

**REPORTS OF INTERNATIONAL  
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**RECUEIL DES SENTENCES  
ARBITRALES**

British-Italian Conciliation Commission established pursuant to the Peace Treaty signed on 10 February 1947 between the Allied and Associated Powers and Italy

**Case of the Raibl-Società Mineraria del Predil S.p.A v. Italy (Raibl Claim),  
decision of 19 June 1964**

Commission de conciliation anglo-italienne établie par le Traité de paix  
signé le 10 février 1947 entre les Puissances alliées et associées et l'Italie

**Affaire relative à Raibl-Società Mineraria del Predil S.p.A c. Italie (requête Raibl),  
décision du 19 juin 1964**

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fact that Article 75 refers to a special kind of property and outlines a special procedure for its recovery is not in itself a reason for excluding another procedure in respect of property which meets the conditions required to come under that procedure. The framers of the Treaty may very well have wished to provide several remedies for the recovery of property. In this case that is to be regarded as being so much more likely seeing that when the property clauses of the Treaty were being drafted it must have been the general and dominating tendency to give the interests of the United Nations and their nationals satisfactory protection. In the light of this general tendency there is no reason why property removed by the Axis Powers to Italy from the territory of any of the United Nations should not come within the scope of Article 78, para. 1, at least when a claim under Article 75 has not been made or has been abandoned.

It can, no doubt, be said that with such an interpretation the Treaty will, in respect of certain cases, seem to be illogical or irrational, but that would be the case with any other interpretation that might be placed upon the text. Such deficiencies in the system of the Treaty are not surprising in view of the circumstances in which the Treaty was made and they can in any case not be allowed to import into the Treaty principles which are warranted neither by the text nor by other relevant data of interpretation.

On the grounds hereinbefore developed, the Commission considers that in respect of the yacht *Gerry* a claim under Article 78 of the Treaty lies against the Italian Government. The owner is entitled under para. 4(a) of that Article to restoration to complete good order of the yacht, and as in the circumstances of the case it must be assumed that the yacht was damaged and sunk as a result of bombardment from the air, he can claim redress under the second sentence of this paragraph. In respect of that remedy, however, it is rightly contended on behalf of the Italian Government that the latter is responsible only for the damage which actually occurred in Italy. As liability under the Treaty is based on the existence of the property in Italy, it cannot extend to loss or damage suffered before the property came to Italy.

**Case of the Raibl-Società Mineraria del Predil S.p.A. v. Italy  
(Raibl Claim), decision of 19 June 1964\***

**Affaire relative à Raibl-Società Mineraria del Predil S.p.A. c. Italie  
(requête Raibl), décision du 19 juin 1964\*\***

Treaty interpretation—interpretation of Article 78 of the Treaty of Peace between Italy and Great Britain—reference to other languages—reference to other international arbitral decisions and jurisprudence—reference to general principles of law recognized by civilized nations.

\* Reproduced from *International Law Reports* 40 (1970), p. 263.

\*\* Reproduit de *International Law Reports*, 40 (1970), p. 263.

Property—definition of property under the Treaty of Peace—concession considered a property—property considered a subjective patrimonial right.

Compensation for war damages—compensation of loss suffered by larcenous exploitation—definition of loss of profit, excluded from compensation—assessment of damages.

Interprétation des traités—interprétation de l'article 78 du Traité de Paix entre l'Italie et la Grande-Bretagne—référence à d'autres langues—référence à d'autres sentences arbitrales et décisions jurisprudentielles—référence aux principes généraux de droit reconnus par les nations civilisées.

Propriété—définition de la propriété en vertu du Traité de Paix—la concession est considérée comme une propriété—la propriété est considérée comme un droit patrimonial subjectif.

Réparation des dommages de guerre—compensation des pertes subies du fait d'une exploitation illicite—définition de la perte de profit, exclue de la réparation—estimation des dommages.

The British-Italian Conciliation Commission, established in pursuance of Article 83 of the Peace Treaty, signed on 10 February 1947 between the Allied and Associated Powers and Italy, its members being M. Antonio Sorrentino, honorary President of Section of the Council of State, as representative of Italy, Mr. A. S. Brooks, as representative of Great Britain, and M. Paul Guggenheim, Professor at the University of Geneva and at the Institut Universitaire de Hautes Études Internationales at Geneva, as Third Member appointed by the British and Italian Governments by common consent, in the dispute relating to the claim for compensation put forward by the Agent of the Government of Her Britannic Majesty on behalf of the Predil Mining Company (Raibl, I, II and III)

Take note of the following facts:

1. On 25 February 1949 the British Embassy presented to the Ministry of Foreign Affairs of the Italian Republic a Note asserting a claim to compensation for war damage to movable and immovable property, and damage to all rights and interests, which Raibl-the Predil Mining Company Ltd. (Raibl I, II and III) had suffered. This concerned a mining company which, on 10 April 1933, had obtained a mining concession in the Italian provinces of Udine and Gorizia, and was sequestered by the Italian authorities on 16 July 1940 on the ground that all the shares in the company were the property of British subjects. The claimant company asserted that it had suffered loss in the sum of 1,518,428,702 lire. Furthermore, the company maintained that it had disbursed the sums of 2,189,732 lire and 82,408 lire in expenses and costs of the sequestration. The total sum claimed therefore amounted to 1,520,700,842 lire.

The Minister of Foreign Affairs acknowledged receipt of the claim in a *Note Verbale* dated 2 March 1949 and addressed to the British Embassy in Rome.

2. On 1 April 1954, the claimant company presented a further claim directly to the Italian Government for loss caused to the mines by larcenous exploitation by the German occupants. This loss was assessed at 961,597,746 lire.

3. An Italian inter-ministerial sub-committee examined the British claims and in consequence, in the interests of a friendly compromise, offered the claimant company a sum of 100,000,000 lire. This sum was refused by the representatives of the company. The unofficial negotiations were consequently broken off.

4. Later, however, the British Embassy in Rome was informed by a Note from the Ministry of the Treasury, dated 21 July 1959, that the claim had been submitted to an inter-ministerial committee (of which the committee mentioned above was an organ) established under Article 6 of Law No. 908 and charged with the examination of claims based on Article 78 of the Treaty of Peace. The inter-ministerial committee took the view, in a legal opinion of 3 July 1959, that this case involved public property established during the period of the Austrian regime and which had passed to Italy under the Treaty of Peace of 1919; that the exercise of the concession had been regulated by a Convention dated 10 July 1933 for a duration of thirty years (up to 30 June 1963); and that the Ministries of Corporations and of Finance, on the one hand, and the Raibl Company, on the other hand, were parties to this Convention. Since the Convention provided that, at the moment when the contract expired, everything appertaining to the concession ("plant, buildings, machinery, galleries, etc") should be restored to the State without charge, the claimant company could not be regarded as the owner of the mine nor as having suffered loss in the sense of Article 78 of the Treaty of Peace, which excluded compensation for "loss of profit." In these circumstances, it was necessary to exclude compensation under Article 78 of the Treaty of Peace in respect of "immovables, machinery, plant, furnaces, galleries and, in general, the property which constituted the mine and which would have had to be restored to the State Administration at the end of the Convention". Only loss apart from the mines should be taken into account for the purposes of compensation. For these reasons, the loss due to larcenous exploitation by the German occupying forces could not be taken into account for the purpose of compensation. The total indemnity would consequently amount to only 29,600,476 lire, reduced by a third to 19,733,650 lire, and further reduced to 18,933,650 lire by deduction of a payment on account of 800,000 lire which had been paid to the Raibl company on 9 April 1948. In addition, 1,066,350 lire must be granted in respect of the costs of the claim. The total would therefore be 20,000,000 lire.

5. In a *Note Verbale* of 10 October 1959 the British Embassy in Rome informed the Italian Government that the British Government could not accept the Italian offer. The Government of Her Britannic Majesty considered that a dispute had arisen between the United Kingdom and Italy within the terms of Article 83 of the Treaty of Peace with Italy. No reply was made to this

Note. The British Government considers, however, that it can be deduced from the Note of 21 July 1959 from the Italian Minister of the Treasury (mentioned above) that the following questions are involved in this dispute:

(a) Is the question whether the claimant company is the tenant or the concessionaire of the mines relevant to the right to compensation for injury or loss due to the war provided for in Article 78 of the Treaty of Peace?

(b) Should the loss due to larcenous exploitation of the mines and the damage caused to the installations be characterized as "loss of profit" in the meaning given to this concept, by Article 78, paragraph 4 (d), of the Treaty of Peace, and should the Italian Government consequently be relieved from liability to pay an indemnity?

(c) If the reply to either or both questions is favourable to the company, what is the amount of the indemnity for each head of damage?

(d) What is the sum which should be awarded to the claimant company for reasonable expenses incurred in Italy in establishing the claim?

6. Of the undisputed facts which led to the claims for compensation made by the company, the following, in the opinion of the Conciliation Commission, appear particularly important:

(a) The concession agreement of 10 April 1933, mentioned above, provides that the company must produce at least 30,000 tons of zinc and lead per year, and pay to the Italian State both a fixed rent and a variable royalty in proportion to the quantity of minerals extracted.

(b) By a Decree dated 16 July 1940 the claimant company was sequestered in accordance with war legislation. The Italian Mineral Metal Companies were appointed as Sequestrator.

(c) On 8 September 1943 the German military authorities occupied the mines and continued to exploit them larcenously. The German occupation lasted until 7 May 1945. From this date the area was occupied by Yugoslav partisans, who, in their turn, committed acts of destruction.

(d) After some days, the mines were placed under the control of the Anglo-American forces and of the Allied Control Commission in Italy. The Anglo-American authorities immediately ordered the measures necessary to put the mines into a state of production.

7. (a) The British Government considers that the claimant company can assert a claim for compensation, since Article 78, paragraph 9 (c), provides that "all movable or immovable property, whether tangible or intangible . . . as well as all rights or interests of any kind in property" belonging to United Nations nationals who suffered loss due to injury or damage may be the subject of compensation. Now this wide concept of "property" would comprehend not only tangible property but also intangible property, as well as all rights and interests whatever in such property.

In the opinion of the British Government, the term "injury" refers in particular to intangible property, including all rights or interests of any kind in property. "Damage", on the other hand, refers to tangible property.

Although under Article 826 of the Italian Civil Code the mines form part of the inalienable patrimony of the Italian State, under the 1933 Convention the operation of the mines was granted to the Raibl company. This was in accordance with Article 14 of the Italian Mining Law, under which the concessionaire has the right to “exploit the mines”. In this regard, the concessionaire would have certain obligations in connection with the rational exploitation of the mines, as is provided in Article 4 of the 1933 Convention; these duties correspond exactly to Article 26 of the Mining Law. The Raibl company must pay the Italian Government both a fixed rent and a variable royalty (Article 5 of the 1933 Convention and Article 25 of the Mining Law). At the date of expiry of the concession all the installations must be transferred in perfect condition and without charge to the Italian State (Article 1.3 of the Convention and Articles 34 *et seq.* of the Mining Law).

The British Government, on examination of the nature of the interest granted to the concessionaire, arrived at the conclusion that, although the State did not transfer ownership of the mine to the concessionaire, the right of exploitation which was granted has the character of a real right. In fact, the right of the concessionaire could be protected *erga omnes* by means of a possessory action. The concession was consequently susceptible of possession (Article 1145 of the Italian Civil Code). The intangible nature of the right of the concessionaire followed from Article 22 of the Law, which in its reasonable and ordinary meaning guarantees concessionaires an interest in the mines while the mines themselves, being the inalienable property of the State, cannot be legally transferred.

Moreover, mines can be mortgaged (Article 22). In these circumstances the interest of a concessionary which can be mortgaged is intangible in character. Furthermore, the mine could be expropriated (Article 30 of the Mining Law). The object of expropriation would not then be the mine as such, but rather the intangible interest of the concessionary in such a manner that “the expropriation succeeds to the rights and duties appertaining to the expropriated concessionaire”.

The fact that concession agreements, their abrogation and their expiry must be registered (Articles 18 and 24) also shows their character as real rights, since these are characteristic methods of publication to inform third persons of the legal situation. Finally, the taxes on registration submit acts of transfer relating to rights of exploitation to the same taxation as is applicable to the sale of immovable property (Royal Decree of 30 December 1923, No. 3269).

The interest of the claimant company should then be assimilated to a real immovable right, and thus be included among the rights provided for in Article 78, paragraph 9 (c), of the Treaty of Peace. There is therefore no analogy, as the Italian Government maintains, with the right of an agricultural tenant, who can enjoy only the fruits of the property but not touch the substance, as, on the other hand, a concessionary exploiting a mine can. It follows that the concessionary enjoys complete ownership of the minerals found underground

within the area of the concession. Another difference between the agricultural tenant, and the concessionary consists in the fact that in the former situation the immovable objects and the equipment in general belong to the holding, while the immovable equipment and the installations of the mine are constructed by the concessionary and become the property of the State granting the concession only after the expiry of the concession (see in this particular case Article 13 of the 1933 Convention).

In any case, it must be considered that for the duration of the concession all immovable and movable objects and installations belong to the company, and all war damage, must be compensated in the same way as the injuries done to the company with respect to its immovable rights of exploitation of the mine in consequence of larcenous exploitation.

(b) In regard particularly to the larcenous exploitation of mines by the Germans, the British Government seeks to refute the Italian argument, developed in the Note of 21 July 1959, according to which the only consequence of the exploitation was a "loss of profit", that is, that the increase in the cost of exploitation of the mines resulted in a decrease in the expected profit, given that the claimant company was not required to exploit the concession since it could be relieved of this obligation by the fact described by the Ministry of the Treasury as *force majeure*.

This argument does not appear to the British Government to be correct for various reasons. The most important seems to be that the claimant company had the right, under the 1933 Convention, to extract 30,000 tons of minerals per year for a period of thirty years. Now the damage due to the German larcenous exploitation forced the company to re-establish the productive capacity of the installations in order to exercise its right to exploit the mines. The British Government emphasizes in this context that the company has not claimed compensation for the loss which it suffered during the period of executing repairs, in so far as this constituted a "loss of profit." Even if the 1933 concession were regarded as a lease, the Italian State should re-imburse the costs of extraordinary repairs done by the lessee (Articles 1150 and 1621 of the Italian Civil Code).

The British Government draws attention, moreover, to the fact that it was recognized that the impossibility of profitable operation could be compensated under Article 78 of the Treaty of Peace by the decision of the Italian-French Conciliation Commission of 6 July 1954 (*Schappe Spinning Mill* case: *Receuil des Décisions*, Part 5, p. 5, esp. p. i08[1]), and that Article 78, paragraph 4 (a), recognizes that United Nations nationals should not receive less favourable treatment with respect to compensation than that accorded to Italian nationals. Now, Article 37 (c) of the Italian Law relating to war damage, No. 968 dated 22 December 1955, affords compensation to Italians for destruction of stocks of merchandise.

The British Government also emphasizes that the Raibl mines are inalienable property under Italian legislation (see, in particular, the Ministerial

Decree of 24 August 1940). Exploitation of the mine was therefore not granted by an act of private law (such as a lease), but by a Convention for the best utilization of public property. The Convention was assimilable to a concession in the sense of the Italian mining legislation of 1927. As the report on the Law which approved the Convention of 10 April 1933 states, the Convention had the objective of ensuring employment to a significant number of workers in the area.

The British Government maintains, moreover, that the assimilation of the 1933 Convention to a concession was also admitted by the *Avvocatura Generale* of the Italian State in argument before the *Arbitral Tribunal* which gave its award on 27 June 1958 in the case between Raibl against the Ministry of Finance relating to the interpretation and application of the criteria for the calculation of the variable royalty to be paid by the company for exploitation of the mine (see p. 52 of the arbitral award, where it is stated explicitly:

It (the *Avvocatura*) maintains that the Convention of 10 April 1933 contains a real and proper concession of public property, that is, the mines included in the category of property constituting the inalienable patrimony of the State, designated as State property in the strict sense, for the satisfaction of the needs of the public interest.

In the view of the British Government, the *Avvocatura Generale* could not put forward a diametrically opposite argument before an international tribunal.

8. Regarding the amount of the indemnity due to the claimant company, the British memorial [*la requête introductive d'instance*] contains itemized claims. This case involves only the larcenous exploitation of the mines by the Germans. With regard to this, the claimant company maintains that, on re-taking possession of the mine, it was forced to undertake certain work preparatory to operation and also research, which the Germans, exploiting the mine in order to extract the greatest possible amount of material in the shortest possible time, had omitted. On the basis of a calculation made by the mining authorities of Trieste in August 1958, and completing this with its own technical report, the British Government presents the following claims:

Costs of re-conditioning. . . . .	423,018,005 lire
Interest up to 31 December 1959 . .	<u>234,945,947 lire</u>
	<u>657,963,952 lire</u>

The British Government further claims, in accordance with Article 78, paragraph 5, that all the reasonable expenses incurred in Italy in establishing the claim, including the assessment of loss and damage, should be borne by Italy. It considers that these costs should be fixed at 10 per cent, of the loss and damage suffered by the company and recognized by the Commission.

9. On 29 September 1960, the Italian Government filed its memorial in reply with the Commission.



According to the Italian argument, which has already been referred to above, a concessionary has a personal right. He is the lessee of the mine. In these circumstances, the Raibl company cannot assert "interests" in property under Article 78, paragraph 9 (c), of the Treaty of Peace. Moreover, the nature of the damage caused by larcenous exploitation by the Germans is an "economic deterioration" of a productive process and not the destruction or loss of an object. There had been no diminution in the substance of the minerals, since the mines themselves had not been destroyed.

10. Before the Italian memorial was filed, the Conciliation Commission in its normal membership (a British member and an Italian member) named, on 11 July 1960, an expert, in the person of the engineer Salvatore Amoroso, to assist the Commission in the examination of the technical matters at the basis of the British claim.

By a decision of 24 October 1960 the Agents of the two Governments requested the expert to investigate at that time only the damage which was not caused by larcenous exploitation. Following this investigation, the Agents of the two Governments agreed, on 22 December 1961, on a partial, conciliatory decision [No. 191]. The contents of this decision are as follows:

- (1) An indemnity equal to 51,500,000 lire . . . net shall be paid by the Italian Government to the 'Raibl-Società Mineraria del Predil-Società per Azioni' in partial settlement of the claim presented by that company in respect of war damage to its property in Italy, in pursuance of Article 78 of the Treaty of Peace;
- (2) Payment of this sum shall be made direct to 'Raibl-The Predil Mining Company Ltd.' in the person of its legal representative for the time being or of its special attorney within the space of 60 days running from the date of notification of the present decision. This sum is understood to be net of any deduction, levy or other charge, in accordance with the provisions of Article 78, paragraph 4 (c), of the Treaty of Peace.
- (3) With respect to the other heads of damage, as to which agreement has not been reached—the losses due to the so-called larcenous exploitation of the mine and the expenses—the Conciliation Commission reserves its decision.
- (4) The present partial decision is binding. Its execution falls to the Italian Government.

A second partial decision was made on 8 November 1962. This decision declares:

- (1) An indemnity of 20,000,000 lire net shall be paid by the Italian Government to the 'Raibl company-The Predil Mining Company-Ltd.' in partial settlement of the claim presented by this company in respect of war damage to its property in Italy, in pursuance of Article 78 of the Treaty of Peace, in respect, of the following heads which were excluded from partial decision No. 191 referred to above:

1. Fencing

2. Hydrochloric acid
3. Central [Bretto-] Turbine
4. Damage of currency nature
5. Costs of the sequestratory administration
6. Electric plant
7. Ore washing plant
8. Repairs to the underground plant.

(2) Payment of this sum shall be made direct to "Raibl-The Predil Mining Company-Ltd." in the person of its legal representative for the time being or of its special attorney within the space of 60 days running from the date of notification of the present decision. This sum is understood to be net of any deduction, levy or other charge, in accordance with the provisions of Article 78, paragraph 4 (c), of the Treaty of Peace.

(3) With respect to the other heads of damage, as to which agreement has not been reached, that is, the damage due to the so-called "larcenous exploitation" of the mine, and the expenses, the Conciliation Commission reserves its decision.

(4) The present partial decision is binding. Its execution falls to the Italian Government.

11. After re-asserting the real character of the immovable rights conferred by the 1933 Convention (which is proved by, inter alia, the fact that rights in the mine can be expropriated and mortgaged) the British Government declares in its Reply of 1 February 1961 that it has always been recognized that war damage suffered by United Nations nationals who were holders of concessionary rights may be compensated under the Treaty of Peace. Reference is made to the *Collas & Michel* case, decided by the Franco-Italian Conciliation Commission under the presidency of its third member (Bolla), and rendered on 21 January 1953 (partial decision No. 166 of 21 January 1953 and the following decision No. 164 of 21 November 1953 (*Recueil des décisions*, Part 4, pp. 134 *et seq.* and 277 *et seq.*).

Finally, the British Government maintains that the sequestration of the company by Decree of 16 July 1940 could not have taken place unless the real character of the rights of the company were admitted. In fact, the war legislation of 18 July 1938 provides in Article 295 that only property *belonging* to enemy subjects may be placed under sequestration. In order to have such possession—the condition precedent for sequestration—the legal relationship between the subject and the object susceptible of being placed under sequestration must be of a real nature. The war legislation could not have been applied if the Raibl company had simply been the lessee of the mine.

12. With respect to the larcenous exploitation by the Germans and the resulting damage, the British Government, in refutation of the contention that it is claiming for loss of profit, refers to the case-law of the Italian-British Conciliation Commission in the *Currie-Pertolani* case of 31 [13] March 1954, in which, with the concurrence of the third member (Bolla), it was decided

that “the putting into perfect condition” provided for by Article 78, paragraph 4 (a), of the Treaty of Peace does not include improvements made in the course of repair (p. 9).

The same decision, moreover, provided that the indemnity must be calculated taking into account that the property will be returned and that this restitution must be made in complete good order.<sup>[4]</sup> The British Government adds that it has not claimed compensation for all the losses resulting from the larcenous exploitation by the Germans. It has not claimed for the loss due to diminution of production in consequence of the work of restoring the galleries to their former condition, even though this relates to events resulting from the war. Consequently, the claim is not for *lucrum cessans*, but solely for indemnification of the costs incurred to permit the renewed exploitation of the mines.

With respect to the statement by the Italian Government that Raibl could have abandoned the mines and freed itself of its obligations on the ground of *force majeure*, and that Raibl would then have lost only the expected benefit from exploiting the concession during the remainder of its duration, the British Government maintains that such an attitude would have been contrary to the obligations which the company had undertaken by the 1933 Convention, which gave all powers of supervision to the public administration, such as, for example, the suspension and reduction of work (Article 4). When the company was able to fulfil its obligations under this Convention it did so, and also regularly paid the rent and royalties to the Italian Government, in accordance with the arbitral award of 26 June 1958.

13. The British Government, in claiming only reimbursement of the expenses of putting the mines into operation after the larcenous exploitation by the Germans, that is, compensation for the diminution in the property only, consequently does not claim compensation for the reduced operations of the mines following that larcenous exploitation. Consequently, it is not (negative) loss of profit that is claimed, but the *positive* loss suffered.

14. With regard to the measure of damages, the British Government restricts itself to repeating its claim for a sum based on the report made in August 1959 by the Mining District of Trieste for reimbursement of the expenses disbursed to put the mines back into their former condition (see above, paragraph 8), that is:

Costs of re-conditioning . . . . .	423,018,005 lire
Interest to 31 December 1959 . .	<u>234,945,947 lire</u>
Total . .	<u>657,963,952 lire</u>

Reduced by a third, this amounts to 438,642,634 lire.

The British Government declares that it agrees to remit to expert examination the fixing of the sum of damages on the basis of the guide-lines set out above.