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Droutzkoy Case — Decisions Nos. 232 and 235

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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.

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The Representative of
the Italian Republic

(Antonio SORRENTINO)