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The Anglo-Italian Conciliation Commission established under Article 83 of the treaty of Peace with Italy (United Kingdom, Italy)

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CONCILIATION COMMISSIONS ESTABLISHED UNDER ARTICLE 83 OF THE TREATY OF PEACE WITH ITALY SIGNED AT PARIS ON 10 FEBRUARY 1947

TREATY[1] OF PEACE WITH ITALY, SIGNED AT PARIS, ON 10 FEBRUARY 1947[2]

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PART VII. PROPERTY, RIGHTS AND INTERESTS

SECTION I. UNITED NATIONS PROPERTY IN ITALY

Article 78

1. In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.

2. 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 connexion with their return. The Italian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940 and the coming into force of the present Treaty. In cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Italian authorities not later than twelve months from the coming into force of the present Treaty, except in cases in which the claimant is able to show that he could not file his application within this period.

3. 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.

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. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals.

(*b*) United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals

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[1] United Nations *Treaty Series*, vol. 49, p. 126.
[2] Came into force on 15 September 1947.

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. This compensation shall be calculated on the basis of the total loss or damage suffered by the corporation or association and shall bear the same proportion to such loss or damage as the beneficial interests of such nationals in the corporation or association bear to the total capital thereof.

(*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 control regulations which may be in force in Italy from time to time.

(*d*) The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (*a*) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property. This sub-paragraph does not apply to a loss of profit.

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

6. United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded.

7. Notwithstanding the territorial transfers provided in the present Treaty, Italy shall continue to be responsible for loss or damage sustained during the war by property in ceded territory or in the Free Territory of Trieste belonging to United Nations nationals. The obligations contained in paragraphs 3, 4, 5 and 6 of this Article shall also rest on the Italian Government in regard to property in ceded territory and in the Free Territory of Trieste of United Nations nationals except in so far as this would conflict with the provisions of paragraph 14 of Annex X and paragraph 14 of Annex XIV of the present Treaty.

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

9. As used in this Article:

(*a*) "United Nations nationals" means individuals who are nationals of any of the United Nations, or corporations or associations organised 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 or associations which, under the laws in force in Italy during the war, have been treated as enemy;

(*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;

(*c*) "Property" means all movable or immovable property, whether tangible or intangible, including industrial, literary and artistic property, as well as all rights or interests of any kind in property. Without prejudice to the generality of the foregoing provisions, the property of the United Nations and their nationals includes all seagoing and river vessels, together with their gear and equipment, which were either owned by United Nations or their nationals, or registered in the territory of one of the United Nations, or sailed under the flag of one of the United Nations and which, after June 10, 1940, while in Italian waters, or after they had been forcibly brought into Italian waters, either were placed under the control of the Italian authorities as enemy property or ceased to be at the free disposal in Italy of the United Nations or their nationals as a result of measures of control taken by the Italian authorities in relation to the existence of a state of war between members of the United Nations and Germany.

PART IX. SETTLEMENT OF DISPUTES

Article 83

1. Any disputes which may arise in giving effect to Articles 75 and 78 and Annexes XIV, XV, XVI and XVII, part B, of the present Treaty shall be referred to a Conciliation Commission consisting of one representative of the Government of the United Nation concerned and one representative of the Government of Italy, having equal status. If within three months after the dispute has been referred to the Conciliation Commission no agreement has been reached, either Government may ask for the addition to the Commission of a third member selected by mutual agreement of the two Governments from nationals of a third country. Should the two Governments fail to agree within two months on the selection of third member of the Commission, the Governments shall apply to the Ambassadors in Rome of the Soviet Union, of the United Kingdom, of the United States of America, and of France, who will appoint the third member of the Commission. If the Ambassadors are unable to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

2. When any Conciliation Commission is established under paragraph 1 above, it shall have jurisdiction over all disputes which may thereafter arise between the United Nation concerned and Italy in the application or interpretation of Articles 75 and 78 and Annexes XIV, XV, XVI, and XVII, part B, of the present Treaty, and shall perform the functions attributed to it by those provisions.

3. Each Conciliation Commission shall determine its own procedure, adopting rules conforming to justice and equity.

4. Each Government shall pay the salary of the member of the Conciliation Commission whom it appoints and of any agent whom it may designate to represent it before the Commission. The salary of the third member shall be fixed by special agreement between the Governments concerned and this salary, together with the common expenses of each Commission, shall be paid in equal shares by the two Governments.

5. The parties undertake that their authorities shall furnish directly to the Conciliation Commission all assistance which may be within their power.

6. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definite and binding.

THE ANGLO-ITALIAN CONCILIATION COMMISSION

Rules of Procedure of the Anglo-Italian Conciliation Commission

Article 1

SEAT OF THE CONCILIATION COMMISSION

The Anglo-Italian Conciliation Commission constituted under the provisions of Article 83 of the Peace Treaty with Italy shall have its seat at Rome.

Article 2

JURISDICTION OF THE CONCILIATION COMMISSION

(*a*) The jurisdiction of the Conciliation Commission shall extend to all disputes between the United Kingdom and Italy which may arise in giving effect to Articles 75 and 78 and Annexes XIV, XV, XVI and XVII, part B, of the Peace Treaty with Italy.

(*b*) The Conciliation Commission shall decide its own jurisdiction.

(*c*) Decisions on questions of jurisdiction shall be given, even *ex officio*.

Article 3

SITTINGS

The sittings of the Conciliation Commission will be held at such places and times as the members thereof may from time to time agree upon.

Article 4

LANGUAGES

Pleadings, statements and documents produced by the parties may be written in either English or Italian. The records and decisions of the Conciliation Commission shall be drawn up in both languages and both texts shall be authoritative. Witnesses may give oral evidence before the Commission in the French language.

Article 5

AGENTS OF THE GOVERNMENTS BEFORE THE CONCILIATION COMMISSION

Each Government shall be represented before the Conciliation Commission by an agent, who may in turn appoint deputies and assistants.

Article 6

SECRETARIAT OF THE CONCILIATION COMMISSION

A joint Secretariat shall be established at the seat of the Conciliation Commission.

Article 7

INSTITUTION OF PROCEEDINGS

Proceedings before the Conciliation Commission shall be initiated by the Agent of the Government concerned who shall draw up and sign the claim and deposit five copies thereof with the Secretariat. The claim shall contain:

(*a*) A description of the person or persons, on behalf of whom the Government presents the claim, his or their residence and nationality. Such indications must be sufficient to ascertain proper identity. In the case of a Corporation, its description seat, nationality and the country under the laws of which it is constituted and also the name nationality and residence of its legal representative. In the case of unincorporated partnerships, companies and associations, the names of the members their residence and nationality.

(*b*) A description of the claim.

(*c*) The material facts and legal principles on which the claim is grounded.

(*d*) A list of documents produced or of documents which the agent may request the right to produce and an indication of the evidence he will submit during the proceedings.

(*e*) If the parties request the appearance of witnesses and experts before the Conciliation Commission, such request shall contain a complete description of the witnesses and experts and shall state their place of residence and nationality.

Article 8

DOCUMENTS ANNEXED TO THE CLAIM

A file containing all documents produced by the Government making the claim either in original or authenticated copy shall be annexed to the claim. The file shall contain an index in quintuplicate.

Article 9

FUNCTIONS OF THE SECRETARIAT UPON RECEIPT OF CLAIM FORMS

The Secretariat of the Conciliation Commission upon receipt of claim forms shall:

(*a*) Enter the claim in the Claims Register and return to the agent of the claiming Government a copy of the claim form proper, together with a copy of the index attached to the file containing the documents annexed. Copies shall be duly signed, stamped, numbered, receipted and dated.

(*b*) Within seven days of the date of deposit, forward another copy of the claims and index to the agent of the defending Government.

(*c*) Immediately after these communications have been effected submit to the Commission the claim form and index in duplicate.

(*d*) File one copy in the archives of the Secretariat.

Article 10

PROVISIONS FOR THE EXAMINATION OF CLAIMS

In accordance with the provisions of the preceding article, the Conciliation Commission shall, upon receipt of the Claim:

(*a*) Fix the time limits for the presentation of the written answer, and any replication, and for the production of the relevant documents by the defending Government.

(*b*) Fix the time limit for the presentation of such documents as the parties have reserved the right to produce under the provisions of Article 7, paragraph (*d*).

(*c*) Whenever necessary determine the procedure of investigation of claims and eventually summon witnesses.

(*d*) Request the agents of the Government to present their arguments orally whenever this step is considered appropriate.

Article 11

ANSWER AND REPLICATION

(*a*) Memoranda of answer and replication shall be forwarded in quintuplicate to the Secretariat of the Conciliation Commission.

(*b*) Memoranda shall indicate the documents and evidence produced or to be produced as set out in Article 7, paragraph (*d*). Documents shall be deposited following the procedure established under Article 8. Receipt of memoranda, their communication to the agent of the Government making the claim and their presentation to the Commission shall be governed by the provisions of Article 9.

Article 12

EXTRACTS AND COPIES OF DOCUMENTS

(*a*) Agents of the respective Governments shall be permitted to inspect at the Secretariat of the Conciliation Commission any documents presented by the other party and to obtain certified copies thereof, at their expense, if any, in the first instance.

(*b*) Documents may be printed or typewritten and carbon copies or stencils may be used.

Article 13

TRIAL AND PROOF

(*a*) The following principles shall be observed by the Conciliation Commission in deciding the admissibility of evidence:

(i) Whenever possible written evidence shall be produced in preference to any other form of evidence.

(ii) Unless the Commission shall decide otherwise in any specific cases, the evidence of only one expert witness on either side shall be admissible on any one point. The Commission shall have power in any case in which it shall deem it expedient, to appoint an expert to advise the Commission on any point in dispute and nominate interpreters and translators. In all cases the Commission shall always be free to decide the relative value of any evidence produced.

(*b*) Whenever necessary, evidence on commission may be collected through the British or Italian consular authorities, and when evidence is being collected in this manner an Italian or a British representative as the case may be, shall be present and may add their observations, if any, on the statement of evidence.

(*c*) The Commission may proceed to places where damage to property may have occurred.

(*d*) At all such investigations the agents of the Government shall be present.

(*e*) Assistance from the Governments concerned as provided for in paragraph 5 of Article 83 of the Peace Treaty shall be requested through the representative agents.

Article 14

INTERESTED PARTIES

Persons concerned or interested in any disputes before the Conciliation Commission shall only be heard as witnesses.

Article 15

OATH

Before giving evidence witnesses shall take the oath in accordance with the terms of the law of the place where such evidence shall be given or according to the law of their nationality.

Article 16

EXPENSES

Expenses arising from proceedings instituted by one of the Governments other than those coming within the provisions of Article 78, paragraph 5, shall be borne in the first instance, pending decision of the Conciliation Commission, by the Government which has instituted the proceedings. Expenses arising from the normal activities of the Commission under the provisions of Article 83 and of the present rules of procedure shall be shared equally by the respective Governments.

Article 17

INTERPRETATION OF NATIONAL LAW

(*a*) All questions which may arise in relation to the existence, text or interpretation of concrete rules or general principles of Italian or English municipal law shall be submitted by the Conciliation Commission to the *Avvocato Generale dello Stato* or to Mr. Hubert Hull, former Assistant Procurator General, respectively,

(*b*) The Commission shall consider such opinions as factual evidence.

Article 18

POWERS OF THE CONCILIATION COMMISSION

The Conciliation Commission may exercise its discretion in interpreting the scope of its powers whether established under these rules of procedure or not. It shall act in a fair and impartial manner.

Article 19

DECISIONS OF THE CONCILIATION COMMISSION

When agreement shall have been reached by the members of the Commission, the text of the decision of the Conciliation Commission shall contain a declaration of its jurisdiction, and:

(*a*) The names of the parties.

(*b*) The subject matter of the disputes.

(*c*) The agents' statements.

(*d*) A statement of the material facts and legal arguments.

(*e*) The decision, which shall affirm or deny the liability of one of the Governments party to the dispute, determine the amount of such liability and make an order as to costs.

(*f*) The date, the signatures and seal of the member of the Commission. The decision in original shall be deposited with the Secretariat, who shall give notice thereof to the respective governmental agents immediately.

Article 20

Procès-verbal OF NON-AGREEMENT

In cases when no agreement has been reached by the members of the Commission they shall draw up a *procès-verbal* of non-agreement. The *procès-verbal* shall contain the information enumerated in paragraphs (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) of article 9 and also a statement of the points on which the members have not been able to reach agreement.

The *procès-verbal* shall be deposited and communicated according to the rules set out in the preceding article.

Article 21

APPOINTMENT OF THIRD MEMBER

The agents shall communicate to their respective Governments the *procès-verbal* of non-agreement, in order to enable the Governments to act in accordance with the procedure set out in Article 83 of the Peace Treaty for the appointment of the third member, who will fulfil the functions of President on taking up his office.

Article 22

PROCEEDINGS BEFORE THE CONCILIATION COMMISSION OF THREE MEMBERS

(*a*) Proceedings before the Conciliation Commission of Three Members shall be limited to the points on which no agreement has been reached. Agreement on points already reached by the two members shall be considered as final.

(*b*) The rules of procedure set out in the preceding articles shall be observed, as far as practicable in the proceedings before the Commission of Three Members. The admissibility of new evidence shall be determined through an interlocutory reasoned decision of the Commission of Three Members.

Article 23

DECISIONS OF THE CONCILIATION COMMISSION OF THREE MEMBERS

(*a*) The Conciliation Commission of Three Members shall decide upon the points still in dispute by majority vote following the order proposed by the President.

(*b*) The decision shall have the form set out in article 18.

(*c*) The decision shall recite the points upon which agreement had been reached by the two members and those remaining in dispute for which a decision of the Commission of Three Members was necessary.

Article 24

DISSENT OF ONE OF THE MEMBERS

When a decision shall not be reached by unanimous vote, the member in the minority shall have the right to express the reasons for his dissent.

Article 25

SEAL

The official seal of the Conciliation Commission shall be such as its members may direct. All copies, notices, orders and other documents appearing to be sealed with the seal of the Commission shall be presumed to be official copies thereof.

Article 26

AMENDMENTS AND DEROGATIONS

The Conciliation Commission, whether of two or three members, shall have the right at any time to amend, modify or complete the present rules of procedure, and, in specific cases only, to depart from them, either by agreement or majority voting.

Rome, 20th day of October 1948

The Representative of his Majesty's Government on the Anglo-Italian Conciliation Commission

G. G. HANNAFORD

The Representative of the Government of the Italian Republic on Anglo-Italian Conciliation Commission

MICHELE GIULIANO

PROCÈS-VERBAL

The Representative of Italy and the Representative of the United Kingdom of Great Britain and Northern Ireland at the Anglo-Italian Conciliation Commission, established under Article 83 of the Treaty of Peace, assembled at the premises of the Conciliation Commission at No. 68 Via Palestro, Rome

Having seen article 26 of the Rules of Procedure;

Having recognised the advisability of establishing a fixed period for the presentation of the Reply and of the Replication in the proceeding before the Commission;

Have agreed that:

1. The Reply of the Agent of the convened Government must be presented within the period of 60 days from the date of the presentation of the introductory Submission.

2. The Replica must be presented within 30 days from the date of the presentation of the Reply.

3. The Commission has the power to concede prolungation of the periods established above on the presentation of a written request for well founded reasons by the Agent of the interested Government.

4. The present *procès-verbal* constitutes an integral part of the Rules of Procedure.

Drawn up at Rome on the 24 March 1952.

A. SORRENTINO
The Representative of Italy at the Anglo-Italian Conciliation Commission

G. G. HANNAFORD
The Representative of Great Britain at the Anglo-Italian Conciliation Commission

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PROCÈS-VERBAL

The Representative of Italy and the Representative of the United Kingdom of Great Britain and Northern Ireland in the Anglo-Italian Conciliation Commission, established under Article 83 of the Treaty of Peace, assembled in Rome at the premises of the Conciliation Commission, Via Palestro No. 68;

Having seen article 26 of the Rules of Procedure;

Having recognised the advisability of granting the defending Government the right to request authority to present a Counter-Replication should the Replication of the Agent of the claimant Government contain new matters either of fact or law which had not been raised in the Submission or in the Answer of the Agent of the defending Government;

Have agreed:

1. that the Agent of the defending Government be granted the right to request, within five days from the filing of the Replication by the Agent of the claimant Government, authority to present a Counter-Replication should the Replication of the Agent of the claimant Government contain new arguments either of fact or law which had not been raised in the Submission or in the Answer of the Agent of the defending Government:

2. that, should the request of the Agent of the defending Government prove to be really founded, the Commission will have the right to grant him a period of up to twenty-five days within which to file a Counter-Replication:

3. that this *procès-verbal* constitutes an integral part of the Rules of Procedure.

Drawn up in Rome on 14th April, 1953.

The Representative of Great Britain before the Anglo-Italian Conciliation Commission
(G. G. HANNAFORD)

The Representative of Italy before the Anglo-Italian Conciliation Commission
(A. SORRENTINO)

Decisions [1] of the Anglo-Italian Conciliation Commission

GRANT-SMITH CASE (THE *GIN AND ANGOSTURA*)— DECISION No. 2 OF 4 MARCH 1952

Claim for compensation — Yacht belonging to a British national seized during war in France by Italian authorities and brought to Italy — Total loss of yacht — Articles 75 and 78 of Peace Treaty — Inapplicability of Article 75 — Distinction between right of owner to claim and that of State from whose territory property taken — Applicability of Article 78 — Whether property must have been in Italy at date specified in said Article— Circumstances in which property lost — Burden of proof —Interpretation of treaties—Rules of.

Demande d'indemnisation — Yacht appartenant à un ressortissant britannique, saisi en France durant la guerre par les autorités italiennes et amené en Italie — Perte totale du navire — Articles 75 et 78 du Traité de Paix — Inapplicabilité de l'article 75 — Distinction entre le droit d'action appartenant au propriétaire et celui de l'Etat du territoire duquel le bien a été enlevé — Applicabilité de l'article 78 — Question de savoir si le bien doit avoir été en Italie à la date visée par cet Article — Circonstances ayant donné lieu à la perte du bien — Fardeau de la preuve — Interprétation des traités — Règles d'interprétation.

Given on 4 March 1952 in Rome by the Anglo-Italian Conciliation Commission established under Article 83 of the Treaty of Peace of 10 February 1947, its members being Colonel G. G. Hannaford of the Embassy of Great Britain, Rome, as representative of the United Kingdom Government, Dott. Antonio Sorrentino, honorary President of Section of the Council of State of Rome, as representative of the Italian Government, and Dr. Plinio Bolla, former President of the Swiss Federal Tribunal of Morcote (Switzerland), as Third Member

[1] Original French text not available. English translations provided by the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations.

Extracts from a number of these decisions may be found in: *International Law Reports*, Lauterpacht, 1955. See also: *American Journal of International Law*, vol. 51, 1957, p. 128.

appointed by the British and Italian Governments by common consent, in the dispute relating to a claim for compensation put forward by Mrs. Margaret Grace Grant-Smith, a British national, as a result of the loss of the yacht *Gin and Angostura*,

THE FOLLOWING BEING THE FACTS OF THE CASE:

A. About 17 August 1943, the Italian Navy seized at Antibes (France) the yacht *Gin and Angostura* (hereinafter called "the yacht") belonging to the British national, Mrs. Margaret Grace Grant-Smith, (hereinafter called "the owner") and, on an unspecified date, brought it to Italy. About 3 September 1943, the yacht was at Imperia (Italy).

The Peace Treaty with Italy of 10 February 1947 (hereinafter called "the Treaty") having come into force on 15 September 1947, the French Government asked the Italians on 13 March 1948 to return the yacht, under the terms of Article 75 of the Treaty. But no traces of it could be found.

On 11 August 1948 the British Government presented to the Italian Government an Application by the owner dated 5 April 1948 for the return of the yacht under the terms of paragraphs 1 and 2 of Article 78 of the Treaty.

The Italian Government replied on 8 February 1949 to the effect that the yacht having been seized in the territory of one of the United Nations, Article 75 and not Article 78 was applicable and that, as the yacht in question had been destroyed, the owner had no right to claim either restitution or compensation.

On 15 March 1949 the British Government expressed its disagreement to the Italian Government and submitted a claim by the owner dated 10 November 1949 for compensation under Article 78 of the Treaty for the total loss of the yacht.

On 14 June 1950 the Italian Government rejected the new claim, repeating the arguments brought forward on 8 February 1949.

B. On 15 November 1950 the British Government then submitted the dispute to the Anglo-Italian Conciliation Commission established under Article 83 of the Treaty.

The British Government requests:

(*a*) That the claim of the owner to obtain compensation in Italian lire to the extent of two-thirds of the sum necessary at the date of payment to purchase a yacht similar to the one lost, including the gear and equipment on board, be declared well-founded;

(*b*) That the liability of the Italian Government in respect thereof be confirmed;

(*c*) That the question of "quantum" be reserved for further examination, in default of agreement between the parties, after presentation of additional evidence;

(*d*) That the expenses in connexion with the claim and those referred to under paragraph 5 of Article 78 of the Treaty, be placed to the charge of the Italian Government.

C. In their reply dated 15 December 1950 the Italian Government requested that the claim should be rejected, as Article 75 of the Treaty only contemplates a recovery, which is impossible to carry out when the property is lost, and Article 78, in accordance with paragraph 1, only applies to property which was in Italy on 10 June 1940.

D. In their replication of 27 February 1951 the British Government pointed

out that the Italian Government let 19 months pass before rejecting the claim of 10 November 1948 and made all reservations in this respect.

E. On 5 October 1951 the British and Italian representatives in the Conciliation Commission established their disagreement.

The two Governments appointed by common consent Dr. Plinio Bolla of Morcote, former President of the Swiss Federal Tribunal, as Third Member of the Conciliation Commission.

On 14 November 1951 the British and Italian representatives took note of the appointment of the Third Member and decided to send him the dossiers as soon as he communicated his acceptance.

The Third Member accepted the charge.

The Conciliation Commission, thus completed, was unanimous in recognizing that the case is ready for judgment. The Agents of the two Governments waived oral argument and rested to their written pleadings.

CONSIDERATIONS OF LAW:

1. The claim is based on paragraph 4 and paragraph 9 (*c*) of Article 78 of the Treaty. Paragraph 4 lays down the obligation on the Italian Government, in cases where property cannot be returned (to United Nations nationals in accordance with paragraph 1) to pay to such nationals as compensation a sum in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property. Paragraph 9 (*c*) defines the term "property" of the United Nations and their nationals, so as to include "all seagoing and river vessels, together with their gear and equipment, which were either owned by United Nations or their nationals, or registered in the territory of one of the United Nations, or sailed under the flag of one of the United Nations and which, after 10 June 1940, while in Italian waters, or after they had been forcibly brought into Italian waters, either were placed under the control of the Italian authorities as enemy property or ceased to be at the free disposal in Italy of the United Nations or their nationals, as a result of measures of control taken by the Italian authorities in relation to the existence of a state of war between members of the United Nations and Germany".

The Italian Government opposes the claim, arguing that the field of application of Article 78 is precisely determined in its first paragraph and that, therefore, neither its paragraph 4 nor *a fortiori* its paragraph 9 (*c*)—which merely defines some expressions used in the preceding paragraphs—can have effect on property which, like the yacht in question, was not in Italy on 10 June 1940.

The argument of the Italian Government presupposes that paragraph 1 of Article 78 has in view only those properties of the United Nations or their nationals to which two conditions apply simultaneously—one relating to place (their existence in Italy) and the other to time (before 10 June 1940). It also presupposes that these two conditions were expressed in paragraph 1 in such a way as to exclude the possibility, in the succeeding paragraphs, of exceptions or modifications, however clearly expressed.

The Conciliation Commission does not consider that it can uphold these arguments at any rate to the extent to which the Italian Government maintains them.

In the first place in the light of a literal interpretation, the date, 10 June 1940, is only mentioned in paragraph 1 in regard to Italy's obligation in respect of the restoration of legal rights and interests, but not in regard to Italy's obligation in respect of the restitution of properties. As there appears to be no plausible reason for a distinction, in this respect, between legal rights and interests on

the one hand and properties, which are not legal rights and interests, on the other, (supposing that such an opposition were conceivable), it is permissible to admit that the date of 10 June 1940 is assumed in paragraph 1 only to be the start of the period of Italian responsibility, meaning that she is not responsible for acts and events before 10 June 1940, and denying the restoration of anything as it existed earlier than 10 June 1940. In fact, the Treaty has no reason whatever to exclude Italy's responsibility for properties acquired in Italy by the United Nations or their nationals after 10 June 1940. Italy, having declared war on some of the United Nations, such as the U.S.S.R. and the U.S.A. after 10 June 1940, it is therefore difficult to understand why the United Nations should have imposed on Italy for these properties obligations less comprehensive than those in respect of properties which existed in Italy on 10 June 1940. Moreover, it cannot even be ruled out that a national of one of the United Nations already at war with Italy from 10th June 1940 may have, after such date, legitimately acquired properties in Italy, for example, through inheritance; the United Nations cannot allow such a national to be treated worse than one of his fellow nationals who possessed property in Italy on 10 June 1940.

This interpretation is strengthened by the consideration that paragraph 2 of Article 78 also mentions that date 10 June 1940, but specifically to affirm Italy's obligation to nullify all the measures, including those of requisition, sequestration or control, which may have been taken in respect of properties of the United Nations or their nationals within that date and the date of entry into force of the Treaty, the date on which the properties came into the ownership of the United Nations or their nationals being of little importance.

Nor can the inclusion of the words "in Italy", which occurs in the two parts of paragraph 1 of Article 78, as also in the title of Section 1 of Part VII of the Treaty, be taken to exclude in the following paragraphs the fact that the Treaty puts Italy under an obligation with regard to property, existing originally outside Italy, as such property, having been brought to Italy before the Treaty came into force, acquired the character of property *appartenant en Italie* to the United Nations and their nationals.

2. Therefore, within the frame of paragraph 1 of Article 78 a special provision, dealing with property not existing in Italy on 10 June 1940 but brought there after such date, would not have been necessarily required in the succeeding paragraphs. However, such a special provision is given precisely in the second sentence of paragraph 9 (*c*) relating to ships. This provision, as clearly worded, does not apply only to ships which were in Italian waters at 10 June 1940, but also to those which were brought there forcibly after that date. Certainly, the date of 10 June 1940 appears to be solely the starting point of the control measures taken by Italy against the vessels themselves as enemy property; but the phrase "whether they were in Italian waters or had been brought there forcibly" refers, in its second part, to the forcible transport into Italian waters between 10 June 1940 and the date of the control measure, as prior to 10 June 1940, Italy could not bring vessels of the United Nations or their nationals forcibly into her waters as enemy property. The phrase quoted cannot but refer to two categories of vessels; those which were in Italian waters at 10 June 1940, and those which were therein subsequently *amenés de force*; the only ones which are excluded—which is understandable—are those vessels of the United Nations or their nationals which sailed voluntarily into Italian waters after 10 June 1940, thus accepting the attendant risks. If the phrase were to be given the interpretation maintained by the Italian Government, the words "*ou qu'ils y aient été amenés de force*" would be superfluous, the vessels supposed to have been brought forcibly into Italian waters prior to 10 June 1940 being necessarily included

amongst those which were in Italian waters at 10 June 1940, failing which the Treaty would have had no reason to concern itself with them.

The Italian Government contends that from the closing words of paragraph 9 (*c*) which mention the existence of a state of war between members of the United Nations and Germany, it is clear that the Treaty here considers Italy to be in a position of neutrality or at any rate of non-belligerence; therefore, the period of time considered for the forcible transport of ships to Italy would necessarily be prior to 10 June 1940. This objective overlooks the consideration that the control measures taken by the Italian Government and which carry for Italy the liability referred to in the second sentence of paragraph 9 (*c*) are of two kinds; those taken against vessels as enemy property, and therefore necessarily subsequent to 10 June 1940, and the others taken by the Italian authorities as a neutral State and in consequence of the existence of a state of war between members of the United Nations and Germany, therefore prior to 10 June 1940, but which as a result had the effect, after that date, of causing the property to cease to be at the free disposal of the legitimate owners. The objection of the Italian Government does not consider this distinction which is clear from the wording of the Treaty.

Nor can the subsidiary thesis put forward by the Italian Government be accepted, according to which the provision of the second phrase of paragraph 9 (*c*) would affect, besides ships which were in Italian ports on 10 June 1940, only those which were seized subsequently on the high seas and thus taken to Italian waters. In fact the text does not distinguish between the place of seizure of vessels *amenés de force* to Italian waters, and it is not permissible for the interpreter to introduce a distinction between seizure on the high seas or in the territorial waters of a United Nation. Moreover such distinction would not make the provision under discussion conform to paragraph 1 of Article 78, even if the too arbitrary interpretation put forward by the Italian Government was accepted, because the high seas are always outside Italian territory. It is begging the question to claim that the provisions of Article 78, paragraph 9 (*c*) do not cover vessels taken from the territorial waters of one of the United Nations, as the special ruling of Article 75 already covers them. In fact the latter article does not give a right of action, as regards ships, for even partial compensation, in case of their loss, a right of action which, on the other hand, does result from the combined effect of paragraph 4 (*a*) and paragraph 9 (*c*) (of Article 78).

3. The Italian Government objects that Article 78 cannot be correctly interpreted without taking Article 75 into account; the latter applying to property removed from the territory of any one of the United Nations, whilst the former applies to the property of the United Nations or their nationals as it existed in Italy on 10 June 1940; Article 75 gives a right of action to the State from the territory of which the property was taken, which State has an interest in the recovery of the property as a part of its economy, independently of the nationality of the owner, while Article 78 gives a right of action to the owner of the property, the Government of his country only taking a part in the international dispute as the representative *ad litem* of its national; Article 75 only allows for an action of recovery (with replacement in kind only for properties belonging to the cultural heritage, under the special conditions of Article 75, paragraph 9), while Article 78 contemplates both an action for recovery and the liability of the Italian Government; and the conditions for an action for recovery are different in the two provisions, and more onerous for the Italian Government under Article 75 (reversal of the burden of proof, Article 75, end paragraph 7; greater expenses for the Italian Government, Article 75, paragraph 3 and

Article 78, paragraph 4 (*a*); invalidation of any transfers, Article 75, end paragraph 2 and Article 78, paragraph 3).

In this specific case the French Government abandoned recovery of the yacht, and was bound to do so because the yacht could not be found. The general question, therefore, of the relation between the two actions of recovery under Article 75 and Article 78 of the Treaty, as far as ships taken by force to Italy after the 10th June 1940 and expressly mentioned in Article 78, paragraph 9 (*c*) are concerned, does not and cannot arise here. To reach a decision in the present dispute it will be enough to realise that the question itself does not appear insoluble, if the interpreter, starting from the consideration that the ultimate beneficiary of the action under Article 75 must be the owner of the ship (supposing it to be private property), gives him the choice between the direct action under Article 78 and that under Article 75 through the medium of the Government from whose territory that ship was carried off, and if the interpreter also allows the owner to start an action under Article 78 only when the Government which is authorized to do so has not presented the demand for restitution within the time limit fixed by the last sentence of Article 75, paragraph 6.

As, in the present case, restitution is impossible Article 78, paragraph 4 (*a*) therefore becomes applicable, that is to say the right to two-thirds compensation arises, without the possibility of a conflict between the exercise of this right and the exercise of the faculty given to the French Government by Article 75.

4. Finally, the Italian Government contests, subordinately, the existence of the conditions laid down by Article 78, paragraph 9 (*c*) as interpreted by this Commission.

Although the Italian Government admits that it was the Italian Navy which took possession of the yacht at Antibes and brought it to Italy, it is argued that such seizure would not in itself satisfy the conditions of Article 78, paragraph 9 (*c*) since they also require that Italy should have subjected the yacht to a specific measure of control in her territory; it would, therefore, be for the British Government, according to the general principles of law, to furnish proof that such a measure had been imposed. Moreover, according to the Italian Government, the fact that the property could not be found would not suffice to found an action under Article 78, paragraph 4 (*a*), but proof that destruction took place as a result of the war would also be required.

The Commission is of opinion that the conclusive fact is that the yacht, seized in French waters by the Italian Navy, and brought by them to Italian waters, was not placed at the free disposal there of the owner by the Italian authorities. The captured yacht, remained in Italian waters, at the disposal of the Italian Navy, and therefore in reality was subjected to the most drastic form of control by the Italian authorities, without any specific administrative measure being necessary for the purpose.

The circumstances in which the ship was captured and disappeared justify, in the present case, according to the general principles of a reversal of the onus of proof as to the cause of its not being found, as it could not be humanly conceived that such onus of proof should be thrown upon the owner of the ship. It was, therefore, for the Italian Government, whose Navy captured the yacht, and was obliged to follow its destiny, to prove that the ship, contrary to all probabilities, was not a victim of an act of war.

THE CONCILIATION COMMISSION RULES:

(1) That the request of the British Government shall be admitted;

(2) A period of three months from the notification of this decision, is granted

to the British Government within which to specify the amount of the compensation claimed and to produce proof thereof, unless a direct agreement is reached with the Italian Government on the amount;

(3) This decision is final and binding.

JOHN CASE—DECISION No. 11 OF 9 NOVEMBER 1953

Compensation under Article 78 of the Peace Treaty—War damages—Damaged property jointly owned by claimant and another—Measure of damages.

Indemnisation au titre de l'article 78 du Traité de Paix — Dommages de guerre — Biens endommagés dont le réclamant est co-propriétaire — Détermination du montant de l'indemnité due au réclamant.

The Anglo-Italian Conciliation Commission, established in accordance with Article 83 of the Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy, composed of Colonel Guy G. Hannaford of the Embassy of the United Kingdom of Great Britain at Rome, Representative of the Government of the United Kingdom, Avvocato Antonio Sorrentino, President of the Honorary Section of the Council of State at Rome, Representative of the Italian Government, and Doctor Plinio Bolla, former President of the Swiss Federal Tribunal at Morcote (Ticino, Switzerland), Third Member appointed by the common accord of the British and Italian Governments;

Having met in Rome on Monday, 9 November 1953;

In respect of a claim for damages presented by the British Government represented by its Agent Mr. M. C. Adams in Rome, against the Italian Government represented by its Agent Avv. Francesco Agrò of the Avvocatura of the State in Rome, on behalf of Mrs. Mary A. E. John.

HAVING ESTABLISHED AS MATTERS OF FACT:

That Mrs. A. E. John, a British subject, and her daughter Doris J., who is married to Renato Marzano, an Italian citizen, had resided in Rome for many years before the war.

Just before the war the two ladies occupied a rented residential apartment consisting of five rooms and usual offices, in a house situated at No. 58 Via Panama. The apartment was luxuriously furnished. The furniture and objects d'art belonged as to 25/46 to Mrs. A. E. John and as to 21/46 to Mrs. Doris J. Marzano (*née* John).

In 1938, Mrs. John and Mrs. John Marzano approached an art valuer, Signor Mario Barsanti, and asked him how much it would have been possible to obtain as the result of a sale at auction of the contents of their apartment.

After a summary estimate Signor Barsanti arrived at the total approximate figure of L. 900,000.

Mrs. John and Mrs. John Marzano however, gave up the idea of the sale and, before their departure for Agra (India), the entry of Italy into the war being imminent, prepared to store their furniture and effects with Mr. Arthur Bolliger, a forwarding agent in Rome.

Mr. Bolliger, having made an inventory of it, placed it in a warehouse at No. 12, Via Porto Fluviale, which was completely destroyed by bombardment in March 1944. The few possessions of Mrs. John and Mrs. John Marzano which were saved, were listed by Bolliger and placed in another warehouse.

These remaining items were valued in March 1950, on the order of the owner, by Professor Giorgio Ansoldi, who, availing himself of Barsanti's estimate and Bolliger's inventory, endeavoured to establish the value that the goods left in Italy by the two ladies would have had at that time, had they not been damaged and partially destroyed by the effect of the bombardment.

At the time of depositing the goods with Bolliger, the owners asked the forwarding agent to insure them against fire for L. 200,000.

Under the Treaty of Peace Mrs. John claims damages from the Italian Government amounting to two thirds of the sum of L. 25,013,760, plus the sum of L. 385,210 for expenses incurred in the preparation of the claim.

The Italian Government, basing itself above all on the figure quoted in the Insurance Policy offers an indemnity of L. 3,311,750 in settlement.

The Conciliation Commission ordered an inquiry and heard Messrs. Barsanti, Bolliger and Ansoldi as witnesses.

CONSIDERATIONS IN LAW:

The Conciliation Commission, having seen the results of the inquiry, particularly the indications derived from the Insurance Policy and from the estimates of Barsanti and Ansoldi, as completed orally and explained at the hearing by their authors, availing itself of the wide powers of fair appraisal which are conferred on it, decides on the figure of L. 8,500,000 as being two thirds of the sum necessary to buy equivalent goods or compensate the loss suffered, in accordance with Article 78, paragraph 4 (*a*), of the Peace Treaty.

In arriving at this figure the Conciliation Commission, having taken into account both the fact that 21/46 of the movable property deposited at Bolliger's belonged to Mrs. John Marzano, and are therefore outside the scope of the present dispute, and also that a part of the claimant's property—although small and in bad condition—was able to be recuperated, has applied the coefficient of revaluation of 47, which was agreed to by the Italian Agent.

To the sum of L. 8,500,000 the Conciliation Commission adds L. 200,000 for the item to which Article 78, paragraph 5, of the Peace Treaty refers (Reasonable expenses incurred in Italy during the process of examination of the claim, including the establishment of the amount of the loss and damage).

DECIDES:

1. The Italian Government will pay within two months from the notification of this Decision, the sum of L. 8,700,000 (eight million, seven hundred thousand) to Mrs. Mary A. E. John, in application of Article 78, paragraphs 4 (*a*) and 5, of the Treaty of Peace.

2. The sum will be paid free of any levy, tax or other form of fiscal imposition.

3. The present Decision is definitive and binding.

Drawn up at Rome the 9th November 1953.

The Third Member

The Representative of H.B.M. Government before the Anglo-Italian Conciliation Commission

The Representative of the Italian Government before the Anglo-Italian Conciliation Commission

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CURRIE CASE—DECISION No. 21 OF 13 MARCH 1954

Claim for compensation under Article 78 of Peace Treaty—Damages sustained by property in Italy belonging to United Nations nationals—Damages resulting from aerial bombardments—Damages due to discriminatory measures—Whether measures taken against property discriminatory—Sequestration—Negligence of sequestrator—State responsibility for—Responsibility for effect of delay in repairing damaged property—Interpretation of treaties—Rules of—Interpretation by reference to decision of another Conciliation Commission—Meaning of "Injury or damage suffered as a result of the war"—Measure of damages.

Demande d'indemnisation au titre de l'article 78 du Traité de Paix — Dommages subis par des biens en Italie appartenant à des ressortissants d'une Nation Unie — Dommages résultant de bombardements aériens — Dommages résultant de mesures discriminatoires — Question de savoir si les mesures prises à l'encontre des biens avaient un caractère discriminatoire — Séquestre — Responsabilité de l'Etat — pour faute de l'administrateur séquestre — pour conséquences du défaut de réparation des biens endommagés — Interprétation des traités — Règles d'interprétation — Interprétation par référence à une décision d'une autre Commission de Conciliation — Signification de l'expression « atteinte ou dommage subi du fait de la guerre » — Détermination du montant de l'indemnité.

Given on 13 March 1954 at Morcote (Switzerland) by the Anglo-Italian Conciliation Commission, instituted in accordance with Article 83 of the Treaty of Peace of 10 February 1947 between the Allied and Associated Powers on the one hand, and Italy on the other, and composed of Dott. Plinio Bolla, former President of the Swiss Federal Court, at Morcote (Ticino, Switzerland), third member designated by mutual agreement by the Government of the United Kingdom of Great Britain and Northern Ireland and by the Government of the Italian Republic, Colonel Guy G. Hannaford of the British Embassy in

Rome, representative of the Government of the United Kingdom of Great Britain and Northern Ireland, and Avv. Antonio Sorrentino, Honorary Section President of the Council of State, at Rome, representative of the Italian Government, in the dispute between the British Government, represented by its agent, Mr. Michael Adams, Secretary of the British Embassy in Rome, and the Italian Government, represented by its agent, Dott. Avv. Stefano Varvesi, of the State Attorney's Office in Rome, regarding a claim of Mr. Percy Currie and his wife, Ernestina Pretolani, of 45, Via Camillo Hajech, Milan

CONSIDERATIONS OF FACT:

A. At the time when Italy declared war on Great Britain (10 June 1940), the married couple Percy Currie and Ernestina Pretolani, British citizens, were the owners in Milan, 45, Via Camillo Hajech, of buildings which included premises used as a workshop and a private dwelling, occupied by the owners themselves.

The assets of Mr. and Mrs. Currie at Milan were sequestrated by the decrees of the Prefect of the Province of Milan dated 18 September 1940 and 13 January 1941. The sequestrator nominated was the *Ents di Gestione e liquidazione immobiliare* (E.G.E.L.I.) which appointed the *Credito Fondiaro della Cassa di Risparmio delle Provincie Lombarde* to act for it. Included amongst the assets sequestrated was also a Fiat car of the "Balilla" type, built in 1938, number-plate No. MI 47868 which, according to the reading on the speedometer had done 5,083 kilometres. The car was in the courtyard of the building covered by a tarpaulin, and jacked up as Mr. Currie had left it.

During the air-raid which took place during the night 12-13 August 1943, a piece of metal of considerable weight, having detached itself from an aircraft in flight which had been hit by anti-aircraft fire, fell from a considerable height on to the main building owned by Mr. and Mrs. Currie and penetrated the roof and the ceiling of the fourth floor. Other damage was caused to the buildings as a whole by incendiary bombs and by the blast of explosive bombs which fell close by.

Owing to the fact that the necessary repairs were not carried out in time, the conditions of the buildings worsened as a result of the weather.

On 4 August 1945 the *Credito Fondiario della Cassa di Risparmio delle Provincie Lombarde* handed back the sequestrated property to Mr. and Mrs. Currie, who made the fullest possible reservations in regard to the damage sustained. According to the instrument of reconsignment the motor-car was still in the courtyard, as it had been left by the owner, whilst the furniture, during the prolonged absence of the aforementioned married couple, had been placed in the cellar and was therefore in need of repair, recovering and overhaul.

Invoking Article 78 of the Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy (hereinafter called the Peace Treaty), Her Britannic Majesty's Embassy in Rome, on 10 February 1949, presented Mr. and Mrs. Currie's claim to the Italian Ministry of Foreign Affairs which requested payment of:

(*a*) L. 2,728,718 for the repair of the damage caused to buildings;

(*b*) L. 680,000 for repairs to the movable property and to the car;

(*c*) L. 194,000 for the replacement of the furnishings which had got lost;

(*d*) L. 170,452 for expenses connected with the preparation of the claim;

(*e*) L. 60,574 in respect of the refund of the extraordinary tax on total wealth.

On the advice of the Interministerial Committee set up in accordance with Article 6 of Law No. 908 of 1 December 1949, the Italian Ministry of the

Treasury awarded Mr. and Mrs. Currie L. 480,000, the equivalent of two-thirds of the damage admitted as being compensatable of L. 720,000 as well as L. 20,000 in respect of expenses incurred in the preparation of the claim, making a total of L. 500,000, with the invitation to apply to the competent authorities for the refund of the extraordinary tax on total wealth.

The British Government did not accept this settlement and referred the dispute to the Conciliation Commission contemplated by Article 83 of the Peace Treaty. The two members of the Commission designated by the British and Italian Governments having failed to reach agreement, the Governments concerned designated as third member, in accordance with Article 83, paragraph 1, of the Peace Treaty, Dott. Plinio Bolla, former President of the Swiss Federal Court, of Morcote, who agreed to accept the appointment.

On 16 March 1953 the Agents of the two Governments discussed the case before the Conciliation Commission thus composed.

The Agent of the British Government pleaded that the Conciliation Commission should:

(*a*) Confirm the liability of the Government of Italy to:

(i) Restore to complete good order the immovable property of the claimants and also such of their movable property as was returned to them in a damaged state capable of repair;

(ii) Pay two-thirds of the sum necessary at the date of payment to purchase property similar to the movable property of the claimants which could not be returned to them, or was returned to them in a damaged state incapable of repair;

(*b*) Fix the amount of the liability of the Government of Italy:

(i) under (*a*) (i) at L. 2,728,718 in respect of the immovable property and L. 300,000 in respect of furniture and household effects, or at such larger sums as are necessary in order to adjust building costs and prices of furniture and household effects ruling in November 1948, to those ruling in the month in which this Honourable Commission pronounces its decision.

(ii) under (*a*) (ii) at two-thirds of the sums of L. 380,000 for the motor-car and L. 114,000 for furniture and household effects or of such larger sums as are necessary in order to adjust the prices of such property ruling in November 1948, to those ruling in the month in which this Honourable Commission pronounces its decision, or at such other sums as may be just and equitable.

(*c*) Order that the amount of such liability so ascertained be paid by the Government of Italy to the claimants.

(*d*) Order that the sum of L. 170,452 for expenses incurred by the claimants in establishing the claim be paid to them by the Government of Italy.

(*e*) Reserve all questions in respect of *Imposta straordinaria proporzionale sul patrimonio*.

(*f*) Order that, if any payment ordered by this Honourable Commission's decision to be paid by the Government of Italy shall not be paid within 60 days from the date of this Honourable Commission's decision, the Government of Italy shall pay the claimant interest thereon at the rate of 8% per annum from the date of such decision to the date of payment, or at such other rate as this Honourable Commission shall deem just.

(*g*) Provide for the costs of and incidental to this claim.

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

The Agent of the Italian Government pleaded for the rejection of the claim.

The arguments of the parties are summarized, as far as necessary, in the following legal considerations.

CONSIDERATIONS IN LAW:

(1) The Commission is unanimous in considering it desirable, by means of a preparatory decision, to fix the rules which will have to be followed for the assessment of the damage in the present case and to invite the parties to proceed in accordance with the rules to fix the amount of the indemnity by common accord; should the parties fail to agree, the Commission, by a final decision, and, if necessary, after having sought the advice of experts, would fix the amount due.

(2) The first point on which the parties disagree is whether the Italian Government is responsible, in accordance with Article 78, paragraph 4, of the Peace Treaty, not only for the damage caused to buildings by aerial bombardment, but also for the increase of such damage due to delay in carrying out the necessary repairs.

The Italian Government argues that it is responsible only within the limits of paragraphs 4 (*a*) and 4 (*d*) of Article 78 of the Peace Treaty: paragraph 4 (*a*) covers damage derived from a specific event of war, such as, in the present instance, aerial bombardment, and paragraph 4 (*d*) covers those damages due to discriminatory measures taken against enemy subjects; the sequestration of enemy property in accordance with the war law does not by itself involve the responsibility of the Italian Government which, on the contrary, is responsible whenever it is proved that the sequestrator caused damage deliberately or by negligence; in the case under review one cannot blame the sequestrator for the fact that, during the war the damage caused by bombing was not immediately repaired; in reality the omission complained of was due to the fact that the sequestrator was unable to make such arrangements; taking into due account the state of war, the shortage of raw materials and manpower, and the general difficulties prevailing at the time.

In fact, there is no need to decide whether this inability existed *in casu*.

In fact, even if one were to accept the interpretation which the Italian Government places upon paragraph 4 (*a*) and 4 (*d*) of the Peace Treaty, the responsibility of the Italian Government would still exist in either case, i.e., whether the sequestrator were able or unable to make arrangements in good time for the necessary repairs to be carried out.

If the situation was such as to prevent the sequestrator from being able to take in good time the necessary measures to prevent the inclemency of the weather increasing the initial damage caused by the bombardment, then the Italian Government is responsible for such increase foreseeable and unavoidable just as in the case of the initial damage, in accordance with Article 78, paragraph 4, letter (*a*), of the Peace Treaty. The "loss suffered", according to the terms of this provision, is not only that arising directly and immediately "as a result of injury or damage" but also that arising indirectly and subsequently as a result of the impossibility of arranging for the repairs to be carried out in good time; also in this case the link of causation exists between the "injury or damage" and the "loss suffered" that ceases only from the moment in which it would have been materially possible to take action with a view to preventing a further increase in the loss itself.

If, on the other hand there was nothing to prevent such action from being taken immediately after the bombardment, the sequestrator is at fault for having failed to do so and the responsibility for the damage caused by delay lies with the Italian Government, in accordance with Article 78, paragraph 4, letter (*d*).

The extent of the responsibility is identical in both hypotheses, i.e., the one

based on the application of Article 78, paragraph 4, letter (*a*), and the one based on Article 78, paragraph 4, letter (*d*).

(3) The amount claimed from the Italian Government in respect of damages to buildings also includes:

(*a*) The cost of restoring to its normal condition the cellar which, in accordance with the safety laws, by the sequestrator, who also had the materials removed, in order not to increase the risk of fire in the event of incendiary bombs being dropped.

The British Government argues that this work would not have been carried out, nor would it have been necessary, had it not been for the war.

The Italian Government objects that in accordance with a decision given on 8 March 1951 by the Italo-French Conciliation Commission in connexion with a claim of the Società Mineraria e Metallurgica di Pertusola, and of the Société Minière et Métallurgique de Penarroye [1], the obligation of partial indemnity created by Article 78, paragraph 4(*a*) of the Peace Treaty does not extend to all losses which the war has caused to a citizen of the United Nations as the owner in Italy, on 10 June 1940, of movable or immovable property, corporeal or incorporeal, but only to a specific category of such losses, i.e., to those which are the direct consequence of events of war.

There is no need here to examine and solve the question of principle which was decided by the Italo-French Conciliation Commission in the aforementioned decision of 8 March 1951. In fact, in the case under review the cellar was turned into an air-raid shelter and the dividing walls on the fourth floor removed in compliance with provisions laid down in time of war and aiming at reducing the risk of death and damage due to aerial bombardments. The said provisions form part of those "measures adopted during the war" mentioned in paragraph 4, letter (*d*), of Article 78 of the Peace Treaty. But this provision involves the responsibility of the Italian Government only when the measures were of a special character and were not applied to Italian property. Here, on the other hand, we are faced with measures of a general character which were applied without discrimination to all buildings in Italy, irrespective of the nationality of their owners and which, therefore, lack the quality of discrimination required by Article 78, paragraph 4, letter (*d*), of the Peace Treaty as a condition for the Italian Government's responsibility.

(4) The sum of L. 2,728,718 claimed by Mr. and Mrs. Currie for damages to the building is in keeping with the conclusions reached by a private survey which the owners had carried out by Dott. Ugo Montana.

An examination of the survey reveals that Ing. Montano has calculated the cost which is necessary in order to restore the property to a new and technically up-to-date condition, leaving aside its condition on 10 June 1940.

This point of view cannot be shared by the Conciliation Commission.

True, paragraph 4(*a*) of Article 78 makes Italy responsible for the "restoration to complete good order", (*"remise en parfait état"*—*"rimessa in ottimo stato"*) of the property which is returned to citizens of the United Nations, in accordance with paragraph 1 of the Article.

But this initial affirmation must be connected with the second sentence of paragraph 4 (*a*), and with paragraph 4 (*d*), which impose upon the Italian Government the obligation to make good only up to a limit of two-thirds the losses sustained "as a result of injury or damage arising out of the application of discriminatory measures". It cannot be admitted that the initial sentence of paragraph 4 (*a*) was meant to lay down a liability and a full liability, on the

[1] Vol. XIII of these *Reports*, decision No. 95.

part of Italy in respect of damages different from those contemplated under the said two special provisions, and particularly in respect of damages different from those contemplated under the said two special provisions, and particularly in respect of damage arising out of the passage of time and out of normal wear and tear during the war; as, in the latter hypothesis, the reasons for a limitation to two-thirds would be far more cogent than in the qualified cases contemplated in the second sentence of paragraph 4, letter (*a*) and in paragraph 4 (*d*). The first sentence of paragraph 4, letter (*a*) can therefore only mean

> where the special conditions mentioned in the second sentence of paragraph 4 (*a*) or in paragraph 4 (*d*) do not occur, the restitution of the property must be made in complete good order, i.e., as though arrangements for its normal maintenance had been made during the period in which the owner was dispossessed of it—
>
> where the special conditions mentioned in the second sentence of paragraph 4 (*a*) or in paragraph 4 (*d*) do occur, the compensation of two-thirds shall be calculated by taking into account that the property would have to be restored, if restitution had been possible, to complete good order, i.e., as though arrangements for normal maintenance had been made during the period in which the owner had been dispossessed of it.

In casu, the indemnity must be two-thirds of the cost required to restore the buildings to the condition in which they would have been at the time of the hand-over if the damages by bombing had not happened, including in those damages the damages caused by the failure to effect the repairs in good time, and if the sequestrator had carried out normal maintenance. If such expenditure were to result in the improvement or increase in value of the buildings (as, for example, by the replacement of the destroyed or damaged sanitary installations by more up-to-date installations), this would justify a reduction equal to two-thirds of the excess value, in order to avoid undue profit, which Article 78, paragraph 4, letter (*a*) of the Peace Treaty certainly did not contemplate.

(5) Finally, the parties disagree in regard to the method of calculating the amount of compensation for the car.

It is not disputed that when the sequestration was lifted, the car was found to be reduced to scrap without value. Compensation must therefore be calculated as though it had been impossible to effect restitution and must therefore be equal to two thirds of the sum necessary at the date of payment, to purchase similar property.

According to the Italian Government, compensation as determined by the Peace Treaty is a substitute for restitution, and not compensation for loss, and cannot therefore take into account depreciation due to the passage of time, whether as a result of age or of technical obsolescence. The Italian Government should therefore make good the loss which citizens of the United Nations have suffered as a result of non-restitution, and not the loss suffered by each of them at the moment when the event occurred which today prevents restitution. *In casu* compensation should be equal to two-thirds of the sum required to purchase now a Fiat car of the Balilla type built in 1938 which has run approximately 5,000 kilometres.

Even without taking into consideration the practical difficulties of finding such a motor-car on the market today, the Conciliation Commission cannot agree to the Italian Government's line of argument. If the property cannot be restored, the Peace Treaty (Article 78, para. 4 (*a*)) intends that the owner should receive, not compensation equal to two-thirds of what would have been the value of the returned property (if restitution had been possible), but two-

thirds of the sum necessary at the date of payment, to purchase an equivalent article.

In 1953, a motor-car can be said to be equivalent to the one sequestrated in 1940 from Mr. and Mrs. Currie, when the following conditions are fulfilled: (*a*) that it is of the "Fiat" make; (*b*) that it belongs to the type of Fiat car, about two years old, which resembles as closely as possible the 1938 Balilla type; (*c*) that is has run about 5,000 kilometres.

It is probable that a motor-car of this type is technically superior to the 1938 Balilla. In that case, in order to avoid undue profit, the sum necessary for the purchase must be adequately and fairly reduced.

DECISION

1. The parties are given a period of three months in which to reach agreement on the amount of compensation due to Mr. and Mrs. Currie on the basis of the principles laid down in the considerations of Law in the present decision.

2. In the event of no agreement being reached within the time-limit states, the Commission, after all necessary investigations, shall itself proceed to determine the amount of compensation due.

3. The present decision is final and obligatory.

(*Sgd.*) G. G. HANNAFORD F. to Plinio BOLLA

F. to Antonio SORRENTINO

CASES OF DUAL NATIONALITY—DECISION
No. 22 OF 8 MAY 1954

Dispute of general nature—Question whether in Article 78 of Peace Treaty there is any limitation to right of an United Nations national possessing also Italian nationality to present claim under said Article—Objection to admissibility—Jurisdiction of Conciliation Commission—Article 83 of Peace Treaty—Jurisdiction to interpret Peace Treaty provisions in an abstract and general manner with obligatory effect for all future cases—Nature of Conciliation Commission—Interpretation of treaties—Rules of interpretation—Existence of—Peace Treaties—Interpretation of—Governed by general rules of interpretation of treaties—Interpretation of clear and precise provisions—Intention of the parties—Comparison of texts in different languages—Conformity with rules of international law—Restrictive interpretation.

Différend de nature générale — Question de savoir si l'article 78 du Traité de Paix comporte des limitations au droit d'un ressortissant d'une Nation Unie possédant également la nationalité italienne de se prévaloir des dispositions de cet article — Exception d'irrecevabilité — Compétence de la Commission de Conciliation —

Article 83 du Traité de Paix — Compétence de la Commission d'interpréter les dispositions de ce Traité d'une manière abstraite et générale avec effect obligatoire pour tous les cas futurs — Nature de la Commission de Conciliation — Interprétation des traités — Règles d'interprétation — Leur existence — Interprétation des Traités de Paix régie par les règles générales d'interprétation des traités — Interprétation des dispositions claires et précises — Intention des parties — Comparaison des textes dans leurs différentes langues — Conformité avec les règles du droit international — Interprétation restrictive.

The Anglo-Italian Conciliation Commission established in accordance with Article 83 of the Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy, composed of Colonel Guy G. Hannaford, of the Embassy of the United Kingdom of Great Britain in Rome, Representative of the United Kingdom, Avvocato Antonio Sorrentino, Honorary Section President of the Council of State, at Rome, Representative of the Italian Government, and Professor José Caeiro da Matta, formerly Rector and Professor of the University of Lisbon, Councillor of State, Third Member chosen by common accord by the British and Italian Governments;

In the case of the Submission presented on 6 June 1952 by Her Britannic Majesty's Government, represented by its Agent, Mr. M. C. Adams, against the Italian Government, represented by its Agent, Avvocato Stefano Varvesi, regarding Cases of Dual Nationality.

On 6 June 1952 Her Britannic Majesty's Government referred to the Anglo-Italian Conciliation Commission the question as to whether a physical person, included within the definition of United Nations National contained in the first phrase of sub-paragraph (*a*) of paragraph 9 of Article 78 of the Peace Treaty with Italy, is excluded from the right to present a claim under that Article in the case that, at a certain period, he was also, according to Italian law, in possession of this latter nationality. The British Government had no intention of asking the Conciliation Commission to examine whether a certain individual claimant possessed Italian citizenship at the same time as British. The attention of the Commission should be brought to bear on the question of a general nature which consists in knowing whether British nationals who come under Article 78 of the Treaty, who possessed British nationality on 15 September 1947, the date of entry into force of the Treaty, and also on the date of the Armistice, 3 September 1943, have the right to present claims under that Article, if at one or both of the dates mentioned, they possessed also Italian nationality.

Her Britannic Majesty's Government affirms that this right exists, invoking: (*a*) the clear and literal sense of the expressions of the Treaty and their unequivocal character; (*b*) the fact that the Article does not contain any exception in respect of nationals possessing dual nationality; (*c*) the lack of necessity of introducing such an exception in order to make the expression used intelligible or in order to explain any ambiguity; (*d*) the expressions contained in the Treaty of Peace, if and in so far as they depart from the common rulings of international law, must prevail, unless their incompatibility is demonstrated.

In its reply of 20 September 1952, the Government of the Italian Republic stated that the jurisdiction of the Conciliation Commission is limited to disputes which may arise with regard to the application of Article 75 and 78 of the Treaty. The abstract interpretation of a provision is beyond the jurisdictional

function of whatever nature the jurisdiction may be, as this cannot be exercised except in respect of concrete cases and only as regards the determination of such cases; and, the judge interprets the provision as regards its sole application to such cases, that is to say, he determined its extent and contents.

In his Submission the Agent of the British Government simply affirms that the principle which he is defending is based on the first part of paragraph 9 (*a*) of Article 78. But the Italian Government considers, on the contrary, that the question has been expressly determined in the second part of the same paragraph and in the opposite sense to that upheld by the Agent of the British Government. The paragraph referred to, after having laid down, in the first part, that the expression "United Nations National" applies to physical persons who are nationals of one of the United Nations, adds, in its second part, that such expression also applies to all physical persons, who, under Italian laws in force during the war, were considered as enemy. This ruling brings with it the conclusion that the hypothesis of dual nationality was not envisaged in the first part of the paragraph: if it had been considered, as regards the application of Article 78, that the status of United Nations nationals was determinative and that of Italian or neutral national irrelevant, what would have been the contents of the second phrase, considering that the laws in force in Italy during the war considered as enemy, in cases of dual nationality, only those physical persons who also possessed the nationality of an enemy State and, in the cases in question, of any one of the United Nations?

Consequently, the right to compensation in the sense of Article 78 is extended to United Nations nationals, as such, when they possess that nationality only; in the cases of dual nationality a further condition is required; that they were considered as enemy according to the laws in force in Italy during the war. And it must be observed that if Article 3 of the Italian War Law did consider as enemy he who, at the time of the application of the law, possessed the nationality of the enemy State, even though he possessed at the same time Italian nationality or that of another State, such a ruling was modified by the law of 16 December 1940. This law alludes to the person who, at the time of the application of the law, possesses the nationality of a third State. As a consequence of this modification, the Italian citizen who possessed also the nationality of the enemy State, ceased to be considered an enemy subject, the consideration of such nationality being in this way limited to the hypothesis of foreign double nationality. Consequently, and given the above mentioned provision contained in the second part of paragraph 9 (*a*) the possibility of invoking Article 78 in favour of an Italian citizen must be excluded, even in the case in which he were a national of one of the United Nations.

On 10 November 1952, the Agent of the British Government submitted his replication to the answer of the Agent of the Italian Government, maintaining his point of view and pointing out that, by virtue of paragraph 2 of Article 83 of the Peace Treaty, once the Conciliation Commission has been instituted, it has jurisdiction in respect of all disputes between the United Kingdom and Italy regarding the application or interpretation of Article 78. No reference is made to a concrete case. And, after having invoked the precedent of the decision of the Italo-United States Conciliation Commission in the *Amabile* dispute,[1] the British Agent recalls the provision under Article 2 of the Rules of Procedure of the Anglo-Italian Conciliation Commission in which it is stated that the Commission is the judge of its own jurisdiction. He requests, in conclusion, that the Commission decide that it has jurisdiction in order to determine this dispute.

[1] *Infra*, p. 115.

A counter-replication was drawn up on 18 January 1953 by the Agent of the Italian Government. He insists on the inadmissibility of the Submission, considering that same had not the object of bringing into effect the jurisdictional powers of the Conciliation Commission, but that of a legislative power which had never been conferred on the Commission. In fact, the Conciliation Commission was not asked to decide that Article 78 of the Peace Treaty would be applicable, in concrete, to a British national, but to declare, in an abstract and general form, its applicability to all British nationals who found themselves in determined conditions. The fact invoked by the British Agent, that this question had already been raised in numerous cases presented by British nationals, is not decisive and it is not possible to introduce into the object of the present jurisdiction, alongside the abstract and general question which has been proposed, the determination of individual cases. A dispute does not therefore exist between the two Governments on the question of dual nationality, but there are various disputes in the various cases in which this question has been raised. The advisability envisaged by the British Government to clarify the provision of the Peace Treaty, with the object of obtaining a decision on principle of the question which will avoid a number of disputes before the Conciliation Commission, may form the subject of discussions and agreements between the Governments but not through jurisdictional channels. The question of dual nationality cannot be examined and decided by the Conciliation Commission except in respect of a concrete case. The decision can constitute a precedent in jurisprudence and serve as a guide for the future action of the two Governments, but in no hypothesis may it constitute a judgement for the future cases and cannot prevent the same question being presented in another dispute by one of the two Governments who might consider it not in accordance with the Treaty and hope to see it modified by another decision. And one cannot invoke in favour of the British Submission paragraph 2 of Article 83; its intention was to exclude the establishment of a Conciliation Commission for each individual case, as is the normal case for arbitral tribunals. The fact of speaking of the application of a provision or of its application or interpretation does not exclude that one must do so always and exclusively in relation to a concrete case.

After discussion of the problem before the Conciliation Commission in the light of the successive memorials presented by the Agents of the two Governments, the Commission, integrated by the Third Member, having heard the Agents referred to above, issued on 20 October 1953, an ordinance granting the Agent of the British Government a period of eight days, commencing from the date of such notification, in which to present a written memorial on the prejudicial question of the admissibility of his claim. And the Agent of the Italian Government was also granted a similar period commencing from the expiry date of the period granted to the British Agent.

A. The question as to whether in Article 78 of the Peace Treaty there is any limitation to the rights of an United Nations national possessing also Italian nationality, to present a claim under the terms of that Article, was raised by the Agent of the British Government in the following terms:

(1) The Conciliation Commission, according to the wording of Article 83 of the Treaty of Peace, has jurisdiction over all disputes relating to the application and interpretation of the said Article, whether it is a question of a dispute arising from the application of the article to a particular case, or of a dispute of a general nature based on the interpretation of a special provision of that Article. If the Commission were to have had jurisdiction only in the case of disputes arising from individual claims Article 83 would have stated

this expressly. And the interpretation of the British Government is based on the fact that the Commission has jurisdiction not only in questions concerning disputes relating to claims under Article 78, but also in the case of disputes raised regarding the application of other Articles of the Peace Treaty, where it is even more probable that the dispute concerns rather the general interpretation to be given to some provisions than the application of a particular provision.

(2) In order to define the competence of the Conciliation Commission it is necessary to consider the provisions of Article 83 of the Peace Treaty. It is a principle of International law, often confirmed by the international courts, that the jurisdiction of an international tribunal is established and defined in the agreement which created it, in this case the Peace Treaty. No importance must be given to the fact that other international tribunals may have supported that no question of principle can be decided without the agreement of the Parties, as the question of knowing whether a tribunal is competent or otherwise depends exclusively on the terms of the instrument which created it.

(3) The argument has sometimes been put forward that the Conciliation Commission could not decide the general question mentioned above, because, by doing so, it would express a consultative opinion which cannot be requested by one only of the two Parties in the dispute. The question was discussed before the Permanent Court of International Justice regarding the Statute of the Memel Territory, which decided that is was competent to give a decision with obligatory effect, and not only a consultative opinion, on the interpretation of a particular international instrument.

(4) The British Government firmly upholds that the jurisdiction conferred on the Conciliation Commission by paragraph 2 of Article 83 of the Peace Treaty is sufficiently extensive to give it the possibility of being seized, without the agreement of the other party, of a dispute of a general nature relating to the interpretation to be given to the expression "United Nations Nationals" contained in Article 78.

(5) In conclusion, the British Agent requests the Commission kindly to define, as a question of right, its jurisdiction in the present dispute of a general nature, by giving an affirmative decision as regards its competence.

B. The Italian Government pronounced openly for the non-admissibility of the request, observing that:

(1) The judge may and must interpret the provision of law exclusively in the exclusive case that it is required to be applied to a concrete case. It is not competent to give an abstract and general interpretation of it, having effect for future cases, as it would be a question, in this hypothesis, of an activity inherent to the legislative function. The Conciliation Commissions contemplated in Article 83 of the Peace Treaty have exclusively jurisdictional functions; they cannot give an authentic interpretation of the provisions of the Peace Treaty as, in this case, it would be a question of entering into the province of a legislative function which does not belong to them. Consequently, the request should be declared inadmissible.

(2) In his argument the Agent of the British Government recognizes that the work of the Conciliation Commission is of a jurisdictional nature. Now, the expression *jurisdiction* and the function indicated thereby, have, in international law, the same significance as is attributed to them in internal legislation. The Permanent Court of International Justice has always decided in this sense. And the distinction between the jurisdictional and the legislative function

can easily be established, the latter being destined to determine the rules of law which will have to be observed in each particular case as forming part of the juridical organization and having as characteristic elements both abstraction and generality; the former being destined to apply the law to a practical case and characterised by the concrete and particular aspect. The obligatory strength of a judicial decision and the authority of the thing judged are necessarily limited to the parties *en cause* and to be subject of the dispute.

In the international field this principle was established in Article 59 of the Statute of the Permanent Court of International Justice.

(3) One must, consequently, exclude that the jurisdictional function can include the faculty to interpret the provision in an abstract and general manner having obligatory effect for all future cases. This interpretation—authentic—forms part of the legislative function.

(4) The invoking of the dispute on the Statute of the Memel Territory as a precedent in which the permanent Court of International Justice issued an obligatory decision on the interpretation of a special international instrument, lacks consistency. On the contrary, the Court had no intention to interpret the Statute as having obligatory effect for the future, and in fact excluded that its decision could be obligatory between the Parties, even as regards the particular case which had been examined.

The Court gave a consultative opinion, having authority without doubt, but without the character of being obligatory. Therefore there is no precedent to invoke in connexion with the case in question in the dispute on the Statute of the Memel Territory.

(5) As regards the Conciliation Commissions established under Article 83 of the Peace Treaty there are no elements to permit one to consider that their jurisdiction is different from the normal jurisdiction or that the Commissions have other functions than the jurisdictional function. Paragraph 1 of Article 83 considers the disputes which might arise on the application of Articles 75 and 78, and the application cannot be effected except in respect of concrete cases. Paragraph 2 makes express mention of the jurisdictional nature of the work of the Commission. The expression *application* or *interpretation* contained therein does not imply an authentic interpretation of the provisions made in a general way and in contemplation of future cases; the Conciliation Commissions have not the nature of political bodies but of jurisdictional bodies. The objects of the paragraph was to exclude that one should have to establish a Conciliation Commission for each particular dispute, as is normally done in the Arbitral Tribunals. On the other hand paragraph 2 expressly states that the Conciliation Commissions will have jurisdiction.

(6) Consequently, it is hoped that the Commission will declare that the dispute of a general nature referring to the interpretation of paragraph 9 (*a*) of Article 78 submitted by the British Government, is inadmissible.

Let us analyse the question, limited to this last and essential aspect—admissibility or non-admissibility of the dispute of a general nature—in the light of the principles of international law and of the provisions of the Peace Treaty.

We have before us a clear and precise provision of the Peace Treaty—such is the affirmation of the Agent of the British Government.

But one could commence by asking: is it always easy to know if the text is sufficiently clear? Does not the fact that there is a dispute prove that, for one at least of the parties, an interpretation is necessary? In the new *Projet Définitif de résolutions sur l'interprétation des Traités*, presented on 19 October 1953 at the

session of the Institute of International Law at Sienna, it is stated, under Article 1 that the apparent clarity of the provisions of a treaty would neither be sufficient to exclude proof to the contrary nor render it unduly difficult.

We could say first of all, with Anzilotti (*Publications of the C.P.J.I.*, series A/B No. 50, p. 383) that one cannot see how it would be possible to say that an article of an agreement is clear, before having determined its object and its end; it is only when one knows what the contracting Parties proposed to do, the object they wished to achieve, that one can ascertain that the natural sense of the terms used either remains within or exceeds the said intention.

There are some rules for the interpretation of treaties, despite the opinion of certain authors, like Hall, Lawrence, Oppenheim who deny this. But, it is strange that Oppenheim himself after having said that a rule regarding the interpretation of treaties does not exist, adds that it is important to enunciate the rules for interpretation which are recommendable by reason of their convenience. (*International Law*, vol. I, 7th ed., 1948, paragraphs 553 and 554). Notwithstanding the unilateral genesis of Peace Treaties, imposed on the vanquished by the victors, they are really bilateral conventions and their interpretation is regulated by the general rules of interpretation of treaties (*Recueil des décisions des Tribunaux arbitraux mixtes*, VII, paragraph 47). The Court of International Justice, and its antecedent, the Permanent Court of International Justice, have continually made use of the rules of interpretation (V. Hudson, *The Permanent Court of International Justice*, 1943, paragraph 631 and following). On could not subcribe to the opinion of Lord Phillimore (*Commentaries upon International Law*, vol. II, part V, chapter VII), according to which (these are the principles of Grotius and his successors) the provisions of a treaty must be interpreted in an equitable and not in any technical manner. The great majority of the authors have shown themselves contrary to this opinion (See, for example, Cavare, *Le Droit International Public positif*, 1951, vol. II, p. 194 and following). Schücking on his part (*Friedenswarte*, September 1928, p. 268) is of the opinion that an arbitral tribunal is obliged to apply the same law as the Permanent Court of International Justice. It is only in default of rules of law which are applicable that it can make laws *ex aequo et bono*. But, this is not the case. It must be said that it is within the jurisdiction of the doctrine and the decisions of the Court that the application of the general principles does not exceed the limits of positive right; in applying them the judge does not become free to decide *ex aequo et bono*. This arises from the fact that Article 38 of the Statute demands a formal agreement between the Parties, if the Court wishes to have the faculty to decide according to the principles of justice and equity.

In order to be able to establish the true sense of Article 78 of the Peace Treaty one must, as an essential element, in order to obviate the paradoxical consequences which an interpretation exclusively taken from the formula of the text would—and this is not an hypothesis—at times be liable to reach, have recourse to the determination of the *ratio legis* of the Treaty.

The application of this principle is found in all jurisprudence established by the Permanent Court of International Justice. (See the consultative opinion of 6 April 1935.)

It is true that there is so little precision and clarity in the Peace Treaty with Italy that the interpretation of it becomes at times difficult.

One must observe, for instance, the difference of wording used in the French and English texts. Paragraph 2 of Article 83 in the French text states that "*lorsqu'une commission de conciliation sera constituée en application du paragraphe 1^er^, elle aura* compétence *pour connaître de tous les différends. . .*" In the English text, it is stated: "when any Conciliation Commission is established under paragraph 1

above, it shall have *jurisdiction* over all disputes . . ." This difference of terminology has, on the other hand, very little importance, the competence being only the limit of jurisdiction, the measure of the power to judge. After all it is always a question of a jurisdictional function. But must this jurisdiction be considered as limited to disputes arising from individual claims under the terms of Article 78, or can it include also the disputes arising from the general interpretation to be given to some provisions contained in the Peace Treaty? That is the question. Despite the designation of Conciliation Commissions (which is acceptable when it is a question of the settlement of a dispute between a representative of the Government of the United Nation concerned and a representative of the Italian Government, being able to settle the disputes amicably), they are in cases like the present one, real arbitral tribunals. Affirmation which is more than ever evident in the case of the addition of a Third Member, when according to paragraph 6 of Article 83, the decision of the majority of the members of the Commission shall be the decision of the Commission and accepted by the Parties as definitive and binding. Which means that its mission is not to decide along the lines of what it considers just and equitable but to determine the disputes according to the strict rules of law. This is what was established as regards the Mixed Arbitral Tribunals which were established by virtue of the Peace Treaties of 1919. This intention of the drafters of the Treaty of Versailles arises clearly from paragraph 2 of the Annex to Article 304, which orders that the Tribunal shall adopt *for its procedure* rules which are in conformity with justice and equity (formula which appears reproduced, in the same terms, at paragraph 3 of Article 83 of the Peace Treaty with Italy) which, as Blühdorn observed ("*Le fonctionnement et la jurisprudence des Tribunaux arbitraux mixtes*", *Recueil des Cours de la Haye*, 1932, vol. III, p. 190) excludes the application of these rules to the disputes themselves. The tendencies of international arbitration are in this sense, as they lean more and more towards obliging the arbitral tribunals to give their decisions, not according to a more or less vague conception of equity, but according to the rules of law. The competence of the arbitrator is limited to the knowledge of the treaty exclusively (See Salvioli, "*La règle de droit international*", *Recueil des Cours de la Haye*, 1948, vol. II, p. 391).

The Conciliation Commission judges: it is not given to it to exceed the limits which the Peace Treaty assigns formally to its jurisdiction.

If it is a question therefore, without any shadow of doubt, of the exercise of a jurisdictional function (an authentic interpretation would demand, as definition, the agreement of all the contracting parties, the authors (denying unanimously the admissibility of an unilateral interpretation, in the sense that they exclude the possibility of forcing one of the parties to accept an interpretation adopted by the other party) if it is the case, it is repeated, of a jurisdictional function, one can only conclude that the Commission must limit its activities to determining the disputes arising from claims presented according to the terms of Article 78 of the Peace Treaty the understanding of jurisdiction being the same in international and internal law. One cannot exceed the limits which the principles, the text and the spirit assign to the competence of the Commission. An interpretation according to which the Commission would also have the faculty to interpret the provisions of the Peace Treaty in an abstract and general manner, with obligatory effect for all future cases, would run the risk, because it is abusive, of ending in a judgement blemished by excess of power (it would create rules of law, which is not a jurisdictional function, but a legislative function), a very serious position in our case precisely because, according to the provision of paragraph 6 of Article 83 of the Peace Treaty, the decision is considered as definitive and binding.

It has been pointed out that if the Conciliation Commission were to have

to limit its activity solely to the determination of disputes based on individual claims, concrete cases, Article 83 of the Treaty of Peace would have expressly laid this down. But we can say, on the contrary, that if it had been intended to give to the Conciliation Commission a jurisdiction which is not that which is generally attributed to Conciliation Commissions, and which does not come within their normal function, it should here be stated expressly. Even as regards the Court of International Justice it was put forward that it could not be seized of a question posed in abstract terms as that would mean leading the Court almost to a legislative role. This opinion was set aside for the sole reason that the Charter of the United Nations and the Statute of the Court state expressly that the Court can give an opinion on all juridical questions, abstract or otherwise. (S. Bastid, "*La Jurisprudence de la Cour Internationale de Justice*", *Recueil des Cours de la Haye*, 1951, vol. 1, p. 603). And it must be added that these opinions have no obligatory value unless a special text stipulates an undertaking to apply the opinion requested of the Court. This is the established jurisprudence. There is no word in the Peace Treaty which can lead to the conclusion that the interpretation of a provision by a consultative opinion, comes within the function of the Conciliation Commission. And it appears that the opinion is rejected that the jurisdiction conferred on the Commission by Article 83 paragraph 2 of the Treaty is sufficiently comprehensive to give the Commission the possibility of being seized of a request by one of the Parties without the concurrence of the other. There is no indication of the acceptance of this doctrine in the cases—and they are so very numerous—submitted to the consideration of the Arbitral Tribunals or of the Conciliation Commission. On the contrary, a Conciliation Commission would not know how to issue the requested opinion without infringing the well established principle of international law according to which all judiciary procedure arising from a juridical question pending between States, calls for the consent of these States.

It could not be admitted, without falling into a serious contraction, on one side, the postulate, that the decision of the Commission must bring the dispute to an end, and on the other, the recognition of the right to establish the same decision unilaterally.

This argument has been put forward because paragraph 3 of Article 83 states that each Conciliation Commission will establish its own procedure, adopting rules which are in conformity with justice and equity; the Commission has the capacity to determine its own jurisdiction. But it must not be forgotten that it is one thing to *establish a procedure* and another, entirely different, to *determine the jurisdiction*; the provision contained in paragraph 3 of Article 83 cannot but mean that each Commission has the faculty to determine, *within the limits of its jurisdiction*, the procedure to be followed. When a tribunal or an arbitration Commission are authorized to determine *their own jurisdiction*, this is expressly stated, as was done for example in the Hague Convention of 1899 for the peaceful settlement of international conflicts, in its Article 48. The provisions of a treaty must be interpreted in such a way that they may conform as much as possible with the rules established by international law rather than derogate from these rulings. And let us say once for all that the arbitrator cannot substitute the legislator (V. par. ex., Carabier, "*l'arbitrage international*", *Recueil des Cours de La Haye*, 1950, vol. I, p. 265 *et suiv.*; Briefly, "*Règles du Droit de la Paix*", *ibid.*, 1936, vol. IV, p. 137).

Procedure, competence, jurisdiction are technical words with a precise meaning. No interpretation must ever arrive at a solution other than that which emerges formally from the Treaty, unless, obviously, this latter leads to an absurd result.

There is one last remark: International Jurisprudence normally interprets

the provisions of international treaties in a restrictive manner, as it considers them as limitations of the sovereignty of the State, by the application of the principle which submits to a restrictive interpretation the clauses which derogate from common law. (Ch. Rousseau, "*L'Indépendance de l'Etat dans l'ordre international*", *Recueil des Cours de la Haye*, 1948, vol. II, p. 211).

In the present case neither the provisions of the Peace Treaty nor the principles allow an affirmative reply to be given to the Submission presented by the British Government.

DECIDES :

(1) The Submission presented by the Agent of the British Government is rejected.

(2) The present decision is definitive and obligatory.

Signed: Avv. Antonio SORRENTINO *Signed:* Prof. Caeiro DA MATTA

ROSTEN CASE—DECISION
No. 99 OF 13 FEBRUARY 1957

Claim for compensation under Article 78 of Peace Treaty—Sale of enemy property—State responsibility—Non-responsibility for sale of enemy property effected in accordance with common law—Inapplicability of Article 78 of Peace Treaty—Rejection of Claim.

Demande en indemnité au titre de l'article 78 du Traité de Paix — Vente de biens ennemis — Responsabilité de l'Etat — Non-responsabilité pour vente de biens ennemis effectuée conformément au droit commun — Inapplicabilité de l'article 78 du Traité de Paix — Rejet de la demande.

The Anglo-Italian Conciliation Commission established in accordance with Article 83 of the Treaty of Peace, consisting of Messrs. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of Italy and G. G. Hannaford, Counsellor of the Embassy of Great Britain, Juridical Attaché, Representative of Great Britain, and Professor José de Yanguas Messia, Professor of International Law at the University of Madrid—Third Member appointed by common accord between the Governments of the United Kingdom of Great Britain and Northern Ireland and of the Italian Republic.

Having seen the Submission filed on 8 March 1954 by the British Government represented by its Agent Mr. Bayliss, and registered at n. 45, on behalf of Mr. and Mrs. Paul and Alice F. Rosten, in which it is requested that the respon-

sibility be affirmed for the sale of furniture, household goods, dental instruments, and personal effects contained in two liftvans and in a crate, unloaded in 1939 from the German steamer *Geierfels*, in the port of Naples;

Having seen the Answer of the Agent of the Italian Government dated 30 June 1954 denying the responsibility of the Italian Government both because the sale in question took place in accordance with the regulations of common law in order to cover the expenses of unloading, storage and insurance, and also because the claimants Mr. and Mrs. Rosten, are not qualified to avail themselves of the provisions of the Treaty of Peace, as, at the period to which the Treaty of Peace refers, they were German subjects, against whom no wartime measures were adopted.

Having seen the *Procès-verbal de Désaccord* dated 16 July 1954 whereby the Representatives of the two Governments decided to have recourse to the Third Member, in accordance with Article 83 of the Treaty of Peace;

Having concluded that, from the information contained in the pleadings, and filed by the Agent of the Italian Government on 27 February 1956, it has been established that the sale complained of by Mr. and Mrs. Rosten took place in order to recover the expenses of unloading, storage, and insurance, in accordance with the claim put forward by Mr. and Mrs. Rosten's creditors, without any intervention on the part of the Italian Government; and that therefore the sale cannot be considered as arising from the war, neither conferring the right on Mr. and Mrs. Rosten to avail themselves of the provisions of Article 78 of the Treaty of Peace, nor constituting war damages compensatable in accordance with the provisions of that Article;

DECIDES:

The Submission put forward by the British Government on behalf of Mr. and Mrs. Paul and Alice F. Rosten is rejected.

The present decision is definitive and obligatory.

Rome, 13 February 1957.

The Third Member

The Representative of Great Britain	*The Representative of Italy*
(*Sgd.*) G. G. HANNAFORD	(*Sgd.*) A. SORRENTINO

KENT CASE--DECISION No. 144 OF 9 APRIL 1958

Claim, under paragraph 6 of Article 78 of Peace Treaty, for exemption from extraordinary proportional tax on property imposed by Italian legislation—Whether such tax established for specific purpose of meeting expenses resulting from war or from some consequences thereof—Reference to decision No. 32 rendered by Franco-Italian Conciliation Commission—Inapplicability of exemption provisions to tax in litigation—Rejection of claim.

Demande d'exemption présentée au titre du par. 6 de l'article 78 du Traité de Paix — Impôt extraordinaire progressif sur le patrimoine établi par la législation italienne — Question de savoir si cet impôt a été établi en vue de couvrir les dépenses entraînées par la guerre ou par ses conséquences — Rappel de la décision n° 32 rendue par la Commission de Conciliation franco-italienne — Inapplicabilité des dispositions d'exemption à l'impôt litigieux — Rejet de la demande.

The Anglo-Italian Conciliation Commission composed of Messrs. Antonio Sorrentino, Representative of the Italian Government and Plinio Bolla, former President of the Swiss Federal Tribunal, Third Member chosen by mutual agreement between the Italian Government and the British Government, sitting in Rome on 9 April 1958, in the dispute between the British Government, represented by its Agent, Mr. F. C. S. Bayliss and the Italian Government, represented by its Agent Avv. Francesco Agrò, concerning the claim presented by Miss Pauline Kent relating to the applicability to British subjects of the Extraordinary Proportional Tax on Property (4%) established by D.L. No. 143 of 29 March 1947, and comprised in part III of Consolidated Law No. 203 of 9 May 1950.

CONSIDERATIONS OF FACT:

A. Article 78, paragraph 6, of the Peace Treaty signed on 10 February 1947 between the Allied and Associated Powers and Italy states:

> United Nations nationals and their property shall be exempted from any exceptional taxes levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority beteen 3 September 1943 and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded.

The Peace Treaty came into force on 15 September 1947.

B. By Decree Law of the Provisional Head of the State No. 143 of 29 March 1947 an Extraordinary Progressive Tax on Property was imposed in Italy. The same D.L. (Articles 68-74) converted the ordinary tax on property, established by R.D.L.N. 1529 of 12 October 1939, into an Extraordinary Proportional Tax on Property at the rate of 4% on the values definitely assessed for the purpose of the ordinary tax, for the year 1947; in substance, the ordinary tax on property was abolished commencing from January 1948, and the payment of 0.40% per year for ten years was consolidated into one payment *una tantum* of 4%.

Article 77 of D.L. No. 143 of 29 March 1947 established that it would be presented for ratification to the Constituent Assembly.

On 1 September 1947 the Provisional Head of the State sanctioned and promulgated a law No. 828 dated 1 September 1947, to "ratify, with alterations and additions, D.L. of the Provisional Head of the State No. 143 of 29 March 1947, concerning the establishment of an extraordinary progressive Tax on property".

Among the additions which this law brought to D.L. No. 143 of 29 March 1947 were the provisions which establish an extraordinary proportional tax

on the property of legal bodies (Article 67 from paragraph (*a*) to paragraph (*c*).

Law No. 828 of 1 September 1947 was published in the Official Gazette of the Italian Republic No. 202 of 4 September 1947.

This law laid down, under Article 77, that the Government would arrange the co-ordination and codification in a sole text of the provisions contained in Legislative Decree No. 143 of 29 March 1947, and of the alterations made to same.

The *Testo Unico* (Consolidated Law) in question was sanctioned and promulgated by the Provisional Head of the State by D.L. No. 1131 of 11 October 1947 published in Official Gazette No. 246 of 25 October 1947. The Consolidated Law governs at part III the Extraordinary Proportional Tax on Property at the rate of 4%, imposed under Article 68-74 of D.L. No. 143 of 29 March 1947.

The various legislative acts quoted above have therefore:

(*a*) Established an Extraordinary Progressive Tax on the property of physical persons (hereinafter called more briefly the First Tax);

(*b*) Established an Extraordinary Proportional Tax on the property of Legal Bodies (hereinafter called more briefly, Second Tax);

(*c*) Substituted the ordinary tax on property, from 1 January 1948, by an Extraordinary Proportional Tax at the rate of 4 per cent (hereinafter called more briefly, Third Tax).

C. A dispute arose in the first place between the French Government and the Italian Government, the French Government upholding that its nationals and their property should be exempt, in application of paragraph 6 of Article 78 of the Peace Treaty, from the First and the Second of these taxes on their capital assets in Italy, whilst the Italian Government opposed, primarily, the exemption from the two taxes arguing as to their purpose which, in their opinion, was different from that laid down in paragraph 6 of Article 78 of the Peace Treaty, and, subordinately, the exemption from the Second Tax, it having been, in their opinion, imposed only by law of 1 September 1947, published on 4 September 1947, which came into force 15 days later, that is on 19 September 1947, when the time-limit established in paragraph 6 of Article 78 of the Peace Treaty had elapsed four days previously.

By Decision No. 32 of 29 August 1949 the Italo-French Conciliation Commission in its Three-Member stage, rejected the two arguments of the Italian Government, the principle and the subsidiary *(Recueil des décisions de la Commission de Conciliation franco-italienne, premier fascicule, pp. 95 à 105)* [1]

The provisions of the Decisions are as follows:

1. The extraordinary taxes imposed in Italy:

(*a*) by D.L. No. 143 of 22 March 1947;

(*b*) by law No. 848 of 1 September 1947;

which were grouped into a consolidated text by D.L. No. 1431 of 11 October 1947, are not applicable to French citizens.

2. All the sums paid by French citizens relating to the above-stated taxes must be refunded to them within three months from the notification of the present Decision.

3. (omissis).

Though these provisions speak generally of the extraordinary taxes imposed in Italy by D.L. No. 143 of 22 March 1947, and by Law No. 848 of 1 September

[1] Volume XIII of these *Reports*.

1947, legislative acts grouped into one consolidated text by D.L. No. 1431 of 11 October 1947, and appear therefore to exclude the applicability to French citizens also of the so-called Third Tax, it appears clear from the grounds of the decision that it has a bearing only on the First and Second Tax, on Property of physical Persons, and the Extraordinary Proportional Tax on the property of Legal Bodies; the Third Extraordinary Tax was never mentioned in the case, the French Government having been already convinced at the start that it should be paid by French citizens despite paragraph 6 of Article 78 of the Peace Treaty. The French representative in the Italo-French Conciliation Commission later confirmed, in a letter to the Italian Representative in the Commission dated 17 July 1950 that the French Authorities also consider that the exemption decided by the Italo-French Conciliation Commission on 29 August 1949 refers exclusively to the two extraordinary taxes, the progressive on the property of physical persons (First Tax) and the proportional on the property of legal bodies (Second Tax), and not also to the Extraordinary Proportional Tax on Property comprised in part III of D.L. No. 1131 of 11 October 1947 (Third Tax).

D. In the relations between the British Government and the Italian Government, the former had at first opposed the applicability "of the extraordinary taxes on property to British subjects in Italy", whilst the latter had upheld that these extraordinary taxes on property had not been imposed for the specific purpose indicated in paragraph 6 of Article 76 of the Peace Treaty but only as deductions from wealth affected in order to give the State financial assistance from the wealthy classes, without the income from the Extraordinary Taxes being destined in any way for any specific purpose (*notes verbales* No. 29.726 of 22 September 1947 from the Ministry of Foreign Affairs to the British Embassy, No. 639 of 25 October 1947 from the British Embassy to the Ministry of Foreign Affairs, No. 299 of 3rd June 1948 from the same to the same).

The settlement of the dispute was postponed by mutual agreement as an analogous question (it was thought) had been deferred to the Italo-French Conciliation Commission.

As that Commission decided in the above sense on 29 August 1949, the British Embassy communicated on 30 December 1949 to the Ministry of Foreign Affairs, by *note verbale* No. 667, that, in their opinion, the decisions represented a correct interpretation of Article 78 of the Peace Treaty, and was therefore applicable to British subjects and their property, as also to all other United Nations nationals and their property; the Embassy requested confirmation that it was no longer necessary to defer the dispute to the Anglo-Italian Conciliation Commission.

In the exchange of notes which followed, the Ministry of Foreign Affairs expressly recognized "in the Anglo-Italian relations the applicability of paragraph 6 of Article 78 of the Peace Treaty to the Extraordinary Progressive Tax on Property and to the Extraordinary Proportional Tax on Property of Societies and Legal Bodies (letter No. 12011,115 of 13 June 1950) from Count Sforza to the British Embassy)". But, referring again to this letter, The British Embassy, in their *note verbale* No. 143 of 9 March 1953, pointed out that "it did not expressly mention the analogous Extraordinary Proportional Tax on Property comprised in Part III, Articles 83-90 of D.L. of the Head of the State No. 1131 of 11 October 1947", whilst the British point of view was "that all three of the taxes comprised in that Legislative Decree stand on the same footing as regards the applicability of Article 78 paragraph 6 of the Treaty of Peace, and that consequently the individuals, corporations and societies

entitled to exemption from the first two Extraordinary Taxes are similarly exempt from the Third Tax".

This point of view was not shared by the Ministry of Foreign Affairs which, by *note verbale* No. 4481/13, informed the British Embassy: "The Extraordinary Proportional Tax on Property differs from the other two taxes . . . as it constitutes merely the exaction of ten yearly payments of the Ordinary Tax on Property established in 1939, that is prior to the commencement of the war. In the case of this tax, therefore, the specific purpose contemplated in paragraph 6 of Article 78 of the Peace Treaty 'to meet charges arising out of the war'—which is essential in order that it may be declared non-applicable to United Nations nationals, cannot be found."

In *note verbale* No. 290 of 16 June 1953 from the British Embassy to the Ministry of Foreign Affairs, the British Government stated that it must be considered that a dispute had arisen under the terms of Article 83 of the Peace Treaty.

E. The British Government deferred, therefore, to the Conciliation Commission the claim of Miss Pauline Kent, British subject, presented on 31 December 1949 by the British Embassy to the Ministry of Foreign Affairs, in so far as the claimant demanded refund of Lire 47,694 paid for the Extraordinary Proportional Tax on Property indicated in part III of D.L. No. 1131 of the Head of the State dated 11 October 1947.

F. The Agent of the British Government, after having referred again to his argument regarding the non-applicability of the First and Second Taxes to British nationals and their property in Italy, non-applicability which has been finally admitted by the Italian Government observes in his Submission of 28 November 1956, that there is no substantial difference between the Third Tax on one side and the First and Second Taxes on the other, all the three taxes, or in any case the First and Third having been established by the same legislative acts within the period indicated in paragraph 6 of Article 78 of the Peace Treaty. Should the Third Tax however be considered a continuation in a different form and with modifications of the Ordinary Tax imposed at the beginning of the aforesaid period, the United Nations nationals and their property would then have the right, by virtue of paragraph 6 of Article 78 of the Peace Treaty, to exemption *pro tanto* from the liability arising from Article 83 of the Consolidated Law (*Testo Unico*) to the extent by which the liability exceeds the amount of their liability under the previously existing Ordinary Tax; they would furthermore have the right, by virtue of paragraphs 1 and 2 of Article 78 of the Peace Treaty, to have their property freed *pro tanto* from this charge.

The Agent of the British Government therefore requested that the Conciliation Commission do:

(*a*) Confirm that United Nations nationals in general, and the claimant in particular, are exempt from payment of the Extraordinary Proportional Tax on Property (the Third Tax) as being one of the exceptional taxes specified in Article 78 (6) of the Peace Treaty;

(*b*) Order that the sum of Lire 47,694, paid by the claimant in respect of the Third Tax, be refunded to her by the Italian Government within 60 days from the date of this Honourable Commission's Decision;

(*c*) Provide for the costs of and incidental to this Submission;

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

G. The Agent of the Italian Government, in his Answer of 9 May 1957, called attention to the particular nature of the Third Tax which, in his opinion,

is extraordinary only in name and in the method of encashment; in fact, having to impose the two patrimonial taxes which are entirely extraordinary: the Progressive on physical persons and the Proportional on the property of companies and legal bodies (Part I and II of Consolidated Law No. 203 of 9 May 1950) it appeared necessary to abolish as from 1 January 1948 the *ordinary* tax on property established by R.D.L. No. 1529 of 12 October 1939, converted into Law No. 150 of 8 February 1940, ordering the recovery of 10 yearly payments of same. This was in fact done by establishing the Extraordinary Proportional Tax on Property based on the same financial values finally assessed in 1947 for the purpose of the Ordinary Tax on Property, at the rate of 4%, that is equivalent to ten times the rate of the Ordinary Tax which was 4 per 1000. And as the Ordinary Tax on Property, of an entirely real and general nature, did not establish exemptions of a subjective nature, it follows that, in the case of the 4% Extraordinary Proportional Tax, which has obviously the same characteristics, no exemptions may be granted which were not allowed in the case of the Ordinary Tax. The special nature of the Extraordinary Proportional Tax on Property is proved, besides by the above-quoted basic characteristics, also by parliamentary documents.

H. By *Procès-verbal de Désaccord* dated 21 November 1947 the representatives of the Italian Government and of the British Government in the Conciliation Commission, having established their disagreement on the point forming the subject of the dispute, decided to have recourse to the Third Member, whose intervention is laid down in Article 83 of the Peace Treaty, in order to settle the dispute, which is to be submitted to him as a whole.

The two Governments appointed as Third Member Dott. Plinio Bolla, former President of the Swiss Federal Tribunal, who accepted the assignment.

HAVING CONSIDERED IN LAW:

1. Miss Pauline Kent, a British subject, paid to the Italian Government the sum of Lire 47,694 for the Extraordinary Proportional Tax on Property established by D.L. No. 143 of 27 March 1947, and comprised in part III of Consolidated Law of 11 October 1947 (Third Tax). The British Government requests, in the first place, that the Conciliation Commission order the Italian Government to repay the aforesaid sum to Miss Pauline Kent. The liability on the part of the Italian Government as regards this repayment should be recognised in application of the last sentence of paragraph 6 of Article 78 of the Peace Treaty, if this sum was received by that Government under the title of any one of the taxes established in the said paragraph 6. This provision states: "United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between 3 September 1943, and the coming into force" (15 September 1947) "for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations."

2. The Italian Government and the British Government, after an initial disagreement, agree now that the Extraordinary Taxes indicated in paragraph 6 of Article 78 of the Peace Treaty, include, in any case, the Extraordinary Progressive Tax on the Property of physical persons (First Tax) and the Extraordinary Proportional Tax on the property of legal bodies (Second Tax). But, according to the British Government, they would include also the Extraordinary Proportional Tax on Property established by D.L. No. 143 of 29 March 1947, and comprised in Part III of Consolidated Law of 11 October 1947,

whilst, in the opinion of the Italian Government, United Nations nationals and their property should not be exempt from this tax in application of paragraph 6 of Article 78 of the Peace Treaty, even though it was established in the period contemplated in that provision, that is between 3 September 1943 and 15 September 1947.

The taxes from which United Nations nationals and their property are exempted by virtue of paragraph 6 of Article 78 of the Peace Treaty are those having the specific purpose of meeting expenses resulting from the war or meeting the cost of occupation forces or of reparations to be paid to any of the United Nations. This specific purpose would not logically have been contemplated in the case of taxes levied before the entry of Italy into the second World War. The so-called Third Tax was not established in D.L. No. 143 of 29 March 1947 as a new tax with the specific purpose of meeting the expenses resulting from the war or from some consequence thereof, but as the conversion of an ordinary tax on property already established by R.D.L. of 12 October 1939, that is before the second World War, and for which there was no specific purpose in view; by D.L. No. 143 of 29 March 1947 this ordinary tax on property was abolished as from 1 January 1948, the obligatory recovery of same being established by means of the payment *una tantum* (without prejudice to the legal possibilities of instalments) of ten yearly payments. The legislator's clear intention in this sense appears from the resolution submitted to the Constituent Assembly by the Honourable Mr. Pella, then Minister of Finance, at the time of the ratification of D.L. No. 143 of 29 March 1947. At the meeting held on 5 July 1947 (summary at page 5), he insisted on the fact that, in the case of the 4% Proportional Tax it was not a question "of a new Tax, but of the recovery, in advance, in view of it being abolished, of an already existing tax", which he repeated at the meeting held on 22 July 1947 (summary at page 2). At the meeting on 22 July 1947, the Minister of Finance, Mr. Pella, remarked "the rate of 4% merely means reducing to 12 years the average life of a tax which should have been perpetual (summary at page 11).

3. Neither can the Conciliation Commission accept the subordinate argument of the Honourable British Agent, according to which United Nations nationals who have paid the Third Tax would in any case have at least the right to repayment of the difference between what they would have paid as Proportional Tax on Property in accordance with R.D.L. No. 1929 of 12 October 1939, and what they have actually paid for the recovery of same in accordance with D.L. No. 143 of 29 March 1947 in the form of Extraordinary Proportional Tax on Property. The exemption laid down in paragraph 6 of Article 78 of the Peace Treaty is only in respect of extraordinary taxes imposed, within a given period, with certain specific purposes in relation to the war, and not in respect of extraordinary taxes the main purpose of which consisted in the recovery of ordinary pre-war taxes, even if the desire to bring as much money and as speedily as possible into the Treasury and so reduce the danger of inflation in view of the situation which had arisen as a result of the large war and post-war expenses, was not foreign to the decision as to this method of recovery.

But this concern, which contributed to the decision as regards recovery, is not sufficient to interrupt the link of causation between the Third Tax and the pre-existent proportional tax on property, or to substitute same by a specific link of causation as called for in paragraph 6 of Article 78 of the Peace Treaty. Neither can it be seen, on the other hand, how the difference between what the United Nations nationals had to pay for the Third Tax and what they would have had to pay if this tax had not substituted, in the form of recovery, the ordinary tax on property of pre-war origin, could be calculated on a definite basis; this because the latter tax should have been perpetual.

4. The Agent of the British Government argues furthermore regarding paragraphs 1 and 2 of Article 78 of the Peace Treaty. Paragraph 1 lays down the obligation for Italy to restore, if not already done, "all legal rights and interests in Italy of the United Nations and their nationals as they existed on 10 June 1940" and to return "all property in Italy of the United Nations and their nationals as it now exists".

Paragraph 2 of Article 78 of the Peace Treaty specified in its first sentence that "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 connexion with their return". But paragraphs 1 and 2 referred to simply lay down general principles, the terms of application of which appear from the following paragraphs and especially from paragraph 6 as regards the subjecting of property of United Nations nationals to imposts, taxes or levies of an extraordinary nature imposed by the Italian Government or by other Italian authority during the period 3 September 1943 to 15 September 1947.

5. The British Submission also aims at getting the Conciliation Commission to decide "that United Nations nationals in general . . ." are exempt from the payment of the Extraordinary Proportional Tax on Property (Third Tax) it being one of the exceptional taxes specified in paragraph 6 of Article 78 of the Peace Treaty.

The question would then arise, prejudicially, as to whether the Conciliation Commission established in accordance with Article 83 of the Peace Treaty has jurisdiction to decide, and if so on what conditions, by abstract rulings questions of principle concerning the application of the Treaty to a whole series of real cases besides the one especially referred to by implication in the conclusions (see Bolla, *Quelques considérations sur les Commissions de Conciliation prévues par l'Art. 83 du Traité de Paix avec l'Italie*, in *Symbolae Verzijl* p. 85 and 86). But this question may be left undecided in view of the holding as to the merits of the case expressed by the Conciliation Commission as regards the claim for repayment in favour of Miss Pauline Kent. The question as to whether the British Government would anyhow have active *locus standi* to demand a special interpretation of the Peace Treaty in favour of "United Nations nationals in general" and not of British nationals only, may also remain undecided.

DECIDES:

(1) The Submission is rejected as it cannot be heard.

(2) The present Decision is definitive and obligatory.

UNITED AFRICA COMPANY LIMITED CASE— DECISION No. 189 OF 15 JULY 1961

Compensation under Article 78 of Peace Treaty—War damages sustained by enemy property in Italy—Concession—Extension of—Whether considered as compensation in substitution for that provided by paragraph 4 (*b*) of Article 78—Agreement for extension of concession—Whether constitutes arrangement establish-

ing particular form of compensation in accordance with paragraph 8 of said Article —Reference to decision No. 146 rendered by Franco-Italian Conciliation Commission in Collas and Michel case.

Indemnisation au titre de l'article 78 du Traité de Paix — Dommages de guerre subis par des biens ennemis en Italie — Concession — Extension du contrat de concession — Question de savoir si l'extension de la concession est considérée comme une indemnisation au sens du par. 4 (b) de l'article 78 — Contrat de concession — Question de savoir s'il constitue un arrangement prévoyant une forme particulière d'indemnisation conformément au par. 8 de cet article — Rappel de la décision n° 146 rendue par la Commission de Conciliation franco-italienne dans l'affaire Collas et Michel.

The Anglo-Italian Conciliation Commission established pursuant to Article 83 of the Treaty of Peace signed on 10 February 1947 between the Allied and Associated Powers and Italy, composed of Avvocato Antonio Sorrentino, Representative of the Government of the Republic of Italy at Rome, and Mr. E. A. S. Brooks, Representative of the Government of Her Britannic Majesty, at London, and of M. Paul Guggenheim, Professor of the Faculty of Law at the University of Geneva and at the Graduate Institute of International Studies at Geneva, in the dispute arising out of the claim by the United Africa Company Limited for compensation pursuant to Article 78, paragraph 4, sub-paragraph (*b*), of the Treaty of Peace, takes cognizance of the following facts:

1. The United Africa Company Limited, hereinafter referred to as "the English Company", was incorporated in England pursuant to the English Companies Acts 1861-1928, on 30 April 1929. It acquired, on 13 November 1929, 10,000 shares in the Società Anonima Africane Riunite (hereinafter referred to as S.A.A.R.), which comprised one-half of the 20,000 shares in the issued capital of the latter undertaking which has its head office at Genoa.

2. S.A.A.R. bought the whole capital of the Compagnia Italiana Depositi Olii Società Anonima (hereinafter referred to as C.I.D.O.S.A.) having its head office also at Genoa. The merger had legal effect as from 26 March 1947.

3. By a contract No. 266 dated 9 January 1933, the Consorzio Autonomo del Porto di Genova, granted to S.A.A.R. a concession for the temporary occupation of an area at Ponte Paleocapa, for the discharge of vegetable oils, for a period of thirty years, at a rental of Lire 30,925. By a contract No. 281 dated 31 January 1934 the Consorzio granted a concession to C.I.D.O.S.A. likewise authorizing it to occupy an area of land known as Paleocapa, in the Port of Genoa, for the purpose of storage installations, for a period of 26 years, commencing on 9 February 1934. By annual licences No. 61 of 20 February 1939 and No. 124 of 24 April 1939, the Consorzio granted certain rights to S.A.A.R. and C.I.D.O.S.A. in connexion with the use of the leased properties.

4. Following the grant of the concessions and the above-mentioned licences, the two companies carried out certain works. On the outbreak of war between the United Kingdom and Italy, the installations were fully active. After the outbreak of hostilities, the two companies, because half of the capital was in the ownership of the claimant, a British Company, were placed under sequestration by the Italian Government. At the request of the Administrator of the sequestrated property, the Consorzio Autonomo del Porto di Genova authorized the transfer of the concessions granted to the companies S.A.A.R. and C.I.D.O.S.A. to the Consorzio Italiano per il Commercio Estero. On 2 June 1941 the Consorzio Autonomo extended the duration of the concessions to 9 March 1965.

5. The Port of Genoa suffered heavy damage in the course of the Second World War, as a result of naval bombardment by the British fleet and aerial bombardment by Allied forces. The property of the S.A.A.R. being thereby severely damaged. Other damage had been caused by German occupying forces and also by the Consorzio Italiano per il Commercio Estero which had conducted the business of the S.A.A.R. during the war. It had removed certain installations during the air raids and hidden dismantled machinery in the mountains.

6. Under Decree Law No. 36 of 1 February 1945 and No. 140 of 26 March 1946, as well as under the Decree of the President of the Council of Ministers of the Italian Republic of 9 April 1946, all provisions and measures taken in relation to property belonging to United Nations nationals were revoked. The S.A.A.R., the C.I.D.O.S.A. as well as the claimant company re-assumed their rights.

7. By legal provisions, the existence of which have not been contested by the parties in the course of these proceedings, the duration of the Consorzio Autonomo del Porto di Genova itself was extended until 30 June 1973. As a consequence the British Government in their claim contend that the greater part, if not all, the concessions granted by the Consorzio were also prolonged to the same date. This statement has not been contested by the Italian Government in the course of the proceedings. It must therefore be considered to be in conformity with the facts.

8. The S.A.A.R. in which the C.I.D.O.S.A. had been merged as mentioned above, obtained an extension of the duration of its concession until 30 June 1973 by a document executed by the Consorzio Autonomo del Porto di Genova on 13 December 1948. The request for an extension of the concession of the S.A.A.R. was dated 25 January 1947. The document prolonging the concession refers to this request in the following manner:

> (i) *Che con domanda in data 25 gennaio 1947 . . . la Società Anonima Africane Riunite S.A.A.R. ha chiesto la proroga, fino al 30 giugno 1973 del contratto . . . in considerazione dei danni subiti, per effetto di azioni di guerra, dal deposito situato alla Calasta Sanità, ed allo scopo di consentire l'ammortizio dei capitali necessari al completo ripristino degli impianti.*
>
> (*Translation:* "That by an application dated 25 January 1947 . . . the Limited Company Africane Riunite S.A.A.R. requested the extension of the contract, until 30 June 1973 . . . in consideration of the damage suffered as the result of acts of war, to the depot situated at Calata Sanita, and for the purpose of permitting the amortization of the capital necessary to put the plant into complete good order.")

The document grants the extension by its Article No. 4 which provides:

La durata del contratto . . . è proragata fino al 30 giugno 1973.

(*Translation:* "The duration of the contract . . . is prolonged until 30 June 1973.")

9. The Treaty of Peace with Italy came into force on 15 September 1947. The claim for compensation for the damage sustained was presented by the claimant company on 2 February 1949, and the amount was specified at Lire 33,018,650. On 7 July 1949 the claim was presented by the Government of the United Kingdom to the Italian Government.

10. On 17 June 1958 the Italian Ministry of the Treasury expressed views on this claim. It was of the opinion that the company should consider its itself as already compensated under Contract No. 369 of 13 December 1948.

The above-mentioned document, *con la quale il Consorzio Autonomo del Porto di Genova ha prorogato a vavore della S.A.A.R. fino al 30 giugno 1973 la convenzione del 9 gennaio 1933, No. 266, risulta che tale proroga è stata richiesta da tale società in considerazione dei danni subiti per effetto di azioni di guerra ed allo scopo di consentire l'ammortizzo dei capitali necessari al completo ripristino degli impianti.*

(*Translation:* "with which the Consorzio Autonomo del Porto di Genova has extended Contract No. 266 of 9 January 1933 in favour of S.A.A.R. until 30 June, 1973. It appears that such extension has been requested by the said company in consideration of the damage suffered as the result of acts of war and for the purpose of permitting the amortization of the capital necessary to put the plant into complete good order.")

11. By *note verbale* of 15 December 1958, Her Majesty's Embassy at Rome informed the Italian Ministry of Foreign Affairs that the British Government "are unable to concur in the aforementioned decision and consequently consider that a dispute within the meaning of Article 83 of the Treaty has arisen . . . which Her Majesty's Government intend to refer to the Anglo-Italian Conciliation Commission unless it is settled by agreement within twenty-one days".

12. The opening submission dated 31 March 1960 was presented by the Agent of the British Government on 18 April 1960. The prayer of the British Government was [that the Commission should]:

(*a*) Affirm that the extensions granted after the war by the Consorzio to the Italian Company do not affect the obligation of the Italian Government to pay compensation under Article 78 (4) (*b*) of the Treaty of Peace with Italy to the Claimant Company;

(*b*) Fix the amount of the liability of the Italian Government at 50% of two-thirds of the sum necessary at the date of payment to repair the damage to the property comprised in the concessions granted by the Consorzio to the Italian Company which at 1949 prices amounted to Lire 33,018,650;

(*c*) Order that the amount of the liability of the Government of Italy so ascertained be paid by the Government of Italy to the Claimant Company;

(*d*) Order that such sum as this Honourable Commission finds to represent the amount of reasonable expenses incurred in establishing the claim including the assessment of loss or damage be paid to the Claimant Company by the Government of Italy;

(*e*) Order that any payment ordered by this Honourable Commission's decision to be paid by the Government of Italy, shall be paid within 60 days from the date of this Honourable Commission's decision;

(*f*) Provide for the costs of and incidental to this Submission;

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

In their Answer of 30 June 1960 the Italian Government prayed the rejection of the British claim. In their Replication of 13 September 1960 the British Government maintained their original demands "in accordance with the prayer contained in paragraph 10 of the Submission dated 31 March 1960".

13. The Representatives of the two governments met in Rome on 9 March 1961, established the points on which they disagreed which form the subject of this controversy.

e ravissata la necissità di riprendere in esame la controversia in presenza di e con l'assistenza del Terzo Membro.

(*Translation:* "and recognized the necessity of re-examining the dispute in the presence of and with the assistance of the Third Member.")

The Third Member appointed on 11 March 1961 by the two Governments, was M. Paul Guggenheim, Professor of the Faculty of Law at the University of Geneva and at the Graduate Institute of International Studies at Geneva. He accepted the nomination.

HAVING CONSIDERED THE LEGAL POSITION:

A.

In favour of their contention that the extension of the concession until 1973 could not be considered as compensation for war damages in substitution for that provided by Article 78 (4) (*b*) of the Treaty of Peace with Italy in favour of United Nations nationals who hold directly or indirectly ownership interests in corporations or associations which are not United Nations nationals (for example: Italian nationals) the British Government adduced the following arguments:

(*a*) The request for the extension of the concession made by S.A.A.R. was made on 25 January 1947 at a time when the Treaty of Peace was not yet in force. The request was therefore made before the right provided by Article 78 (4) (*b*) had come into existence—and moreover was made not to the Italian Government but to an independent organization.

(*b*) The request for extension of the concession made to the Consorzio was not founded upon the right provided by Article 78 (4) (*b*) of the Treaty of Peace which is restricted to United Nations nationals and persons assimilated to them. The two matters, that relating to the extension of the concession and that concerning compensation, are different and should not be confused.

(*c*) As to the opinion expressed by the Italian Government that the damage sustained by S.A.A.R. was compensated by the extension of the concession, this argument would only be valid if it could be proved that if no damage had been sustained the extension of the concession would not be granted. The Italian Government is not, however, in a position to show this. Actually, according to the British Government, all or the greater part of the persons holding concessions from the Consorzio at Genoa without discrimination obtained the extension of their concession to 30 June 1973 independently of whether or not damage had been suffered as a result of the war. The extension of the concessions granted by the Consorzio was a consequence of the extension of the life of the Consorzio itself, the term of which was originally fixed until

1965, but was extended after the war until 30 June 1973. The extension of the concession would, therefore, have been made even if the installations of the S.A.A.R. had not suffered any damage.

(*d*) Even if the main contention of the British Government is not admitted, that is to say if the concession of the S.A.A.R. would not have been extended in the absence of damage sustained by the latter, the right to compensation for the damage would not be excluded. Compensation would, however, in that case be limited to the extent to which the loss had not been made good by the extension of the concession.

B.

The Italian Government replied to the British case as follows:

(*a*) The Italian Government maintain that if 25 January 1947, the date of the request for the extension of the concession by the S.A.A.R., is accepted as the relevant date, the damage no longer existed at the time of the entry into force of the Peace Treaty which took place on 15 September 1947; because Article 78 provides in paragraph 1:

> Insofar as *Italy has not already done so*, Italy shall restore all legal rights and interests of the United Nations and their nationals as they existed on June 10, 1940 . . .

(*b*) On the other hand, if the Conciliation Commission accepts as the relevant date for the compensation of the damage the date of the entry into force of the new agreement (Contract No. 369 of 13 December 1948) that of 28 December 1948—which appears more correct in the opinion of the author of the Italian reply—the agreement relating to the extension of the concession of 13 December 1948 would constitute one of the arrangements which can be substituted "in lieu of the provisions of this Article" in accordance with Article 78 paragraph 8 of the Peace Treaty, that is to say, an arrangement which would replace the provisions relating to restitution and compensation for United Nations nationals and persons deemed to be such.

(*c*) In these circumstances the Italian Government also deny the subsidiary British contention according to which the extension of the concession by eight years (from 1965 to 1973) would have at least partially compensated the damage.

In their reply of 13 September 1960 the British Government maintain their contentions. They point out that some Italian companies obtained compensation for war damages without reference to the fact that their concessions had been extended. This being so, the British reply bases its claim for compensation also upon Article 78, paragraph 4 (*a*), which provides:

> In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals.

C.

The first question to which the Conciliation Commission must reply is the following: Does the extension of the concession from 1963 to 1973 granted by the Consorzio as a result of the agreement of 13 December 1948 constitute compensation of the British company as provided by Article 78, paragraph 4 (*a*) of the Peace Treaty with Italy?

(*a*) A preliminary observation is necessary upon this point. The extension of the concession granted to the S.A.A.R. by the Consorzio does not arise from

a request by the British company, but from a request addressed to the Consorzio by the Italian Company (S.A.A.R.) dated 25 January 1947. This request therefore occurred at a time before the entry into force of the Treaty of Peace.

On the other hand, it was made « *en considération des dommages subis par effet d'actions de guerre* », « *del deposito situato alla Calata Sanità, ed allo scopo di consentire l'ammortizzo dei capitali necessari al completo ripristino degli impianti.* »

(*Translation:* "in consideration of damage suffered as a result of acts of war, to the depot situated at Calata Sanità, and for the purpose of permitting the amortization of the capital necessary to put the plant into complete good order.")

Nevertheless, the reasons which gave rise to the request of the S.A.A.R. are mentioned only in the preamble to the agreement for the extension of the concession of 13 December 1948, and not in Article 4 of that document itself which specifies the extension of the concession until 30 June 1973. The reason for the request for extension given by the S.A.A.R. is not, however, of less importance since the Comitato Consortile (the Comitato of the Consorzio Autonomo of the Port of Genoa) in its preliminary decision of 19 December 1947, decided in favour of this extension without giving any reason. This absence of statement of reasons in favour of the extension of the concession of the S.A.A.R. in the preliminary decision of the competent organization, that is to say, the Comitato Consortile, as well as in Article 4 of the document itself, can be interpreted to mean that the extension is not compensation for the war damage which had been sustained. All the more so, inasmuch as all or the greater part of the holders of concessions from the Consorzio obtained extension of their concessions until 30 June 1973; irrespective of whether they had or had not suffered any war damage. This allegation made by the British Government has not been questioned by the Italian Government in the course of the proceedings. The British contention must therefore be presumed to conform with the facts. It must therefore be admitted that the extension of the concessions in favour of the holders from the Consorzio is the consequence of the extension of the duration of the Consorzio itself to 30 June 1973. Even if the installations of the S.A.A.R. had not been damaged the concession would have been extended. There is consequently no reason to distinguish between the S.A.A.R. and other concession holders from the Consorzio.

(*b*) Furthermore, it must be remembered that the request for the extension by the S.A.A.R. made on 25 January 1947 was made at a time before the entry into force on 15 September 1947 of the Peace Treaty. On the other hand, the claim of the British Company, founded upon Article 78, paragraph 4 (*b*) of the Peace Treaty, dates from a time after the entry into force thereof.

On 2 February 1949, the date of the British Company's claim, the extension of the concession to the S.A.A.R. had already been granted. The claim of the British Company is therefore directed to compensation for actual losses and damage suffered and is based upon the right accorded exclusively to United Nations nationals and persons deemed to be such. This damage is assessed at Lire 33,018,650, whereas the total of the damage sustained was not stated by the S.A.A.R. when on 25 January 1947 it requested an extention of the concession. In these circumstances it is not possible to admit that Italy has already restored the rights and interests of the British Company by extending the concession of the S.A.A.R. to 1973. Such a restoration would only have taken place had the damage specified in the British claim been previously compensated or if the extension of the duration of the concession had been the compensation

sought by the British Company that suffered the damage. The extension of the duration of the concession would therefore have had to correspond to the criterion of reparation of damage laid down by Article 78, paragraph 4 (*a*) of the Peace Treaty. This nevertheless has not been shown in the proceedings of the Conciliation Commission. It is, moreover, impossible, since Article 78, paragraph 4 (*a*) of the Peace Treaty admits as compensation the payment of "a sum in Lire", but does not recognize compensation in the form of the extension of the concession.

(*c*) There remains the question of ascertaining whether, as the Italian reply states, the extension of the concession constitutes one of the "arrangements in lieu of the provisions of this article" (Article 78, paragraph 8 of the Peace Treaty). For this contention to be accepted by the Conciliation Commission it would be necessary to show that the prolongation of the concession had replaced, in accordance with the wish of the Parties—of Italy and of the United Kingdom —compensation in Lire for the war damage. However, the document granting the concession to the S.A.A.R. of 13 December 1948 does not contain any indication supporting such a substitution. It has no clause from which it could be inferred that the extension of the concession would replace compensation for war damages under Article 78, paragraph 4 (*a*) of the Peace Treaty. Moreover, the contract granted by the Consorzio Autonomo del Porto di Genova is signed on the one part by the representatives of the Consorzio and not by the Italian Government, and on the other part by the representatives of the S.A.A.R. and not by the representatives of the British Company. Now only the British Company, a United Nations national, as owner of property which has sustained damage, and the Italian Government themselves, as the party liable to make compensation for the damage would have been competent to conclude an agreement which could fall within the provisions of Article 78, paragraph 8 of the Peace Treaty. It is impossible to substitute for these two contracting parties to the arrangement, the S.A.A.R. on the one hand and the Consorzio on the other unless authority had been delegated to them by the contracting parties. The document of 13 December 1948, however, does not contain any provision enabling it to be asserted that there was any such delegation.

(*d*) Finally, in the statement of their case, the British Government have drawn attention to a decision of the Franco-Italian Conciliation Commission, No. 146 of 21 January 1953, in the case of Collas and Michel (4th volume, page 140, of the Collection of Decisions of the Franco-Italian Conciliation Commission.)[1] The passage in question reads:

La Commission de conciliation retient avant tout que les amortissements internes que la propriétaire d'un bien peut avoir faits à titre de mesure de prudence, ou même en application d'une obligation légale, ne diminuent pas la valeur du bien en question à l'égard d'un tiers tenu à indemniser, soit en vertu du droit interne, soit en vertu d'une obligation internationale. Par contre, la valeur intrinsèque des installations construites pour l'exploitation d'une concession d'Etat ne peut être déterminée en faisant abstraction de la cause de la concession elle-même.

(*Translation:* "The Conciliation Commission accepts in the first place that the amortization which the proprietor of a property may have effected for his own purposes, out of prudence, or even in compliance with a legal obligation, does not diminish the value of the property in question in relation to a third person who is liable to indemnify him, whether under either domestic law or some in-

[1] Volume XIII of these *Reports*.

ternational obligation. On the other hand, the intrinsic value of the installations constructed to exploit a State concession cannot be determined without taking into consideration the reason for the concession itself.")

In the opinion of the British Government this passage from the above-mentioned decision of the Franco-Italian Conciliation Commission justifies the conclusion that the "improvement of assets" of the S.A.A.R. Company by the fact of the extension of the concession would not diminish the obligation of the Italian Government to make reparation for the damage in relation to the British Company. This view of the Government of the United Kingdom is correct. The prolongation of the concession of the S.A.A.R. has thus not diminished the damage which Italy is bound to compensate by virtue of its obligation under Article 78 of the Peace Treaty in relation to the British Company.

(*e*) In these circumstances it is not necessary for the Conciliation Commission to examine whether the Italian Government are right when they assert that the agreements concluded by the Consorzio Autonomo del Porto di Genova come from an entity indistinguishable from the State, or whether the agreements with the Consorzio were made by an entity independent of the Italian Government, as the British Government affirm.

In fact, if the extension of the concession is not the compensation due under the Peace Treaty and if no arrangement has been made for the purpose of substituting another form of compensation for this compensation in Lire, the question whether the authority prolonging the concession is identical or not with the Italian State is of no importance for the solution of this dispute.

(*f*) Neither need the Conciliation Commission examine the argument of the United Kingdom Government in its subsidiary contention that the extension of the concession in favour of the S.A.A.R. provided only partial compensation for the damage sustained by the British Company.

(*g*) The Conciliation Commission records that the Italian Government could have raised other defences. But as they have not done so, the Conciliation Commission considers that it should not take them into account since it is under no legal obligation to do so.

(*h*) So far as the amount of the damage to be made good is concerned, it has been calculated in "Allegato E" annexed to the British claim of 2 February 1949, at Lire 33,018,650 at 1949 values. It includes damages sustained by the S.A.A.R. (Società Anonima Africane Riunite) as well as damage suffered by the C.I.D.O.S.A. (Compagnia Italiana Depositi Olii Società Anonima). As the function of the Conciliation Commission as at present convened is to decide only the questions essential to the dispute, the discussion concerning the amount of the compensation to be paid by the Italian Government will be undertaken later between the respective Representatives of the Italian Government and the Government of the United Kingdom.

DECIDES THAT:

(*a*) The claim of the United Kingdom Government is accepted in principle:

(*b*) A period of three months from the notification of the present decision is fixed for the Italian Government and the British Government to agree upon

the amount to be awarded to the British Company (The United Africa Company Ltd.);

(*c*) The present decision is final and binding.

DONE at Geneva, 15th July, 1961.

Representative of Italy on the Anglo-Italian Conciliation Commission

A. SORRENTINO

Representative of the United Kingdom of Great Britain and Northern Ireland on the Anglo-Italian Conciliation Commission

E. A. S. BROOKS

The Third Member of the Anglo-Italian Conciliation Commission

M. Paul GUGGENHEIM

THEODOROU CASE—DECISION No. 190 OF 25 JULY 1961

Claims for compensation under Article 78 of Peace Treaty—War damages sustained by enemy property—Ownership of property at time of acts causing damages—Evidence of—Transfer of ownership—Whether property validly transferred under marriage contract—Effect of transfer of property by marriage contract on spouses's rights to present claim—Nationality of claimant as basis of claim—Evaluation of amount of damages compensable—Evidence—Power of Conciliation Commission to decide on admissibility and value of—Place of equity in determination of damages— Reference to decisions handed down by Franco-Italian Conciliation Commission and other Mixed Commissions—Inadmissibility of claim—Delay in presentation of claim.

Demande en indemnisation au titre de l'article 78 du Traité de Paix — Dommages de guerre causés à des biens ennemis — Appartenance des biens au moment du dommage — Transfert de propriété — Validité d'un transfert effectué en vertu d'un contrat de mariage — Effet d'un tel transfert sur le droit des conjoints de se prévaloir de l'article 78 du Traité de Paix — Nationalité du réclamant prise comme base de la réclamation — Evaluation des dommages indemnisables — Preuve — Pouvoir de la Commission de Conciliation de juger l'admissibilité et la valeur des preuves — Place de l'équité dans la détermination des dommages — Rappel de certaines décisions rendues par la Commission de Conciliation franco-italienne et par d'autres Commissions Mixtes — Irrecevabilité — Retard dans la présentation de la réclamation.

Dispute relating to the claims of Mr. Gregory Alfred Theodorou (No. 3175 and No. 3175B) in the series presented by the Government of Her Britannic Majesty to the Government of the Italian Republic.

The Anglo-Italian Conciliation Commission established pursuant to Article 83 of the Treaty of Peace signed on 10 February 1947, between the Allied and Associated Powers and Italy, composed of: Avvocato Antonio Sorrentino, Representative of the Government of the Republic of Italy, Rome, Mr. E. A. S. Brooks, Representative of Her Britannic Majesty's Government, London, and of Monsieur Paul Guggenheim, Professor of the Faculty of Law at the University of Geneva, and at the Graduate Institute of International Studies at Geneva, Third Member appointed by agreement by the Italian and British Governments, in the dispute arising as a result of the claims for compensation of the above named, takes cognizance of the following facts:

1. The Ambassador of Her Britannic Majesty by a Note dated 16 November 1950 presented a claim (hereinafter called the first claim) dated 22 May 1950 (No. 3175) signed by Gregory Alfred Theodorou, a British subject (hereinafter called the claimant).

This first claim relates to an immovable property situated at Pothea, district of St. Jean Theologou in the island of Kalymnos, Dodecanese (hereinafter called: the house). The claimant alleges that he is the owner of the said house which was transferred to his ownership by his father-in-law Schevos M. Alachouzos, under a contract of marriage dated 4 January 1937.

The claimant alleges that during the first months of the German occupation of the Island during the Second World War, German soldiers frequently entered the house and looted it in such a manner that it was practically emptied. As evidence there is annexed to the claim in the first place a declaration dated 21 November 1945 addressed to the British Political Administration, by the Claimant's father-in-law Schevos Alachouzos. In this document the damage caused to the house and its contents was estimated "on the most conservative estimate" at about £ 3,000.

2. Another means of evidence put forward by the claimant is a declaration by the Mayor of Kalymnos dated 15 July 1952. It affirms "his dwelling house in the vicinity of St. Theologou was bombarded in October 1943, suffered severe damage and was looted".

In addition, the claimant supports his claim with a declaration of 5 July 1952 by Engineer George M. Hatzitheodorou. The latter states that he was invited by the claimant in 1946 "to undertake by contract, the restoration of the damaged building belonging to him . . . having made an autopsy, and procedeed to estimate the cost, I asked for the sum of £10,000, to undertake to execute the above repairs".

The claimant found the estimate, which referred only to the restoration of the house and not to the compensation for its contents, unsatisfactory. He did not accept it.

Mr. Theodorou further relies on certain declarations of artisans who carried out repairs to the house between 1945 and 1949. By a declaration of 17 July 1952, before a local notary, two workmen, Michael Skevou Magkoulias and Hlias Skevou Alahouzou, have stated that they carried out repairs between 1945 and 1949 as a result of the bombardment of the house in 1943. The total cost for work, material and expenses amounted to lire 3,470,000. On the same date, two other artisans, George Anastasiou Roussos and Hlias Skevou Alahouzou, made similar declarations, according to which certain repairs were effected between 1945 and 1949, the total cost of which amount to lire 5,590,000.

Finally a third declaration attached was made by a certain Roditis and the

above name Alahouzou, a declaration which concerns further repairs carried out between 1945 and 1949. Their cost was lire 3,140,000.

3. A third category of evidence which relates not to the value of the house itself, but to its contents, is provided by a London sponge merchant Andreas Emmanuel Tyrakis, who claimed to know the house in Kalymnos. He estimates the value of the contents between £15,000 and £20,000. A similar declaration by a certain Xeni Pelecanos, domiciled in Paris, dated 20 June 1952, claims that the contents of the house were worth £15,000. Compare also the declaration made by Constantin Tsangaris, also domiciled in Paris, dated 20 June 1952, which estimated the contents of the house at £14,000.

4. The Ambassador of Her Britannic Majesty by a Note dated 9 July 1954, presented to the Ministry of Foreign Affairs another claim (hereinafter called the second claim). This relates to the following facts:

(*a*) The claimant alleges that the contents of six warehouses situate at Kalymnos which contained amongst other things sponges, and which had been rented by him, had been looted by the German and Italian armed forces.

(*b*) In addition, a warehouse annexed to the house mentioned in the first claim had been damaged during a bombardment of the island of Kalymnos by the British Fleet in October 1943. The contents had already been previously looted by the Italian and German armed forces.

In evidence of the existence of this second claim, the claimant submitted different documents to the British and Italian authorities. In the first place a declaration by the Mayor of Kalymnos dated 15 July 1952 which sets out the following facts:

> His seven warehouses were also looted by the Italian authorities, who removed their entire contents, e.g., sponges, timber, and different materials essential merchandise for the preparation of sponges.

In addition, the claimant alleges that the warehouses which belonged to him, had been acquired on 4 January 1937 under the abovementioned contract of marriage, and that the warehouses which had been rented had been so rented in 1937, 1938 and 1939. The claimant in addition relies as proof on affidavits No. 2287 and No. 2288 drawn up by a Notary Public at Kalymnos made by local merchants in the sponge business as was the claimant. The affidavit sworn by a certain Kalojiannis on 17 July 1952 (affidavit No. 2287), estimated the value of the contents of the warehouses at £65,000. The affidavit sworn by a certain Kouremetis (affidavit No. 2288) of the same date estimated the value of the damage caused to the claimant at £60,000. In addition the claimant relies on a declaration of his father-in-law Schevos Alachouzos made to the British Administration on 21 November 1945. Alachouzos estimated the damage caused at £4,000 whilst claiming that it was a question of his own loss and not that of his son-in-law, the claimant.

5. On 23 October 1951 the Italian Ministry of the Treasury sent a Note to the British Embassy, requesting additional information with regard to the first claim. The Note in particular points out that "*I predetti reclamanti hanno omesso di inserire nei loro reclami qualsiasi indicazione circa i beni danneggiati o perduti limitendosi solamente a richiedere una somma forfettaria*". (*Translation*: "The said claimants have omitted to insert in their claims any details as to the property damaged or lost limiting themselves solely to claiming a lump sum.")

The Ministry of the Treasury requested an inventory of the lost furniture with an indication of the value of each article.

On 16 September 1952 the claimant sent his observations on the subject of

the Italian requests to the British Embassy in Rome. The amounts claimed as compensation were as follows:

	Lire
(*a*) For the repair of the immovable property.	12.200.000
(*b*) For the damage caused to the movable property . .	23.760.000
	35.960.000

The claimant's letter was sent by the British Embassy to the Italian Ministry of the Treasury.

6. The British Embassy were informed by a Note dated 13 February 1957, addressed to them by the Italian Ministry of the Treasury, that the two claims had been submitted to an Interministerial Committee set up under Article 6 of Italian law No. 908 of the 1st of December, 1949. At its meeting on 23 November 1956 this Committee refused to take the two claims into consideration. It expressed its opinion in the following manner:

Considerato che il Sig. Gregory Alfred Theodorou, cittadino britannico, ha, con tre reclami, avanzato, ai sensi dell' art. 78 del Trattato di pace, richiesta di risarcimento dei seguenti denni di guerra:

1) *danni a un fabbricato in Calimno;*

2) *danni a beni mobili di abitezione;*

3) . . .

4) *perdita di merci varie contenute in un magazzino in Calimno;*

rilevato che i predetti beni non furono sottopsti ad alcuna misura prevista dalle leggi di guerra;

considerato che nessuna prova idonea è stata fornita in ordine alla proprietà del fabbricato;

non possono infatti tener luego certificati catastali e delle trascrizioni le copie informi dell' atto di donazione e quelle di proventivi e fatture per lavori che si assoriscono eseguiti;

che, del pari, per quanto riguarda i mobili di abitazione nessuna documentazione concreta prova la loro preesistanza, consistenza, valore e proprietà;

. . .

che, infine, molto incerte e generiche sono le dichiarazioni dell' istante per quanto reguarda le merci, che sono da ritenersi, invece, di proprietà del suocero;

che, pertanto, a prescindere da ogni altro accertamento anche per quanto riguardà il valore dei danni, denuciati con manifesta esagerazione, il reclamo si appalesa del tutto infondato;

esprime l'avviso che i reclami del Signor Gregory Alfred Theodorou debbano essere respinti.

(*Translation:* "Considering that Mr. Gregory Alfred Theodorou a British subject has by three claims put forward in accordance with Article 78 of the Treaty of Peace, requested compensation for the following war damage:

(i) Damage to a building in Kalymnos,

(ii) Damage to furniture in a house,

(iii) . . .

(iv) The loss of various merchandise contained in a warehouse in Kalymnos;

Considering that the above mentioned property was not subjected to any measure foreseen by the laws of war;

considering that no appropriate proof has been furnished as to the ownership of the building;

in fact the informal copies of the act of donation and of estimates and invoices for works stated to have been carried out, cannot take the place of land registry certificates and certificates of transcription;

that equally, as regards the household effects, there is no concrete documentation to prove the pre-existence, details, value and ownership of the same;

. . .

that finally, the claimant's statements appear most uncertain and vague as regards the goods, which are to be considered instead as belonging to his father-in-law;

that, therefore, leaving aside any other inquiries as regards also the value of the damage, the amount of which has been obviously exaggerated, the claim appears to be completely unfounded;

expresses the opinion that the claims of Mr. Gregory Alfred Theodorou must be rejected.")

7. By a *note verbale* of 25 September 1957 the Embassy of Her Britannic Majesty informed the Ministry of Foreign Affairs of Italy that they were not prepared to accept the conclusions at which the Interministerial Committee had arrived. In these circumstances, the Government of Her Britannic Majesty considered that a dispute within the meaning of Article 83 of the Treaty of Peace had arisen between the Government of the United Kingdom of Great Britain and Northern Ireland and the Italian Government, which the Government of Her Britannic Majesty intended to submit to the Anglo-Italian Conciliation Commission if the dispute had not been resolved by agreement within a period of 21 days.

8. On 5 June 1959 the Agent of the British Government sent to the Conciliation Commission his Submission. He moved that the Conciliation Commission should give its decision on the basis of the reasons set out in the said Submission, as well as upon principles of justice and equity relative to the case in question. He requested that the Commission:

(1) Affirm that the claimant has proved:

(*a*) His title to the house;

(*b*) The cost of repairing the house;

(*c*) The pre-existence, details, value and ownership of the contents;

(*d*) His ownership of the goods in the rented warehouses and claimant's warehouse;

(*e*) The cost of replacing the lost goods and repairing the claimant's warehouse.

(2) Affirm the liability of the Government of Italy:

(*a*) To pay two-thirds of the sum necessary at the time of payment to restore the house to complete good order;

(*b*) To pay two-thirds of the sum necessary at the date of payment to purchase property similar to the contents;

(*c*) To pay two-thirds of the sum necessary at the date of payment to purchase property similar to the contents of the rented warehouses and the claimant's warehouse and to restore the claimant's warehouse to complete good order.

As to the claim itself, the Government of the United Kingdom raised the following submissions:

Fix the amount of the liability of the Government of Italy:

(*a*) Under (1) (*a*) at two-thirds of the product of multiplying lire 12,220,000 by such factor as is necessary to adjust building costs ruling in 1950 to those ruling in the month in which this Honourable Commission pronounces its decision or such other sum as may be just and equitable;

(*b*) Under (1) (*b*) at two-thirds of the product of multiplying lire 23,760,000 by such factor as is necessary to adjust the prices of household articles ruling in 1950 to those ruling in the month in which this Honourable Commission pronounces its decision or such other sum as may be just and equitable;

(*c*) Under (1) (*c*) at two-thirds of the product of multiplying lire 105,175,000 by such factor as is necessary to adjust the prices of goods similar to those in the warehouses and to building costs ruling in 1953 to those ruling in the month in which this Honourable Commission pronounces its decision or such other sum as may be just and equitable.

9. The Agent of the Italian Government sent his Reply dated 11 November 1959 to the Conciliation Commission on 14 November 1959.

He submitted so far as concerned the first claim:

Che si prospetti inaccoglibile il 1° reclamo in data 22 maggio 1950 relativo a beni immobili e mobili di abitazione.

(*Translation:* "that the 1st claim dated 22 May 1950 relating to immovable property and household furniture is to be considered inacceptable.")

and as to the second claim:

Che per quanto concerne infine il . . . reclamo in data 27 maggio 1953 relativo alla presunta perdita per asportazione, delle merci di magazzino (spugne, materiale chimico, macchinari, ecc.) si retiene che sia da escludere ogni e qualsiasi indemnizzo perchè i danni sono da considerare insussistenti.

(*Translation:* "that finally as regards the . . . claim dated 27 May 1953 as to the alleged loss by looting of goods in the warehouses (sponges, chemical material, machinery etc.) it must be considered that all and any compensation is to be excluded as the loss must be considered as non-existing.")

10. The Agent of the British Government deposited his Replication with the Conciliation Commission on 6 May 1960:

(*a*) As to the first claim he asserted:

With regard to the proof of ownership, the Learned Agent of the Italian Government has completely ignored the Statement of Law in the Dodecanese (Document No. 4 in the File of Documents) as supported by the Statement of Dott. Giuseppe Lavitola, exhibit No. 11 to Document No. 4 and the Certificate of the Greek Consul-General in London, exhibit No. 12 to Document No. 4.

In the respectful submission of the Agent of Her Majesty's Government the above documents clearly show that the registration of land and movables was not necessary or possible in Kalymnos in respect of property the subject of the marriage settlement.

The house and contents became the property of the claimant on marriage and the house has been since that date and still is his property, and he has produced the only legal document possible to prove such ownership.

With regard to the contents, these too became the property of the claimant by virtue of the marriage settlement and all the furniture and fittings were in the house at the outbreak of war.

(*b*) With regard to the second claim the British Agent pointed out:

The Agent of Her Majesty's Government can only refer to the explanations given by the claimant in his statutory declaration (that is to say in a document annexed to the claim and which is in the file) and submit that in all the circumstances the explanations of the claimant should be accepted by this Honourable Commission.

11. The Italian Representative and the British Representative in the Conciliation Commission met in Rome on 1 July 1960. At this session they arrived at the following conclusion:

Visto che gli argomenti giuridici sollevati dagli Agenti dei due Governi con riferimento a prove di diritto di proprietà di immobili nel Dodecaneso, sono in completo contrasto fra di loro, la Commissione ordina che l'Agente del Governo Italiano chieda informazioni in merito alle compententi Autorità nel Dodecaneso.

Le domande da rivolgere alle dette Autorità verrano concordate di comune accordo fra gli Agenti dei due Governi.

(*Translation:* "Whereas the juridical arguments raised by the Agents of the two Governments with reference to the proof as to the ownership of immovable property in the Dodecanese, are mutually contradictory, the Commission orders that the Agent of the Italian Government should ask information in respect thereof of the competent authority in the Dodecanese. The questions to be submitted to the said authority are to be settled by agreement between the Agents of the two Governments.")

12. A questionnaire was subsequently sent through the Italian Consulate at Rhodes to the Préfecture of Rhodes in the Dodecanese which sent it to the Land Registry Office at Kalymnos with a view to clarifying certain disputed facts. On 25 October 1960, in reply to this questionnaire, the official in charge of the Land Registry Office of Kalymnos stated amongst other things:

Certificati di proprietà, in particolare sulla esistenza di gravami e debiti a carico di immobili, venivano rilasciati dal solo relativamente conservato Registro delle Ipoteche, a volte anche in forma consue tudinaria, oppure si annotavano appunti sui documenti di proprietà degli interessati, sia provenienti dagli archivi del Comune, sia trattandosi di semplici contratti di "matrimonio".

(*Translation:* "Certificates of ownership, in particular regarding the existence of burdens and debts encumbering the immovable property, were issued by the only partially kept Register of Mortgages, sometimes even in a customary form, or else notes were made on the ownership documents of the interested parties, whether coming from the archives of the Commune or being merely marriage settlements.")

13. The Representative of Italy and the Representative of Great Britain met again on 14 April 1961 to record their disagreement on the various points which form the subject of the dispute, after having also taken note of the report of the official in charge of the Land Registry Office of Kalymnos. In these circumstances, the Italian and British Governments agreed to refer to the Third Member contemplated by Article 83 of the Treaty of Peace with Italy. They have called upon Mr. Paul Guggenheim, Professor at the Faculty of Law of the University of Geneva and at the Graduate Institute of International Studies. The latter accepted the mandate.

14. The Conciliation Commission so constituted considered the case on 9 and 10 July 1961 at Geneva.

CONSIDERATIONS OF LAW:

A. The Italian Government and the British Government are in fundamental disagreement on a certain number of questions of fact and of law relating to the two claims for compensation of A. Theodorou. The following questions are at issue:

(*a*) Is the claimant, a British subject, entitled as he alleges, to be regarded as owner of the immovable property situate at Pothea, district of St. Jean Theologou on the Isle of Kalymnos, Dodecanese, transferred to him or to his wife by the contract of marriage of 4 January 1937?

(*b*) If the Conciliation Commission gives an affirmative reply to question (*a*), the question then arises whether the house and the articles which were in it have suffered during the war, damage compensable under Article 78, paragraph 4 (*a*) of the Treaty of Peace with Italy.

(*c*) In the case of an affirmative reply to question (*b*), what compensation ought to be awarded to the claimant?

(*d*) Has the claimant suffered damage compensable under Article 78, paragraph 4 (*a*) of the Treaty of Peace with Italy as a result of the looting by the German and Italian forces of the warehouses rented by him and also as a result of a warehouse annexed to the house mentioned under (*a*) having suffered from a bombardment of the Island of Kalymnos in 1943 and from previous looting by the Italian and german armed forces?

(*e*) In the case of an affirmative reply to question (*d*) what compensation ought to be awarded to the claimant?

B. As evidence of his ownership of the property situate at Pothea, the claimant has submitted to the British and Italian authorities various documents, some of which have already been mentioned above.

(1) In the first place the contract of marriage entered into on the 4 January 1937, which provides under No. 1 that the dowry of the fiancée consists of "the dwelling house . . . together with all furniture and contents as it now stands".

(2) The declaration of the Mayor of Kalymnos of 15 July 1952 already mentioned, certifying the existence of the house.

(3) The above-mentioned declarations of 4 June 1952 signed by Andreas Emmanuel Tyrakis, a London sponge merchant, and Constantin Tsangaris, a Paris sponge merchant, confirming that they knew that the house belonged to Mr. Theodorou.

(4) In addition there may be mentioned the declaration of the Land Registry Office of Kalymnos of 25 October 1960 mentioned above in reply to a questionnaire addressed by the Agents of the two Governments to the Préfecture of the Dodecanese.
The relevant passage is the following:

> *Comunque è notorio a Calino che egli (Theodorou) possiede un notevole patrimonio a Calino sia per dote sia per donazione da parte del padre, sia per acquisti effettuati nel passato, tanto da essere considerato uno dei maggiori proprietari dell' isola.*
>
> (*Translation:* "However it is well known in Kalymnos that he (Theodorou) possessed a considerable patrimony at Kalymnos both by dowry as well as by gift on the part of his father, as well as by purchases affected in the past, so much so as to be considered one of the larger landowners of the Island.")

C. 1. The first question which arises is to know if at the time of the acts causing the damage "the house" was the property of the claimant or of his wife, in such a way that Theodorou was entitled to present a claim in respect thereof. The Italian reply to the Submission denies this for two reasons:

(*a*) "*perchè manca la prova della preesistenza al danno per i beni mobili ed immobili*", *en particulier* "*i documenti probatori della loro sussistenza*",

(*b*) "*perchè anche se si fosse raggiunta tale prova, si ignora a chi i beni appartenovano alla epoca del danno*".

(*Translation:* (*a*) "Because of the lack of proof of the pre-existence of the movable and immovable property before the damage" in particular "the probatory documents as to their existence",

(*b*) "Also because even if such proof were obtained, it is not known to whom the property belonged at the time of the damage".)

2. On the other hand, the Submission of the British Government considers that the above mentioned contract of marriage is sufficient proof of the transfer of the ownership of the house to the husband or the wife. This is how it is expressed:

"It is respectfully pointed out to this Honourable Commission that by virtue of the laws, customs and usages in force in the Dodecanese at that time, there was no necessity for registration or transcription; in fact, on the Island of Kalymnos this was not possible."

In support of this contention the British submission refers to a legal opinion prepared by Proc. Dott. Giuseppe Lavitola dated 3 March 1958 attached to the file. This opinion reaches the conclusion that at the time of the celebration of the marriage there was not at Kalymnos a register of transcriptions of ownership, but only a register of mortgages. This statement is corroborated by the above-mentioned declaration of the Land Registry Office of Kalymnos which on 25 October 1960 stated as follows:

A Calino, nel periodo 1924-1937, non sono mai esistiti registri catastali nè registri di trascrizioni nel senso delle leggi elleniche. Per consuetudine sia nel periodo della dominazione turca che in quello della occupazione italiana, i contratti venivano registrati in cartelle e non in fogli separati a numero progressivo e specco la numerazione incominciava da principio con ogni nuovo Sindaco eletto. Il Comune conserva pertanto un archivio di contratti e non un archivio catastale. Le donazioni e contratti di matrimonio venivano redatti comunemente a mano ed erano valevoli indipendentemente dalla registrazione del documento nel Codice della Metropoli, pertanto la registrazione avveniva per consuetudine senza una apposita disposizione. I Tribunali oggi riconoscono validi tali documenti.

Certificati di proprietà, in particolare sulla esistenza di gravami e debiti a carico di immobili, venivano rilasciati dal solo relativemente conservato Registro delle Ipoteche, a volte anche in forma consuetudinaria, oppure si annotavano appunti sui documenti di proprietà degli interessati, sia provenienti dagli archivi del Comune, sia trattandosi di semplici contratti di mattimonio.

(*Translation:* "At Kalymnos during the period 1924-1937 no land registers or transcription registers existed in the sense of the Greek laws. It was the usual practice both during the period of the Turkish domination and that of the Italian occupation, for contracts to be registered in dossiers and not in separate sheets with a progressive number and often the numbering started from the beginning every time a new Mayor was elected. The Commune keeps, therefore, an Archive of contracts and not a land registry archive. Gifts and marriage settlements were usually made out by hand and were valid independently from the registration of the document in the *Codice Della Metropoli*: therefore, the registration was done habitually without any special provision. The courts today recognize these documents as valid. Certificates of ownership, in particular regarding the existence of burdens and debts encumbering the immovable property, were issued from

the register of mortgages which was the only one even relatively kept up. Sometimes even in a customary form, or else they were noted on the actual ownership documents of the interested parties, whether these came from the archives of the Commune or were merely marriage settlements.")

3. In the opinion of the Conciliation Commission, it can be considered as ascertained, *that in principle*, a contract of marriage could effect the transfer of ownership in Kalymnos in 1937. All the same, even accepting this point of view, it is still necessary to examine whether, in this particular case, the transfer took place in such a way that the claimant is entitled as a result of this procedure to claim rights of ownership so far as concerns "the house". According to information supplied by the claimant, he had the contract of marriage registered with the Italian Commissioner acting as Mayor. Although the register relating to records of the Commune of Kalymnos for the year 1937 had been destroyed during the war as a result of a bombardment (see declaration of the official in charge of the Land Registry Office of Kalymnos of 25 October 1960), the marriage contract itself bears the following endorsement:

De Publ. Municipio di Calino: si dichiara che gli immobili compresi del presente atto di dote sono liberi di qualsiasi ipoteca nei registri di questo comune. Calino, li 3 febbráio 1937. XV. Il Commissario per il comune di Calino.

(*Translation:* "De Publ. The Municipality of Kalymnos: it is declared that the immovable properties comprised in the present deed of donation are free of any charges in the registers of this Commune. Kalymnos, 3 February 1937. XV. The Commissioner for the Commune of Kalymnos.")

In view of this situation, the Conciliation Commission accepts the statement made in the above-mentioned legal opinion of Avv. Lavitola (Document No. 4):

Mr. G. A. Theodorou could not produce a more reliable proof than a declaration of the Mayor of Kalymnos legalised by the Prefect of the Dodecanese, testifying that the local customs did not need any special form for the validity of a dowry contract and that such deeds as well as those of donation and transfers in general, were traditionally drawn up in the form of private documents.

4. However, even if the Conciliation Commission arrives at the conclusion that the contract of marriage was capable of transferring "the house" of the claimant, it is not certain that the transfer had the effects claimed by the British Government. Actually, the contract of marriage of 4 January 1937 does no more than define the dowry of the bride. (*Stabilisce la dote della sposa*). It does not indicate *who* is the owner of the dowry, either the husband, the claimant in this case, or his wife. Now, the latter has not presented a claim for compensation to the Italian authorities in accordance with Article 78 (2) of the Treaty of Peace. Assuming that, in conformity with the law applicable to the matrimonial rights of the Theodorou spouses, the beneficiary of the transfer of the dowry would have been the future wife and not the future husband, several further questions have to be examined, questions which have not been brought into issue between the parties during the course of the proceedings:

(1) To decide whether Mrs. Theodorou would have been eligible to make a claim for compensation, this being possible only for nationals of the United Nations as defined in Article 78 paragraph 9 of the Treaty of Peace. The Conciliation Commission does not hesitate to accept that Mrs. Theodorou was a British subject after her marriage which took place at the beginning of the year 1937. She was therefore a national of the United Nations as defined in Article 78, paragraph 9 of the Treaty of Peace. Mrs. Theodorou's status of

British subject derives from the British Nationality and Status of Aliens Acts 1914-1943, the applicable ones in the present instance. These Acts provide for the acquisition by a wife, of British nationality on marriage. Such is certainly the case for persons of Italian nationality marrying a foreigner—as was the case of Mrs. Theodorou—according to Article 10 of the Italian law on nationality of 13 June 1912. Mrs. Theodorou must therefore be considered as a British subject from the date of her marriage, having thereby lost her Italian nationality. In consequence, she would have had the benefit of the right to demand compensation for war damage in accordance with the provisions of Article 78 of the Treaty of Peace.

(2) The question then arises on the hypothesis that "the house" which was transferred by the marriage contract became the property of Mrs. Theodorou, a British subject, and whether she ought not *herself* to have presented a claim for compensation in her own name, which in fact she did not do. On this point the Conciliation Commission must take note that the Italian Government did not raise any objection to the claim of Mr. Theodorou during the course of the proceedings on the grounds of inadmissibility. There is therefore ground to presume that, on the hypothesis that Mrs. Theodorou ought to be considered as the owner of the house and of its contents, by virtue of the matrimonial rights applicable to the two spouses, the claim for compensation of Mr. Theodorou covers—according to the opinion of the Italian Government—equally the claim which could have been made separately by his wife. Furthermore, in this case, the interest in establishing the claim for compensation was the same for both the spouses, whatever were their matrimonial rights at the date when the marriage was contracted. In these circumstances, Mrs. Theodorou also has not objected to her husband's claim for compensation, the Conciliation Commission must accept that the claim of Mr. Theodorou was made in the name and on behalf of his wife. The admissibility of Mr. Theodorou's claim even on the hypothesis of Mrs. Theodorou being the owner of the house and of its contents cannot therefore be seriously contested.

D. Having reached the conclusion that "the house" and its contents were validly transferred and that the claim for compensation of the claimant is admissible, the Conciliation Commission must answer the question whether during the war "the house" and its contents suffered damage compensable in accordance with Article 78, paragraph 4, of the Treaty of Peace with Italy.

(*a*) There is no doubt that, in spite of the absence of an inventory, the house was furnished. This appears not only from the statements of certain persons who knew the house, all contained in the file, but also and above all from the above mentioned declaration of the Director of the Land Registry Office of Kalymnos dated 25 October 1960. The contention in the Italian reply (pages 10 and 11) that the claimant has not established by probatory documents the existence of the definite contents of the house cannot therefore be accepted. The Conciliation Commission which by virtue of the Rules of Procedure, has a wide discretion in assessing the evidence available to and produced by the parties is all the more of the opinion that the house was well furnished, because it is a matter of public knowledge that the claimant at the time of the marriage was a rich man; that this was equally the case of his wife, the only daughter of a businessman, belonging to one of the well-known families of the Dodecanese. There is not any reason to be surprised that the contract of marriage did not have attached to it an inventory of goods which were in the house at the time of its transfer to the claimant, such an inventory not always having been taken at the time the contract of marriage is concluded.

(*b*) So far as concerns the evaluation of the amount of loss compensable,

there is need to distinguish on the one hand the damage caused to the house itself, and on the other hand the loss arising from the fact that the house had been almost entirely emptied as a result of looting.

The Conciliation Commission, after a thorough examination of the various pieces of evidence has arrived at the conclusion that the loss has in principle been proved, but that the exact amount cannot be established or is difficult to determine, partly because of the same events which caused the damage, and partly by reason of the fact that the evidence adduced is not sufficiently precise.

(*c*) The Conciliation Commission has decided in these circumstances to determine equitably the amount of the compensation, being guided by certain precedents in the decided cases of the Italo-French Conciliation Commission established in accordance with Article 83 of the Treaty of Peace. This latter Commission made final determinations of the loss in the Sandron dispute on 18 May 1950 (Fasc. II, page 45).[1] See also the Squarciafichi dispute (Fasc. II, page 89), as well as the Assayas dispute (Fasc. IV, page 171) and in particular the Asseo-Pelosoff dispute (Fasc. V, page 295), where it is stated:

> That the Commission . . . cannot in this incertitude, do otherwise than fix a single lump sum as compensation taking into account the state of the home as it then existed, for the total of the heads of Claim, including therein the expenses of "establishing the claim".

(*d*) An estimate of compensation in the absence of details of evidence has also been admitted by other mixed commissions. In particular, in the celebrated decision in the Pinson case between France and the United States of Mexico of 19 October 1928, its President, Verzijl, went into the question of the admissibility of an equitable indemnity. This is how President Verzijl expressed himself:[2]

> *. . . en tout cas, la convention ne limite en rien le pouvoir de la Commission de juger l'admissibilité et la valeur des preuves. Dans ces conditions, elle doit être réputée avoir une parfaite liberté d'appréciation, une restriction de cette liberté ne résultant pas non plus d'un principe général quelconque du droit international public en matière d'arbitrage . . . Etant donné que le droit international n'a jamais élaboré de règles précises sur les conditions auxquelles doit satisfaire la preuve devant les tribunaux internationaux, et que ceux-ci ont généralement bénéficié d'une grande liberté, que leur permet d'apprécier les preuves selon les circonstances normales ou anormales dans lesquelles il a fallu les recueillir, l'équité y reste tout de même . . . Si l'usage du mot « equité » dans ce contexte se heurte à des objections, je suis tout disposé à le remplacer par « liberté d'apprécier les preuves selon les circonstances concommittantes ».*

(*Translation:* ". . . in any case, the convention does not in any way limit the power of the Commission to decide on the admissibility and value of evidence. In these circumstances, it must be assumed to have complete freedom of appreciation, a restriction of such freedom does not appear to be anymore a general principle of public international law on the subject of arbitration . . . Admitting that international law has never drawn up precise rules as to the conditions to be satisfied by evidence before international tribunals, and that they had generally benefited by great freedom, which permitted them to evaluate evidence according to the normal or abnormal circumstances in which the evidence happened to have been got together, equity remained all the same . . . If the use of the word "equity" in this context runs up against objections, I am quite prepared

[1] Volume XIII of these *Reports*, decision No. 53.
[2] Volume V of these *Reports*, pp. 412 et seqs.

to replace it by 'freedom to evaluate evidence according to the attendant circumstances' ".)

(*e*) In this particular case, the amount to be awarded to the claimant for the loss of the contents of his house ought then to be established taking into account various different circumstances; first of all it relates to a fairly large house and according to certain witnesses, furnished in a rather luxurious manner, containing also *objets d'art.* On the other hand, the Conciliation Commission cannot ignore the fact that in the above-mentioned declaration of the 21st of November, 1945, the father-in-law of the claimant, Schevos Alachouzos, estimated that the total loss suffered by the claimant amounted to £3,000. Loss caused by the bombardment of the house itself, as well as the looting of its contents. In these circumstances, the Conciliation Commission considers it equitable to admit lire 7,000,000 for the two heads as the global total to be paid to the claimant: damage caused to the house as such and damage caused to its contents, as well as to compensate for the costs of proceedings incurred by the claimant.

E. So far as concerns the second claim it relates, as appears from the exposé above, to the looting by the German and Italian forces of the warehouses rented by the claimant as well as to the fact that a warehouse adjoining the house mentioned in the first claim suffered during a bombardment of the island of Kalymnos in 1943 and of looting beforehand by the Italian and German forces. Have these facts been proved? As has already been said, various documents have been presented by the British Government with a view to proving the damage caused to the rented warehouses and to the warehouse adjoining the damaged house, which is valued in the claim at lire 105,175,000. The Italian Answer (page 6) rightly observes that "Apart from the documentation, there is lacking the Land Registry certificate attesting to possession at the time of the damage, of the warehouses which the claimant declares to have adjoined the domestic residence, and the lease for the others". In addition, the Conciliation Commission must take into account the fact that the second claim was not made until 27 May 1953, that is, more than three years after the presentation of the first claim (22 May 1950) and between ten and thirteen years after the events giving rise to the damage. In addition the documents submitted and evidence which estimate the lost merchandise at £65,000 and £60,000 date only from 16 July 1952. They appear to be vague and late; that of the Mayor of Kalymnos dated 15 July 1952 does not even contain any estimate of the loss caused; that of the father-in-law Alachouzos dated 21 November 1945 does not refer to damage caused to Mr. Theodorou but to damage caused to the contents of his (Alachouzos's) own warehouse estimated at £4,000. In addition the declaration of the claimant himself annexed to the file and dated 11 July 1958 does not give any additional information as to the damage caused to him. The claimant was not even able to indicate the amount of rent which he paid to the owners for the use of the warehouses. This lack of proof is, moreover, not compensated for by certain declarations, all made in 1956, equally late and not containing any precise information. The second claim must therefore be rejected.

DECIDES:

(i) So far as concerns claim No. 1:

(*a*) An inclusive compensation of lire 7,000,000 shall be paid by the Italian Government to Mr. Gregory Alfred Theodorou for war damage caused to the immovable property and its contents situated at Pothea district of St. Jean Theologou in the island of Kalymnos, the immovable property mentioned

under No. 1 in the contract of marriage of Gregory Alfred Theodorou and Irene Alachouzos, on 4 January 1937.

(*b*) The payment of the said sum shall be made within the period of sixty days following the notification of the present decision.

(ii) So far as concerns claim No. 2 this is rejected.

(iii) The present decision is final and binding.

Its execution is the responsibility of the Italian Government.

MADE at Geneva on the 25th of July, 1961.

The Representative of Italy in the Anglo-Italian Conciliation Commission

A. SORRENTINO

The Representative of the United Kingdom of Great Britain and Northern Ireland in the Anglo-Italian Conciliation Commission

E. A. S. BROOKS

The Third Member of the Anglo-Italian Conciliation Commission

Paul GUGGENHEIM