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**RECUEIL DES SENTENCES
ARBITRALES**

De Pascale Case —Decision No. MD/1018

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

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

STATEMENT OF FACTS

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

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

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

B. On January 27, 1960, hence a few days after the partial agreement reached in the De Pascale case on January 6, 1960, the Italian-United States Conciliation Commission, completed by its Third Member, Mr. Plinio Bolla, former President of the Swiss Federal Court, decided in a case which had not been subjected to the special provisions governing the Memorandum of Understanding (Case No. 152, Miss Harriet Louise Self¹), that Miss Self was entitled to receive from the Italian Government the sum of 3,250,000 lire under Article 78, paragraph 4 a) of the Treaty of Peace, as war damage compensation, net of all imposts, taxes and other fiscal charges, in particular, net of any Italian succession tax on the estate of Mr. Edward Danforth Self, of whom she was the heir and who was the owner of the damaged property.

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

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

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

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

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

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

CONSIDERATIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DECIDES

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

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

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

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

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

GENEVA, June 24, 1961.

The Third Member

(GUGGENHEIM)

*The Representative of the
Italian Republic*

(A. SORRENTINO)

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

Milan, June 22, 1961.

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

Dear Prof. Guggenheim,

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

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

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

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

sign. A. MATTURRI

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

sign. LESLIE L. ROOD

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

GENEVA, 24th June 1961.

sign. A. SORRENTINO
