following:

(a) Article 78, paragraph 2, sentence 1:

The Italian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges

of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Italian Government in connection with their return.

(b) Article 78, paragraph 4 (a):

The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. . . .

(c) Article 78, paragraph 4 (c):

Compensation shall be paid free of any levies, taxes or other charges. It shall be freely usable in Italy but shall be subject to the foreign exchange contral regulations which may be in force in Italy from time to time.

(d) Article 78, paragraph 5:

All reasonable expenses incurred in Italy in establishing claims, including the assessment of loss or damage, shall be borne by the Italian Government.

(e) Article 78, paragraph 8:

The owner of the property concerned and the Italian Government may agree upon arrangements in lieu of the provisions of this Article.

(f) Article 78, paragraph 9 (a), sub-paragraphs 1 and 2:

"United Nations nationals" means individuals who are nationals of any one of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

The term "United Nations nationals" also includes all individuals, corporations and associations which, under the laws in force in Italy during the war, have been treated as enemy.

(g) Article 78, paragraph 9 (b):

"Owner" means the United Nations national, as defined in sub-paragraph (a) above, who is entitled to the property in question, and includes a successor of the owner, provided that the successor is also a United Nations national as defined in sub-paragraph (a). If the successor has purchased the property in its damaged state, the transferor shall retain his rights to compensation under this Article, without prejudice to obligations between the transferor and the purchaser under domestic law.

D. The dispute that has arisen between the Government of the United States of America and the Government of the Republic of Italy has become particularly acute by reason of the two conflicting precedents which have been decided by the Conciliation Commission; these are, on one

hand the Harriet Louise Self Case (No. 252) [1] in which a decision was rendered on January 27, 1960 (No. 202), and on the other hand, the De Pascale Case (No. MP/943) [2] in which a decision was rendered on June 24, 1961 (No. MD/1018). In the first of these two cases, the Commission with Mr. Bolla as Third Member, agreed with the theory of the United States; in the second case, Mr. Guggenheim acting as Third Member, the Commission fell in line with the Italian theory, at least in some measure. Each of the two Governments could thus invoke a definitive and binding precedent in favor of its own theory in the cases which were later submitted to the judgment of the Italian-United States Conciliation Commission, disputes which clearly raised the same problem of the applicability of the Italian succession taxes to compensation allowed under Article 78 of the Treaty of Peace, where the claimants had died prior to receiving the indemnities to which they were entitled.

As no agreement was reached between the two Governments on these new cases, they decided that they would resort to the Commission in its present composition whom was given jurisdiction to decide the other three cases of Ludovico Baer (No. 314),[3] Angele Beckman Durst and Henry H. Beckman (No. 318) and Arthur De Leon (No. 320) all of which raised legal questions that were exactly identical with the question of the Droutzkoy-Ruspoli case.

Because of this situation, the parties have not submitted specific pleadings in each of these cases, but have referred to their principal pleadings, stating them to be valid for all of the other cases. Hence, the Agent of the United States, when filing the American pleading in the Baer Case (No. 314) expressly stated, on May 24, 1963, that the arguments contained therein were valid also for the other cases (Nos. 318, 319 and 320), and further, in July 1963, that he had no intention of filing a separate pleading in each case, as the legal points at issue were the same. The Italian Agent, in his turn, filed two Defenses (on September 25 and October 15, 1963 respectively) and pointed out that the arguments therein contained were valid not only for the Droutzkoy Case but also for the other three cases mentioned above.

The written documents were submitted by each Party approximately within the time-limits established by the Order of the Commission dated May 26, 1963; where certain deviations occurred without any exception being raised by the Parties, the Commission admitted them in application of Article 18, first sentence of its Rules of Procedure, and they were duly noted at the opening of the oral hearings. These were held in Rome, at the seat of the Commission, from January 13 to January 16, 1964, all Parties being represented.

E. As the genesis of this dispute goes back to the two decisions rendered in the Self and De Pascale cases, it is important to explain the developments in them, particularly since the arguments of the Parties concerning the collection of the Italian succession taxes have not changed essentially.

The first dispute which arose between the two Governments is the case of Miss Self whose father, Edward Self, a United States national, owned property in Italy which was sequestered during the war and which sustained heavy damage as a result of military occupation or bombing and was pillaged by combat troops. Edward Self died on January 12, 1952 leaving as his sole heir by will his daughter Harriet Louise, also a United States national. Four days after his death, the Embassy of the United States addressed a request

[1] Volume XIV of these *Reports*, p. 435.
[2] *Supra.*
[3] Volume XIV of these *Reports*, p. 402.

for indemnity to the Italian Government pursuant to Article 78 of the Treaty of Peace. Compensation was fixed, by compromise agreement of July 19, 1954, at 3,000,000 lire, plus 250,000 lire as reimbursement for expenses incurred in establishing the claim, and the Ministry of the Treasury approved this settlement without any reservation or condition. Nevertheless, on December 14, 1954, it requested Miss Self to produce a certificate of the competent "Ufficio del Registro" proving that "a declaration of succession had been made with regard to the sum of 3,250,000 lire which had been granted as compensation for war damages and that the related taxes had been paid on this sum".

As the Embassy of the United States in Rome, in its communication dated December 27, 1954, had intimated that this requirement was incompatible with Article 78, paragraph 4, letter (c) of the Treaty of Peace, the Italian Ministry of the Treasury wrote a letter in answer on January 19, 1955, certain passages of which it is deemed appropriate to cite hereunder:

> As is known, instead, payment of indemnities settled in favor of United Nations nationals, under Article 78 of the Treaty of Peace, are ordered, unlike the normal payments effected by the State, to be made without any deductions of this nature and this, in fact, is done in application of the aforementioned paragraph. In cases concerning succession taxes instead, a taxation affecting the payment made by the State is not involved but a taxation which, under Italian domestic law, affects transfers 'mortis causa' of property constituting the estate. It is obvious moreover that the indemnity with regard to the succession is one of the hereditary sources which takes the place of lost property of the *de cuius* or of the damage sustained by him. In the case of the death — occurring after the entry into force of the Treaty of Peace — of a national of the United Nations who was the owner of property damaged as a result of the war, the heirs derive their right to the credit against the State not "iure proprio" but "iure successionis"; and consequently it is evident that there must be applied the law of taxation governing transfers "mortis causa" in Italy. . . There is therefore not here involved a tax which is levied at the time of payment, but a finding of fact, at the time payment is ordered, with regard to whether or not the heirs have complied with the fiscal obligations required by law. In view of the foregoing considerations, it does not appear that the instant case should become the subject of a dispute to be submitted to the Conciliation Commission established under Article 83 of the Treaty of Peace.

In the circumstances the dispute could only be settled by judicial contest; and it was settled by the decision rendered on January 27, 1960 in Case No. 152 which was entirely favorable to the theory of the United States of America.

The second case which came up in the Italo-American relationship and which raised the same questions as the previous one, is that of the De Pascale heirs (No. MP/943). The father, Vincenzo De Pascale, a United States national, whose real property in Italy had sustained damage as a result of the war, died on December 27, 1952 in the State of Ohio in the United States, leaving seven children all of whom were also American nationals. The Agents of the two Governments agreed to include the seven claimants in the list that had been annexed to the Memorandum of Understanding between the United States and Italy concerning the settlement of war damage claims, signed at Rome on March 29, 1957, and, by an amicable settlement on January 6, 1960, established at 900,000 lire the amount due as compensation to the claimants, with the reservation nevertheless that evidence was to be submitted with regard to the payment of the Italian succession tax, but without any prejudice to the theory of the Agent of the United States that com-

pensation was due, as provided for in Article 78 of the Treaty of Peace, to the claimant's heirs without any deduction of any succession tax whatever by the Italian Government.

This question was submitted to the Commission completed by a Third Member, and on June 24, 1961, the Commission rendered a decision based on a distinction between, on the one hand, a payment as such of compensation which had to be made without any deduction of taxes, and, on the other hand, an indemnity on which, subsequent to having been paid, the Italian Government was permitted to collect inheritance taxes, this latter question coming exclusively under the jurisdiction of the Italian authorities.

The contrast between the two decisions, namely the Self Case decision and the De Pascale Case decision, is quite obvious.

Following the Self Case decision, the Agent of the Government of the United States addressed in February 1960 a request to the Conciliation Commission demanding that the latter inform the Banca Nazionale del Lavoro that it had been decided that the heirs of the deceased claimant were entitled to receive compensation net of all levies, taxes and other charges, and, in particular, exempt from the Italian succession tax on the indemnity, and that "the Banca Nazionale del Lavoro was to notify this fact to all the heirs of every deceased claimant to whom the aforesaid Bank had not yet paid the indemnity established by the Italian-United States Conciliation Commission pursuant to the Memorandum of Understanding dated March 29, 1957".

In response to this initiative, the Agent of the Italian Government submitted to the Conciliation Commission a letter of the Ministry of the Treasury dated March 29, 1960 reading as follows:

> This Ministry has taken due note of the decision dated January 27, 1960, No. 202, rendered in the Harriet Louise Self Case by the Italian-United States Conciliation Commission — in which it is affirmed that compensation settled under Article 78 of the Treaty of Peace, in favor of an interested claimant, is exempt from succession tax — and, as a result thereof, reserves itself the right to take any such steps as it may deem appropriate.
>
> With regard to the request submitted to the aforementioned Commission by the Agent of the United States of America, directed at obtaining that, following the issuance of the aforesaid decision, the exemption from inheritance tax be extended to the awards made under the Italian-United States Memorandum of Understanding dated March 29, 1957, it is hereby advised that this Ministry, after consulting the Interministerial Commission established under Article 6 of Law No. 908 of December 1, 1949, holds it cannot accede to this request; therefore, the instructions issued at the time, regarding the payment of the awards made under the above mentioned Memorandum, to the Banca Nazionale del Lavoro, which is the body entrusted with the treasury operation of the transaction, must be considered to be still in full force and effect.
>
> In view of the foregoing will this Ministry kindly issue appropriate instructions to the aforementioned Bank and ask the Representative of the Italian Government on the Commission to oppose the request submitted by the United States Agent, and keep the Joint Secretariat duly informed.

The contents of this letter were also communicated to this Commission on October 30, 1962, by the Agent of the Italian Government; moreover, he referred to the De Pascale Decision wherein the question was solved in a sense opposite to the request of the United States.

The legal position of the Parties has therefore not been modified by the Self and De Pascale Decisions which are respectively invoked by each of the two Governments.

THE CONCLUSIONS OF THE PARTIES

In the instant case on behalf of Mrs. Maria Theresa Droutzkoy (No. 319) the Agent of the Government of the United States of America, stated the conclusions set out hereunder in his request dated December 19, 1962, and has never deviated therefrom either in his written Pleadings or during the oral hearings:

> Wherefore, the Agent of the United States of America requests that the Honorable Commission decides that the Italian Government is obligated to pay the claimant the compensation due under Article 78 of the Treaty of Peace exempt from any charges or levies, including Italian inheritance taxes thereon.

In the other three cases (Nos. 314, 318 and 320), the conclusions of the aforesaid Agent are substantially the same, as regards the question of merit, although they refer more specifically to the particular interests of each claimant in whose behalf the Petition had been submitted through diplomatic channels to the Italian-United States Conciliation Commission.

The Agent of the Government of the Italian Republic, with regard to the four cases (Nos. 314, 318, 319 and 320) now pending before this Commission, in his Defense dated September 17, 1963, concluded by requesting that the Petition be rejected.

CONSIDERATION OF LAW

1. There is a dispute between Italian jurists on the question whether, under Italian domestic tax laws, succession taxes can be collected on war damage compensation payable under the provisions of the Treaty of Peace to the heirs of persons who sustained damage but who died before receiving the amounts to which they were entitled.

Some contend that the right to receive compensation is not a personal asset of the injured party but a mere expectancy (two thirds of the estimated damage) which is not subject to taxation because the owner's heirs do not have a right of action in their own name to the compensation provided for by the Treaty of Peace; such right of action belongs to the State of which the injured party is a national, or, eventually to another United Nation if the conditions of the Treaty are fulfilled.

Other Italian authors, however, contend that the indemnities in question are assets, liable to be transferred *mortis causa*, because the credits for reparation against the Italian Government would appear to replace the damaged properties and are hence subject to the succession tax. This is the point of view expressed by the Ministry of the Treasury in its letter of January 19, 1955 cited above.

This Commission, though it has the jurisdictional power in its capacity as an international adjudicating body to pass on all questions of Italian domestic law which affect the tax exemption of Article 78 of the Treaty of Peace, nevertheless holds that this issue can be left open in the instant case. In fact, even if one were to accept the view most favorable to the Italian Government, the question of the right to collect succession taxes in the cases submitted to the Conciliation Commission would fall within the Commission's jurisdiction, because it is universally admitted that international law, and in particular that arising out of treaties, has priority over the domestic law of the co-contracting States, and that neither can exempt itself from observing an international treaty by screening itself behind the provisions of its

domestic law which are incompatible with its international obligations. This was very clearly stated by the Italo-French Conciliation Commission in its decision dated August 29, 1949,[1] concerning the dispute on the applicability to French nationals and their property of the special property tax established in Italy: "The obligation to exempt is of an international nature and must be settled under the very terms of the Treaty establishing it." (Recueil des décisions de la Commission de Conciliation franco-italienne, Premier fascicule, page 99.)

2. Nevertheless, the Italian Government contended that the Commission lacked the necessary jurisdiction to pass on the question whether Italian law subjects to succession taxes the right acquired by Mrs. Maria Theresa Droutzkoy to the indemnity which should have been paid to Mrs. Eugenia Berry Ruspoli had she not died previously. The Italian Government was followed in its arguments, but only up to a certain point, by the Commission's decision in the De Pascale case.

But, by virtue of Article 83 of the Treaty of Peace, there is no doubt that the powers of the Commission permit this judicial body to investigate not only whether the application of succession taxes to war damage compensation in the cases involved is permissible under Italian domestic tax laws, but above all whether or not the application of such taxes is compatible with Article 78 of the aforesaid treaty, that is, with the international obligations which Italy has undertaken in this connection towards the United Nations.

When a State has obligated itself by an international treaty to accord a certain tax exemption to nationals of other States, resort to the judicial body entrusted with ensuring a correct application of the treaty is possible in cases where the alleged infringement of international law arises out of a law of the State that has undertaken the obligation or by an action of its authorities. The jurisdiction of this Commission to pass on a dispute arising in this connection between the two States bound by the treaty is certain. The provisions of domestic law regarding this immunity are immaterial; the litigation depends upon the meaning and the scope of the provisions of the international law to be applied.

Necessarily, the first step is an analysis of the provisions of Article 78 of the Treaty of Peace concerning the extent of the tax exemption stipulated therein.

3. The right of Mrs. Maria Theresa Droutzkoy to receive compensation for the war damages sustained by Mrs. Eugenia Ruspoli, of whom she is the heir, as well as the amount of the compensation to be allowed have already been definitively established by the Commission. The only question still pending can be stated by the Commission as follows:

Does the Italian Government have or does it not have the right, under Article 78 of the Treaty of Peace, to collect a succession tax on the amount of the indemnity due from it to the owner of property damaged as a result of the war, when the person who originally sustained the damage was a national of one of the United Nations and died before receiving the compensation to which he was entitled, the payment of which is requested by his heirs?

4. *Prima facie* the answer to this question is in the negative as regards the right of the defendant Government to require, directly or indirectly, the payment of succession taxes on the indemnity due, in cases of transfer through legal or testamentary succession of the claim to the heirs of the person who was the owner of the property at the time the damage occurred.

The Treaty of Peace is absolutely clear on this point. Article 78, paragraph

[1] Volume XIII of these *Reports*, p. 108.

4, letter (c) thereof, reads: "Compensation shall be paid free of any levies, taxes or other charges." This sentence is a real example of conciseness. From a grammatical standpoint it is so simple that it defies all interpretation; it is composed of a single subject, "compensation", followed by a verb stating its condition, "shall be paid", and terminates with a circumstantial complement which indicates how the compensation shall be paid and which refers to no other word than the subject of the sentence; in the French text ("L'indemnité sera versée, nette de tous prélèvements, impôts ou autres charges") this is proven by the use of the feminine in the past participle of the verb conjugated with *to be*, and by the feminine form of the adjective "nette" which opens the complement "free of any levies, taxes or other charges". In order to find matter for interpretation, one would have to change the subject of the sentence, something which the De Pascale decision thought wise to do; that decision in considering what it is that is free of any taxes held that it is not the "compensation" but the "payment" thereof; but the word "payment" does not appear in the sentence being construed, although that decision affirms that its interpretation is the most literal one. To adopt this interpretation one has to change the subject of the sentence and rewrite it in this way: "Payment shall take place (or shall be made) free of any levies, taxes or other charges." An interpretation which claims to be literal and which changes the terms of the text to be interpreted condemns itself.

The English and French texts of Article 78, paragraph 4, letter (c) correspond perfectly. There is not the slightest contradiction between them.

The meaning of this sentence is clearly further confirmed by subsequent agreements made only between the United States and Italy, the purpose of which was to re-establish normal financial and economic relations between the two countries, and to stabilize Italy's economic situation by reducing somewhat the burdens imposed on her by the Treaty of Peace. These economic and financial Agreements made at Washington on August 14, 1947 and known as the Lovett-Lombardo Agreements include a Memorandum of Understanding concerning the settlement of certain "wartime claims" and related matters. Article 3, paragraph 16, letter (d) of this Memorandum includes a sentence which shows the closest analogy with the disputed sentence of the Treaty of Peace; the Memorandum's sentence reads: "Compensation paid in accordance with terms of this section shall be free of levies, taxes or other charges . . ."; the Italian text does not show the slightest deviation of meaning: "Il compenso pagato a norma del disposto di questa sezione sara' esente da imposta, tasse od altri oneri . . ."; in the face of this accordance of different texts, the restrictive construction of the De Pascale decision does not stand up under analysis.

This complete tax immunity of the indemnities payable to the heirs of the original owner who sustained damage appears no less clearly from the text of the Treaty of Peace, Article 78, paragraph 9, letter (b) in which it is stated that "'Owner' means the United Nations national, as defined in sub-paragraph (a) above, who is entitled to the property in question, and includes a *successor* [1] of the owner, provided that the successor is also a United Nations national as defined in sub-paragraph (a)".[2] Here again one finds complete agreement between the French and English texts.

An exchange of notes between the United States of America and Italy dated February 24, 1949, for the purpose of settling certain matters of interpretation in connection with Article 16 of the Memorandum of Understanding

[1] The emphasis does not appear in the text.
[2] Of this same Article 78, paragraph 9.

of August 14, 1947, also confirms that the signatories of the Memorandum set out from the conception stated in the Treaty of Peace: "A national of the United States shall be considered, for purposes of the Memorandum of Understanding and of this agreement, as any person . . . on whose behalf the Government of the United States would be entitled to claim the benefits of Article 78 of the Treaty of Peace or of the Memorandum of Understanding or both."

Both parties admit that the term "successor" includes at least the *ab intestat* heirs, the testamentary heirs and the legatees of the original claimant. The result is that all these categories of successors also benefit from the right to receive compensation free of any levies, taxes and other charges. The question as to whether or not this term includes also a successor inter vivos, such as a donee or an assignee, can be left open in the instant case in that this mode of transfer does not entail the payment of succession taxes, but rather a special charge on the transfer of property.

The text of Article 78, paragraphs 4 and 9, as regards tax immunity, does not furnish, *prima facie*, any support for the theory of the Italian Government. One cannot find any indication therein permitting one to assume that the Italian succession taxes were excluded from the exemption. The Honorable Agent of the Italian Government has contended that the inclusion of an exemption from the payment of succession taxes could not be presumed and that a formal provision of the Treaty of Peace was necessary to exempt the beneficiaries of the compensations from the payment of these taxes; to this contention the Commission responds that the present case involves a broad, all-inclusive provision of a contract and not the question whether a tax exemption should or should not be presumed.

After a devastating war, it is unbelievable that the drafters of the Treaty of Peace failed to foresee the cases of *mortis causa* transfers of damage claims to the heirs of the original owner of the property that had sustained damage as a result of the war, the disputes that might arise during the proceedings to establish the amounts of compensation, the long delays which would be caused by the need for experts' reports, and the numerous controversies which would keep the Conciliation Commissions, established pursuant to the Treaty of Peace, busy for almost twenty years. The drafters of the Treaty cannot have ignored reality to the point of failing to consider the owners who had sustained damage and had died before their claims had been submitted to the Commission, or during the proceedings, or, lastly, after there had been rendered in their favor a definitive and binding decision which on the date of their death had not yet been executed by the defendant Government. In all these eventualities which were foreseeable in a very high degree and which were envisaged by the Treaty of Peace in protecting the successors of the predeceased injured parties, the question of a possible payment of succession taxes cannot have escaped the perspicacity of the negotiators; in adopting a simple solution, clear and devoid of all ambiguity, of a total exemption from any levies, taxes or other charges, they clearly included in these terms the exemption from the payment of succession taxes.

This Commission consequently shares the opinion, already expressed in the Self decision, that by resorting to a formula of tax exemption as broad and inclusive as possible, the drafters of the Treaty of Peace clearly intended to avoid the enumerative method which always entails the risk of oversights and gaps. The exemption was extended to all cases of levies and taxes, and the final words of the first sentence of Article 78, paragraph 4, letter (c) "or other charges" clearly indicates that no type of impost was to be excluded. In any event the instant case does not concern a special tax or impost of slight

importance which might have escaped the attention of the drafters, but on the contrary, a tax that is very widespread in the modern world; the treaty could have excluded it from the principle of total tax exemption of the war damage compensation by a specific provision of the kind in Article 78, paragraph 9, letter (b), which makes a *mortis causa* transfer of the right to receive compensation expressly subject to the condition that the successor is also a national of one of the United Nations, and thus confines it to this category of individuals.

5. The grammatical and literal exegesis of Article 78, paragraphs 4 and 9 of the Treaty of Peace which this Commission has made, leads it to the conviction that these texts are clear, that they very correctly express the intent of the contracting Parties and that the Commission is faced with provisions which do not need to be interpreted in order that their true meaning be seen precisely. At this point the Commission could terminate its inquiry and discussion and rely upon the principle formulated by Vattel, namely, that "the first general maxim of interpretation is that it is not permissible to interpret that which does not need to be construed. When a document is written in clear and precise terms, when the meaning thereof is manifest and does not lead to any absurdity, there is no reason to reject the meaning that naturally appears from the document. Searching for conjectures elsewhere in order to restrict or extend it means wanting to evade it." (Le Droit International, Liv. II, chap. XVII, § 263.)

This principle has had a large number of followers before international tribunals. The Permanent Court of International Justice has many times based itself on this principle, particularly in its Advisory Opinion of September 15, 1923 (Acquisition of Polish Nationality) on the interpretation of Article 4 of the Polish Minorities Treaty; it includes the following passage: "The Court's task is clearly defined. Having before it a clause which leaves little to be desired, in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it". (P.C.I.J., series B, No. 7, p. 20.)

This rule, however, is not absolute. The Institute of International Law dealt with it during its Granada session, and on April 9, 1956, approved the following Resolution:

> 1. The agreement of the Parties having been embodied in the text of the treaty, it is necessary to take the natural and ordinary meaning of the terms of this text as the basis of interpretation. The terms of the provisions of the treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law.
>
> 2. If however, it is established that the terms used should be understood in another sense, the natural and ordinary meaning of these terms will be displaced. (Annuaire de l'Institut de droit international, 46 Volume, 1956, p. 365.)

It is then the duty of the international tribunal entrusted with the settlement of a dispute between States, bearing in mind the provisions cited above, to decide whether and in what measure it is necessary to resort to other means of interpretation.

It would hence be expedient to consider whether or not the Italian Government, whose good faith is not doubted, has succeeded in establishing that the terms employed in Article 78 of the Treaty of Peace have a meaning other than that which is natural and ordinary and whether they lead to contradictions, to injustices or to absurdities. The interpretation to be taken

into consideration in the present case is that which is based on the practice followed in the actual application of the treaty by the Italian Government—an interpretation followed in the De Pascale case which is favorable to Italy, just as the Self case is favorable to the United States. One should nevertheless note that it appears from statements made during the oral hearings by the Agent of the Italian Government, that the said Agent invokes the De Pascale decision merely for the purpose of reaching a compromise settlement, and that he has energetically held out, with regard to claims in which a decision has not as yet been issued, for a conclusion which completely rejects the Petition of the United States and which would entail for him the right, that he in no way intends to waive, of requiring payment beforehand of the Italian succession taxes on the two thirds of the war damage compensation paid to the successor of the prematurely deceased claimant who sustained the damage.

6. For the purpose of proving that the statements used in Article 78 of the Treaty of Peace deviate from the meaning which is ordinary and naturally attributable to them, the defendant Government has based itself on the interpretation, favorable to its viewpoint, which was followed in the application of the Treaty in the De Pascale decision.

This decision dwelt at length on the fact that three interpretations might be given to the tax exemption in the framework fixed by Article 78, paragraph 4, letter (c) of the Treaty of Peace. One fails to see very clearly on what grounds this explanatory statement was made, in that nowhere is the obscurity of the disputed text pointed out. It appears that the whole of the Italian argument sets out from the preconceived idea that a means must be found to subject the war damage compensations awarded under the Treaty of Peace to the Italian succession taxes; in doing so sufficient care is not taken to examine whether, on the contrary, the provisions of the Treaty are such that any attempt of this kind is illusory.

According to the De Pascale decision's first interpretation of Article 78, paragraph 4, letter (c) the provision would mean that the indemnity would have an unlimited tax immunity; this would be permanent and the indemnity could not be touched either before or after payment; it would constitute a possession exempt from all taxes in Italy, even in cases where a *mortis causa* transfer had occurred subsequent to payment; it would forever enjoy a kind of immunity, untouchable as far as the tax authorities were concerned, attaching to the property of the claimant, no matter what transfers, changes, investments, etc. it might later be subjected to. But this interpretation, previously rejected in the Self decision which decided that tax immunity is not *rei inhaerens*, was not expounded to prove that the meaning of the terms of the Treaty was not an ordinary and natural meaning; on the contrary the De Pascale decision showed that such an interpretation would be a dangerous technicality and the decision dismissed it saying that such an excessive claim had not been advanced by the Government of the United States.

Notwithstanding the purely academic character thus given to this first attempt to interpret that which did not need to be interpreted, the Commission cannot avoid mentioning it, as it emphasizes the exactitude with which the thought of the negotiators was rendered in the Treaty. Article 78, paragraph 4, letter (c), the basis for all interpretations, says that "Compensation shall be paid free of any levies, taxes or other charges"; this meant very precisely that the tax immunity established for the indemnity could produce its effects only once, at the time of payment thereof, because it is quite obvious that payment of compensation is but a fulfilment by the debtor State of its obligation to make good the war damages and that the payment of

compensation extinguishes the credit; therefore it cannot constitute a subject on which to impose a succession tax. It is only the indemnity, which is part of the claimant's property, that is exempt from all Italian fiscal charges and this immunity can produce its effect only once, that is, at the time when payment is effected. And this is exactly what the Allied and Associated Powers intended to guarantee to the nationals of the United Nations. For the indemnity to constitute, within the estate of the beneficiary an aggregate of separate properties, exempt from all levies, taxes and other charges for an unlimited time in the future, a special provision to that effect would have been necessary in the Treaty of Peace; to recognize that such a provision may not be presumed, it is sufficient to consider the difficulties of producing evidence which would arise in cases of re-investments, re-employments and transfers of these properties in whole or in part.

7. In the De Pascale decision's second interpretation the indemnity as such would be immune from levies, taxes or other charges — hence also from inheritance taxes — which were levied either before or after the payment of compensation for war damages. This is the solution which was adopted by the Self decision, where however it is limited to transfer *mortis causa* which occurred before the payment of the indemnity to the original owner, as his successor can avail himself of the fiscal immunity of Article 78, para. 4, letter (c) of the Peace Treaty only if the indemnity was not paid to the *de cuius* before his death. It is also the solution with which the present Commission aligns itself but it was rejected by the De Pascale decision. The grounds on which this latter decision is based, which have already been discussed above in the grammatical analysis of the articles of the Treaty of Peace, do not rest on the need for an interpretation which is other than the natural and regular meaning, but on the substitution of a new formula which does not appear in the Treaty and which can be the subject of a legal interpretation only if it is shown to be the intent of the signatory States. The error committed in the De Pascale decision has already been pointed out, and it is therefore unnecessary to return to it.

8. In the De Pascale case's third interpretation of the Treaty the arguments of the defendant Party are based on the classical grounds permitting one to abandon the literal and grammatical interpretation by reason of the contradictory or absurd solutions to which it may lead.

This third interpretation is based upon the distinct difference between a transfer by succession of the right to receive compensation and the actual payment of the indemnity. Only the payment, as such, distinct from the right to the credit of which it is nevertheless the execution, could not be reduced by the application of an impost or a succession tax, as the Treaty of Peace would prohibit such reduction. On the other hand the right (or the expectancy) to receive compensation could be subjected, in cases of *mortis causa* transfers, to an impost or succession tax either before or after payment, because the Treaty, in the manner in which it is interpreted by the defendant Party, would not prohibit the collection of succession taxes, and the exemption from imposts provided therein would only concern the actual payment and not the indemnity as such. Besides, one draws from this artificial construction the conclusion that the Treaty rules out the collection of succession taxes on the payment only, but not on the indemnity as such, so that the Italian State would preserve the right of applying these taxes subsequent to the act of full payment of the indemnity, but not beforehand, in that the Treaty of Peace only requires that payment be effected free of any taxes, levies and other charges.

It may be understood, following the statement made by the Agent of the Italian Government during the hearing of the case, that he considered this solution merely as a makeshift. For it in fact places him outside of all reality and in a legally untenable situation. A distinction between the imposition of the succession tax on compensation and on the payment thereof corresponds in no way to the text of Article 78, paragraph 4, letter (c) of the Treaty of Peace and still less to the reason behind the provision — the ensuring of a fair reparation to the victims of the war.

Unquestionably this provision has the meaning to free from all fiscal charges the indemnity itself and not the mere act of payment. It could naturally have been expressed in different ways, all of which would have had the same meaning. But, in fact, the only other construction which would not be admissible, as it would be inadequate to settle the matter, would be exactly the one which serves as starting point for the conclusions in the De Pascale decision, because the payment is the discharge of the debt due by the State and because the payment is a legal act (*negocio giuridico*) which extinguishes the credit, and it cannot be the object of a succession tax; consequently, it is inconceivable that the payment alone and not the indemnity is exempt from the succession taxes. Because as it is a legal act of execution, the payment could be burdened with small taxes, small charges for stamps, and other modest, miscellaneous fees, which in comparison with the total reparations provided for in a treaty of peace are trifles and are summarily grouped in the phrase "other charges". In searching for the purpose of this immunity from taxes and in interpreting the provisions of the Treaty providing for these exemptions, it is obvious that the States did not intend to establish an immunity merely to exempt the parties from the payment of the small charges encumbering the payment of compensation while subjecting them to the collection of the heavier taxes, such as the revenue tax and the succession taxes, on the indemnities due to them.

The grounds invoked, far from proving that the literal and grammatical construction leads to an absurd conclusion, are themselves easily rebuttable because of their absurdity.

In the De Pascale decision dated June 24, 1961, invoked by the defendant Government in support of its conclusions, the Commission rules that all war damages compensations are exempt from the payment of any succession tax up to the time when payment of the indemnity due by the Italian State is effected, but the decision permits the debtor State to exact this tax *a posteriori* and to make the necessary collections immediately after the payment of the indemnity has been effected. This argument is paralyzed by an unavoidable contradiction, and, in practice, the De Pascale decision has proved to be unexecutable. The contradiction consists in admitting that the credit, as such, of the injured party against the State, acquired by succession is not liable to any tax as long as it exists (because the Italian Government is not authorized to condition the payment of the indemnity on the submission of proof that the succession tax on the compensation itself had been previously paid), but that after the extinction of the credit by the effected payment, this credit rises again in some manner or other as a succession asset so as to permit the debtor State to subject it to succession taxes. In other words, the Treaty of Peace would have assured this category of United Nations parties in interest a fallacious immunity.

In the instant proceedings, the Italian Government has taken a much more categorical position; it asks *sic et simpliciter* for the rejection of the Petition submitted by the United States on behalf of Mrs. Maria Theresa Droutzkoy; this means that it does not intend to apply the principles arising

out of the De Pascale decision, which are binding on the defendant Government only in connection with the case in which it was rendered, and that it reserves to itself the right to condition the payment of the indemnity on the submission of proof of the fact that the succession taxes have been paid, which it contends are due unless the Commission should decide otherwise.

This intention conflicts with the clear and formal text of the Treaty of Peace which opposes the deduction of any levies, taxes or other charges from the amount of compensation; nor does the theory of the De Pascale decision find the slightest support in the Treaty of Peace; tax immunity is guaranteed to the successors of the original claimant entitled to an indemnity, without a distinction being made as to whether the impost is exacted before the payment thereof or at the time payment is effected or is exacted subsequently.

The attempt by the defendant Government to obscure the obvious meaning of the provisions of the Treaty, by a convenient interpretation, must be considered as having failed.

9. The Italian Government still insists strongly on considerations of equity which, according to it, conflict with the preservation of the meaning and scope of the disputed sentence of the Treaty of Peace, such as they appear from the ordinary and natural meaning of the words used.

In order to show that the pure and simple application of the Treaty of Peace is not compatible with the requirements of equity, the defendant Government principally invokes the two arguments set out hereunder, one based on the context of Article 78 of this Treaty and the other on considerations of a general nature.

A. Under Article 78, paragraphs 1 and 2, the Italian Government has undertaken the principal obligation to return to the United Nations and their nationals all the property they owned in Italy, as it now exists; this restoration in kind must be effected free of any encumbrances or charges with which the property may have been burdened as a result of the war and without the imposition of any charges by the Italian Government in connection with its return; on the other hand no immunity from levies, taxes and other charges is expressly provided for in favor of the claimants, nationals of the United States; it is admitted, by both parties, that the heirs of claimants whose imheritance materialized after the coming into force of the Treaty of Peace are obligated to pay the Italian succession taxes on the property involved, as no general tax exemption has been decreed in their behalf.

In contrast, the defendant Government points out that its obligation to pay an indemnity is subsidiary and that it is imposed on it by paragraph 4, letter (a) of Article 78 in cases where the property cannot be returned or where, as a result of the war, a national of one of the United Nations has sustained a loss by reason of injury or damage caused to his property in Italy. It points out that, consequently, it is not in keeping with equity to allow different treatment according to whether the heir of the original owner of property is requesting restoration in kind, or whether the heir of a claimant is entitled only to an indemnity, and it contends that both categories of successors should receive the same treatment, and that therefore the latter should be subjected to the payment of succession taxes just like the former.

Although it is undeniable that these two categories of successors are not subjected to exactly the same treatment by the Treaty of Peace, it cannot be said that by this fact the Treaty provides solutions that are contrary to

equity, because the situations of the injured parties are not completely alike. People who are entitled to a return in kind, without any loss or damage, immediately recover their property in its full value but do not benefit by any tax immunity; those who are indemnified in cash, because they have sustained a war damage, can only receive two thirds of the sum necessary on the date of payment to enable them either to purchase similar property or to make good the damage or loss suffered. The victorious Powers were certainly careful in not burdening Italy with reparation charges that were too heavy, but they obviously could not agree that after a reduction of one third of the reparations due to them the parties in interest were to also pay taxes on the amount of this indemnity. The preparatory works seem not to permit one to say that the tax exemption on the indemnities serves to directly balance the reduction of the latter, but as it was stated by the Permanent Court of International Justice, "there is no occasion to have regard to preparatory work, if the text of a convention is sufficiently clear in itself." (P.C.I.J. series A No. 10, p. 16.) Objectively, however it must be admitted that a certain balance is brought about between the tax exemption and the amount of the indemnity and that the allied and associated authorities clearly affirmed the intention to adopt different ways of dealing with restoration in kind and payment of indemnity, a fact which binds the Commission.

Whatever the grounds for this contention, the Commission cannot conclude that they are sufficiently serious to modify the meaning given to Article 78, paragraph 4, letter (c) of the Treaty of Peace on the basis of the terms it used.

B. The second argument of equity, which might militate in favor of the collection of a succession tax by the Italian State on the war damage indemnities, is based on the general consideration that "the international legal system is favorable to the freedom of the subjects involved" and consequently, the principle of interpretation "that preserves this freedom harmonizes with the prevailing tendency of international intercourse", as it is expressed in the De Pascale decision, wherein in support thereof, many precedents taken from the jurisprudence of the Permanent Court of International Justice are cited, which, however, do not concern international obligations settled by a treaty between States.

It is obvious that considerations of this nature cannot prevail over the clearly expressed intention of the victorious Powers who intended in the Treaty of Peace that the indemnities for war damage reparations, already reduced by one third, be paid to the injured parties and eventually to their successors, without any further reduction of a fiscal nature. The Commission feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of this treaty and, as said the Permanent Court of International Justice, "would destroy what has been clearly granted". (P.C.I.J., series A, No. 1, p. 25.)

The general considerations of equity invoked in the De Pascale decision are applicable only in exceptional circumstances in order to establish the final choice between several possible interpretations, and this only after having exhausted all usual means of interpretation of the law of nations, and bearing in mind the special nature of the litigation to be settled; undoubtedly, when one is concerned with a treaty of peace which was imposed — rather than discussed and negotiated — by a group of victorious powers, the principle of safeguarding the greatest possible freedom of the contracting States, as regards the alleviation of too heavy burdens, can best be invoked by means of new negotiations, as was done by the Lovett-

Lombardo Agreement, rather than by leaving to the constituted judicial body the task of making a revision of its own through the channels of interpretation.

10. The defendant Government further points out that the interpretation adopted in the De Pascale decision, in regard to succession taxes, puts the indemnity to be paid to the successor in the same position as the indemnity which might have been paid to the original owner; the Italian Government reasons that if the indemnity had been paid to the original owner before his death, it would have formed part of his estate, and hence it would have been subject to a succession tax at the time the succession took place.

According to the defendant Government there is no reason to treat differently the indemnity paid to the successor following the death of the original claimant, and particularly since the right (or the expectancy) to receive an indemnity is to be considered as if it had been incorporated in the estate of the original owner before his death.

This argument aims to avoid results which, at first sight, would appear to be conflicting, but which actually are not.

The grounds invoked are neither decisive nor sufficiently convincing to lead the Commission to set aside the positive provisions of the Treaty of Peace which assure to the heirs of the original owners an unlimited tax exemption on this indemnity. The considerations of equity cautiously reasoned in the De Pascale decision in the conditional tense could be accepted in some measure only if it were proven that the indemnity paid to the original owner while living were to be found, perhaps in the form of re-investments, in his estate at the time of his death, where they would eventually be subjected to the succession taxes as an element of the total estate. But the evidence proving that this was so would be very aleatory and the drafters of the treaty did not consider this eventuality. On the contrary, it is envisaged that the indemnity can be freely used in Italy, that it need not necessarily be used for the reconstruction of the property destroyed or damaged in Italy, that it need not even necessarily be used in Italy, but that it can be sent abroad, as is implicitly envisaged in Article 78, paragraph 4, letter (c), 2nd sentence which reserves only the "foreign exchange control regulations which may be in force in Italy from time to time", and which were in any event abolished in 1958. The amount of the indemnity paid to the original claimant may be lost as a result of economic vicissitudes before the inheritance of the beneficiary materializes, or, further, the original owner could have made with the indemnity he received such investments which would not *ipso jure* be submitted to succession tax (for example, Italian Treasury Bonds, life insurance policies, etc.). It is therefore impossible to be certain that the indemnity paid to the claimant himself and those paid to his successors will be affected in the same manner and in the same measure by the succession taxes.

This finding is sufficient for discarding the argument based on the idea that both cases should be treated in a like manner; the arguments invoked are too light and too uncertain to justify deviation by the Commission from the positive rules of the Treaty.

On the foregoing grounds,

DECIDES

1. The Petition submitted on December 19, 1962 by the Government of the United States of America on behalf of Maria Theresa Droutzkoy — formerly Berry Ruspoli — is well founded.

2. Consequently:

(a) The Italian Government does not have the right, pursuant to Article 78, paragraph 4, letter (c) of the Treaty of Peace with Italy dated February 10, 1947, to collect a succession tax or impost on the amount of the indemnities which it is obligated to pay to the successors of owners of property damaged as a result of the war, who are in possession of the nationality of one of the United Nations, in cases where the original owner who suffered the damage died before receiving the compensation that was due to him under the aforesaid article of the Treaty of Peace, and provided the successors are also nationals of one of the United Nations.

(b) Mrs. Maria Theresa Droutzkoy is entitled to receive from the Italian Government the sum of 180,000,000 lire awarded to her by decision No. 232, dated July 29, 1963, of the Italian-United States Conciliation Commission, in application of Article 78, paragraph 4, letters (a) and (c) of the Treaty of Peace, free of any levies, taxes or other charges, including, in particular, any succession tax or impost envisaged by Italian Law, on the inheritance of the late Mrs. Eugenia Berry Ruspoli.

3. This decision is definitive and binding.

DONE at Geneva, on February 26, 1965.

The Third Member

(Georges SAUSER-HALL)

The Representative of the United States of America

(Leslie L. ROOD)

DISSENTING OPINION

With respect to the tormented problem of the subjection to the payment of the Italian inheritance taxes of the compensations paid under Article 78 of the Treaty of Peace, subsequent to the death of the owner of the credit, the Italian-United States Conciliation Commission has returned the solution adopted in the decision of January 27, 1960 in the Self Case (No. 152), and has rejected the subsequent decision of the Commission in the De Pascale Case, of June 24, 1961.

I must confess that, notwithstanding the very extensive argumentation, I have not succeeded in convincing myself of the correctness of the present opinion and I am therefore compelled to renew the reservations made by me in the dissenting opinion in the Self Decision.

The fundamental and dominant argument of the decision is, as in the Self opinion, the literal interpretation of Article 78, paragraph 4, subparagraph (c) of the Treaty of Peace. After reaching the conclusion that the provision, according to this interpretation, includes in the exemption the inheritance tax, the Commission rejects every other logical argument, even when it does not discard it on other grounds, by reason of the fact that it breaks down in the face of the unquestionable meaning of the expressions used.

It is my personal belief that one should not give such an absolute and preclusive value to the literal interpretation. If in legal science the logical interpretation prevails (restrictive or extensive), this means that the inter-

preter must search for the meaning of the rule even beyond the expressions used and reject the literal interpretation in cases where he is convinced that it is not in keeping with the legislator's thought.

Such a question of a general nature can be left in abeyance in that the dissent arises in point of the fact from the literal interpretation. The decision makes an accurate grammatical analysis of the provision; and in view of the fact that the subject of the phrase is doubtless the "indemnity", the inference is that the exemption must necessarily refer to the indemnity; it is said that the De Pascale decision, which reached a different conclusion, still at the literal interpretation level, must in substance change the subject of the phrase and rewrite it in the following manner: "*The payment* shall be effected free of any levies, taxes etc.", hence the conclusion that the De Pascale decision conflicts with the provision.

It seems to me, however, that the aforementioned analysis has neglected to ascribe to the verbal predicate the meaning that is its own; the provision does not say that "compensation shall be free of all taxes, levies etc." but that the indemnity shall be *paid* free from any taxes, levies, etc. with a clear reference to the legal act of the payment; and, in point of fact, the two expressions, the one contained in the Treaty ("compensation shall be paid free") and the arbitrary one ascribed to the De Pascale decision ("payment of compensation shall be effected free"), to my mind, coincide perfectly.

The inheritance tax affects a phenomenon that is completely alien to that considered by the Treaty of Peace and which only occasionally comes to the forefront for the purposes of the payment. The death of the United Nations national, owner of the damaged property, could occur prior to the coming into force of the Treaty of Peace and in this case no inheritance tax would be due because the credit, the source of which is to be found in the Treaty itself, arises directly in the successor, providing that he is a United Nations national; the death could occur after the coming into force of the Treaty, and in that case the right of the Italian State to collect an inheritance tax would arise even before compensation was awarded or paid, in that also the credits, as elements are liable to be subjected to the payment of the subject tax (save the determination of the amount when settlement has occurred); the death could occur after the awarding of the compensation but before the material collection thereof and also in this case the subject of the tax is the credit and not the sum.

The provision now under discussion is exactly parallel to the similar one contained in paragraph 2 of the same article; the principal obligation with which the Italian Government is burdened under Article 78 is the restitution of the property and paragraph 2 rules that restitution should not be accompanied by the collection of any sum whatsoever by the Italian Government; the subsidiary obligation is that of the payment of compensation (when property cannot be returned) and likewise paragraph 4 rules that the related payment shall not give rise to any tax collection whatever. By these two provisions the drafters of the Treaty intended to forbid the Italian Government to reduce the amount of obligations by claiming sums, no matter on what grounds, affecting either the phenomenon of restitution or of the payment of compensation. The objection that the provision does not appear to be justified in view of the moderateness of the sums that on these occasions can be collected (stamp tax, receipt taxes, casual rights, etc.) loses therefore all its value; the drafters of the Treaty of Peace intended to prevent the Italian State from introducing, by new provisions, heavier burdens; in the second place the same objection would be valid for the restitution in kind of the property; a provision of exemption would be here

even less justified, in view of the fact that it does not appear that there are taxes in the Italian system affecting the return of property.

The decision observes that, in view of the fact that inheritance tax is very widespread in the various States, it is not conceivable that the drafters of the Treaty of Peace failed to take it into consideration by exempting their nationals. This objection could be easily rebutted; because of the very reason that it is widespread and because its rate of taxation is very high, it would have been more normal, had the intentions of the drafters been in that direction, to expressly provide for the exemption rather than to entrust it to the uncertainty of interpretation.

Having proved, as was held by the De Pascale decision, that the limitation of the exemption to the act of payment finds its basis in the letter of the provision, the reasoning of the decision would be in reverse; that is to say one would have to find out if there were logical grounds not for excluding the exemption from the inheritance tax, but for including it; if the question is posed in this manner, there can be no doubt as to the answer, in that it would appear to be very illogical to give exemption from that tax (a very heavy one for the larger properties) or to apply it in accordance with the temporal relationship existing between the death of the damaged owner and the physical collection of the compensation.

ROME, February 26, 1965

The Representative of
the Italian Republic

(Antonio SORRENTINO)