REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Arbitral Commission on Property, Rights and Interests in Germany established by the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn on 26 May 1952

Case of the Government of the Kingdom of Greece (on behalf of Apostolidis) v. the Federal Republic of Germany, decision of the Second Chamber of 11 May 1960

Commission d'arbitrage sur les biens, les droits et les intérêts en Allemagne établie en vertu de la Convention sur le règlement de questions issues de la guerre et de l'occupation, signée à Bonn le 26 mai 1952

Affaire concernant le Gouvernement du Royaume de Grèce (au nom d'Apostolidis) c. la République fédérale d'Allemagne, décision de la Deuxième Chambre du 11 mai 1960

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Decisions of the Arbitral Commission on Property, Rights and Interests in Germany

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* Reproduced from *International Law Reports* 34 (1967), p. 219.

** Reproduit de *International Law Reports* 34 (1967), p. 219

probante de ceux-ci pour établir l'intention des parties sont laissés à la discrétion de la Commission—prévalence des *leges speciales* sur le droit international général et coutumier—référence aux procédures antérieures—sens raisonnable.

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By complaint of December 6, 1956, filed with the Registry of the Arbitral Commission on December 12, 1956, the Greek firm of Alexandra P. Apostolidis, mines and minerals, of Volos in Greece (called the claimant), through its representative, the lawyer Dr. Constant, requested review of decision GR52–3486/56 of the *Bundesamt für aussere Restitutionen* [Federal Office for External Restitution] (called Bundesamt) of November 8, 1956, which was served upon it on November 10, 1956, for the purpose of obtaining from the Federal Republic of Germany compensation for the value of the chrome ore removed during the war and not restituted.

By letter of December 14, 1956, received at the Registry of the Commission on December 18, 1956, the Royal Embassy of Greece in Germany forwarded to the Registry of the Commission a copy of the pleading constituting the initial complaint of the claimant, pointing out that the decision GR52–3486/56 of November 8, 1956, of the Bundesamt was served upon the Greek Government (called the complainant) by *note verbale* of the Federal Ministry of Foreign Affairs on November 23, 1956, and declaring that the Greek Government "adopts the said appeal in full and makes it its own".

As to the merits, the pleas of the complainant are formulated in the pleading of the firm of Apostolidis of December 6, 1956, and in the application of the Royal Greek Embassy of December 14, 1956, with the modifications contained in the letter of April 17, 1957, from the representative of the applicant according to which it is requested:

> That the Government of the Federal Republic of Germany be ordered to pay to the firm of Alexandre P. Apostolidis, Volos, Greece, as claimant, compensation for:
>
> (1) 40,000 tons of chrome ore at a price of 63 U.S. Dollars per ton plus legal interest;
>
> (2) alternatively, 5,246 tons of chrome ore at a price of 63 U.S. Dollars per ton, plus legal interest.

At the end of the proceedings, the complainant expressly confirmed the conclusions set forth in its Reply of November 1, 1957, and requested the Commission to:

(1) dismiss the objections of the Federal Government as inadmissible and not well founded;

(2) exclude from the discussions in the present case the papers and documents produced by the Federal Government which relate to the *travaux préparatoires* of the Bonn/Paris Convention;

(3) declare admissible the claims of Apostolidis and of the Greek Government;

(4) allow the claim on its merits.

The defendant requested the rejection of the claim.

A. *Facts.*—(2) The facts on which the claim is based are the following:

The firm of Alexandre P. Apostolidis at Volos owns two chrome mines which are situated in Greece. During the occupation of this country by German forces in April 1941, these mines were requisitioned by the Occupying Power. The management of the enterprise was entrusted to a German mining engineer and supervised by the German authorities. The Greek owner of the firm was deprived of the right to exploit his mines and to dispose of their products; the exploitation was effected for the account of the German *Reich,* and the chrome was delivered to various German industrial enterprises. The price of the ore was fixed by German offices and was scarcely sufficient to cover the cost of the mining operation. The head of the firm of Apostolidis was forced to leave the headquarters of his firm at Volos and had no further connection with the mines until the occupying forces evacuated the country in November 1944.

The claimant states that, during the period of requisition, more than 40,000 tons of chrome ore of diverse qualities were removed from its mines, approximately 20,000 tons from each of them. At the end of hostilities, 5,931 tons of ore were still in Germany, distributed among various firms (claimant's application of December 6, 1956, page 3). The claimant fixes the total of the chrome ore to be restituted at 5,246 tons. In its opinion, this ore is of Greek origin, and it asserts that this entire amount was identified as being the property of the firm of Apostolidis. In view of the well-known inadequacy of the raw material supply in Germany at the end of the war, it must be taken for certain that the ore which could not be restituted was utilised by German industry.

Basing its opinion on the claims which the complainant addressed to the Allied Authorities which during the occupation of Germany were in charge of restitution of property removed during the war from the territories occupied by German forces, the Arbitral Commission holds that the amount in question actually totals approximately 4,000 tons of chrome ore, 3,931.245 tons, to be exact. This figure is based on the more precise data contained in details in the application of the claimant and which can be considered as corresponding to the facts.

The complainant and the claimant have computed the amount in the three following claims:

(1)	Claim 163/7012			3,050 tons
(2)	Claim 1055/7015 from which are to be deducted for		2,189.974 tons	
	(a) restitution	424.980 tons		
	and			
	(b) seized by the French	1,314.974 tons		
	Total		1,739.954 tons	
			balance	450.020 tons
(3)	Claim 590/14–15/R		689.315 tons	
	from which are to be deducted for restitution		258.090 tons	
			balance	431.225 tons
			Total	3,931.245 tons

To obtain the figure of 5,246 tons, the claimant adds 1,314.974 tons of chrome ore seized by the French authorities to the 3,931.245 tons indicated above which makes a total of 5,246.219 tons.

(4) In fact, a thorough examination of the various claims submitted leads to the following:

(a) Claim 163/7012 covering 3,050 tons of chrome ore was submitted by the Greek Restitution Mission to the Allied Occupation Authorities on June 28, 1948. Pursuant to General Order No. 6 of Military Government in Germany, the Gesellschaft für Elektrometallurgie [Electric Metallurgy Company] at Weisweiler had reported on April 30, 1947, that it had received this quantity of ore during the war, that is to say after October 28, 1940 (records of the *Bundesamt,* p. 35). But by letter of October 13, 1948, it opposed the restitution claim, stating that the 3,050 tons comprised two items: one of 2,019 tons delivered by the firm of Possehl, of Lübeck, in three lots, the first of 369, the second of 58 and the third of 1,565 tons; the other of 1,031 tons delivered by Eisenerz G.m.b.H. [Iron Ore Limited] of Berlin (records of the *Bundesamt,* pp. 31 and 35), in two lots, one of 403 and the other of 628 tons.

The firm of Possehl asserted that the chrome ore which it had received came from the firm of Apostolidis in execution of normal contracts voluntarily concluded by the Greek firm with the German firm which freed it from the obligation to restitute (letter of February 2, 1949, to the Greek R.D.R. Mission, Annex 10 to claimant's application).

The origin of the ore acquired by Eisenerz G.m.b.H. at Berlin cannot be determined with certainty. According to a letter of December 14, 1948 (records of the *Bundesamt,* p. 47) from this firm to the Gesellschaft fur Elektrometallurgie the ore came from three different sources in Greece, namely the Union Minière [Mining Union], the firm of Scalistieri and the firm of Apostolidis; the destruction of the archives of Eisenerz G.m.b.H. by air raids during the

war prevents it from stating in detail the quantities of ore which it imported. Consequently, only part of the 1,031 tons possessed by this firm came from the mines of the firm of Apostolidis; the exact amount is not known and can no longer be ascertained.

On November 29, 1948, the 3,050 tons the subject of claim 163/7012, were reduced to 1,662 as a consequence of the utilisation of the chrome for the benefit of German industry as authorised by the Allies. In a letter from the Ministry of Economy at Düsseldorf to the *Bundesamt* of May 17, 1956, it is stated that, according to a communication of November 29, 1948, from the Gesellschaft für Elektrometallurgie at Weisweiler, the chrome ore located was stored in the following dumps:

at Weisweiler	810 tons
with the firm of Krauss at Cologne	391 tons
with the firm of Neske at Duisburg	461 tons
Total:	1,662 tons

This figure included the 403 tons coming from Eisenerz G.m.b.H.; the rest had been acquired by the firm of Possehl and came thus from the firm of Apostolidis (records of the *Bundesamt,* p. 25).

According to the investigation report of the Reparation Deliveries and Restitution Division, Detmold (called R.D.R. Division, Detmold) of December 4, 1948, part of the claimed quantities was identified, at most 1,662 tons; it is observed therein that the ore came from normal imports executed in continuation of pre-war deliveries, and that the Greek claim was contested (records of the *Bundesamt,* p. 49).

(b) Claim 1055/7015 was submitted by the Greek Restitution Mission by letter of August 31, 1948, and covered 2,189.974 tons of chrome ore, distributed in three items between the different western zones of occupation of Germany: the first of 425 tons, the second of 450 tons and the third of 1,314 tons.

By letter of November 13, 1948, to the German Restitution Office the Gesellschaft für Elektrometallurgie raised objections and declared that only the items of 425 and 450 tons fell within the restitution claim. The first item of 425 tons was of Greek origin and had been imported by Eisenerz G.m.b.H. of Berlin; the second item of 450 tons came from Macedonia and had been imported by Wacker G.m.b.H. of Munich. The purchases were made on a normal commercial basis and were only the continuation of imports made before the war. These two items were deposited in dumps with another quantity of Bulgarian chrome ore amounting to 37 tons in round figures making a total of 912.633 tons of mixed chrome ore in possession of the firm of Johann Krauss of Cologne.

As to the item of 1,314 tons, it had been shipped, with 195 tons of chrome of a different origin, on lighters which were sunk in the Rhine off Mayence in the spring of 1945; the ore had been subsequently recovered, however, by the

French Military Government which seized it; thus it has not been the subject of identification.

(c) Claim 590/14–15/R was first submitted on May 14, 1948, by the Greek Military Mission to the R.D.R. Division, Detmold, for an amount of 689.315 tons of chrome ore (records of the *Bundesamt,* p. 65). Pursuant to General Order No. 6, the Farbenwerke Bayer [Bayer Dye Factories] had reported in 1946 that they had acquired a total of 589.213 tons of this ore divided in two items: one of 329.569 tons from Wacker G.m.b.H. of Munich, the other of 259.644 tons from Eisenerz G.m.b.H. of Berlin.

After the subsequent communications from this firm, by letter of November 2, 1948 (records of the *Bundesamt,* p. 66), the item of 329.569 tons was of Bulgaro-Macedonian origin, and only the item of 259.644 tons came from Greece. The firm submitted a new rectification of its declarations in January 1949, asserting that the first item was of Yugoslav origin (application of the claimant, p. 127, and Reply of October 12, 1957, p. 30).

(5) The decisions taken by the Allied Occupation Authorities in respect of these three claims show differences:

(a) As regards claim 163/7012, the R.D.R. Division, Detmold, decided to reject it entirely on the ground that the acquisition of the chrome ore was only the continuation of business relations which had already been established between the sellers and buyers before the occupation of Greece by the German army. This decision was notified to the Greek R.D.R. Mission on December 13, 1948, and confirmed by the R.D.R. Branch, Restitutions, Düsseldorf, by letter of November 8, 1949, to the Greek R.D.R. Mission (records of the *Bundesamt,* pp. 50 and 51).

(b) As regards claim 1055/7015, the British Occupation Authorities first decided on December 6, 1948, to reject the restitution claim of the Greek Government, on the ground that this was also a case of pre-war business relations; but the complainant having submitted new evidence, this decision was suspended. Finally, on September 13, 1949, after a new investigation of the matter, the R.D.R. Division, Detmold, granted the authority for release of approximately 425 tons which had been identified on November 25, 1948, and which were covered by the Greek claim 1055/7015 (records of the *Bundesamt,* pp. 60 and 61). The negative decision of December 6, 1948, was overruled, and on the same day the German Restitution Office was informed of the reasons for this second decision. This lot was delivered at Hamburg between November 15 and 18, 1949.

According to the investigation report, the item of 450 tons was Yugoslav ore and that of 1,314 tons was claimed by Yugoslavia; it was observed, however, that this amount of ore had been sunk at Mayence in 1945, then removed by the French Authorities; the authority for release of September 13, 1949, does not contain any express decision concerning these two items, and it does not appear from the other documents of the file that any decision was taken in respect of these two items.

(*c*) As regards claim 590/14–15/R, it formed the subject during the proceedings before the Allied Occupation Authorities of an investigation report of January 13, 1949 (records of the *Bundesamt,* p. 67) concerning 689.315 tons of chrome ore and bears the notation "not identified "and the observation that there are considerable stocks of chrome ore, which are stored together with ore of other origin. It is stated there that I.G. Farben reported, pursuant to General Order No. 6, two lots of chrome totalling 589.213 tons, and that doubtless 329,569 tons are of Yugoslav origin, and not restitutable to Greece. The rest, *i.e.,* 259,744 tons, is of Greek origin, but it is impossible to establish how this amount was imported, all relevant documents having been lost as a result of war damage in Berlin. The said firm asserts, however, that it purchased this ore in the normal course of business and that the importer obtained from the Greek exporter telegraphic confirmation that prior to the war substantial sales of chrome ore had been concluded. These were thus normal imports in continuation of pre-war business relations. It is not possible to establish how Greece arrived at the figure of 689.315 tons as stated in its claim.

On the basis of this investigation report, the authority for release was granted on September 13, 1949, for 259.644 tons considered identified and covered by the Greek restitution claim 590/14–15/R. The authority expressly points out that "the remaining quantities are not of Greek origin" (Records of the *Bundesamt,* p. 68).

In this connection, the R.D.R. Division, Detmold, addressed to the German Restitution Office on September 13, 1949, a communication similar to that concerning case 1055/7015 (records of the *Bundesamt,* p. 69).

(6) The compensation claim, which was first submitted to the Allied Occupation Authorities in Germany, was then filed with the *Bundesamt* at Hamburg. On November 8, 1956, the *Bundesamt* confirmed the decisions of the Allied Occupation Authorities in respect of the three claims submitted by the Greek Government and by the firm of Apostolidis itself, which claimed restitution of the removed property or compensation.

Accordingly, it decided in the three cases to reject the claim for restitution of removed property because the claimed property does not fall within the categories listed in Article 1 of Chapter Five of the Settlement Convention.

The *Bundesamt* also rejected the claim for compensation in the three cases for the following reasons:

(a) As to claim 163/7012, the chrome ore had been identified in part, but this identification necessarily involved only the 1,662 tons which, according to the letter of the Gesellschaft für Elektrometallurgie at Weisweiler of November 29, 1948, still existed when the Allied Occupation Authorities based their negative decision on the finding that the Greek items had been imported in the course of normal business transactions. No new evidence having been produced, in application of Article 3, paragraph 3, of Chapter Five of the Settlement Convention, the *Bundesamt* held that it could not reach any other decision.

(b) As to the claim 1055/7015, the *Bundesamt* stated that the lot of 425 tons had already been restituted to Greece in execution of the authority for release of September 13, 1949; it refused to allow the submissions of the Greek Government in respect of the lots of 450 tons and 1,314 tons, not only because these goods had not been identified in Germany, but also because the investigations made by the Allied Occupation Authorities had revealed that this ore was not of Greek origin.

(*c*) As to the last claim 590/14–15/R, the *Bundesamt* found that 259.644 tons had already been restituted to Greece and that it had already been established that the remaining quantity was not of Greek origin.

The negative decision on the claim was contested by the complainant Government as well as by the claimant both of which applied to the Arbitral Commission for a review of the decision.

The central issue of the dispute was the interpretation of Article 4, paragraph 1, of Chapter Five of the Convention on the Settlement of Matters Arising out of the War and Occupation, 1952–1954, in other words, the conditions under which compensation should be paid if restitution became impossible. According to the said provision, claims for restitution gave rise to claims to compensation only if the property, which was removed by Germany from countries occupied by her during the war and which formed the subject of a restitution claim, had been identified in Germany but, before return to the party entitled to it, disappeared for one of the reasons enumerated in Article 4, paragraph 1. Part of the chrome ore (1,259 tons) the restitution of which had been duly claimed was identified in Germany, but its restitution later became impossible. The Federal Republic of Germany must pay compensation for this ore to the complainant. All other claims for compensation were unfounded and, therefore, dismissed.

The Commission said:

B. *Procedure.*—(7) The Greek Government, through its Embassy at Bonn, submitted to the *Bundesamt* on October 26, 1955, an application bearing the number 52 in which it is expressly mentioned that it concerns "app. 4,000 tons of chrome", "property of a firm A. Apostolidis, Volos". It also refers expressly to the former applications 163/7012 (June 28, 1948), 1055/7015 (August 31, 1948) and 590/14–15 (May 14, 1948) which correspond to the three claims listed in the statement of facts.

This application was filed within the time-limit of six months after the entry into force, on May 5, 1955, of the Settlement Convention, as required by Article 4, paragraph 3, of Chapter Five, and it requested restitution of the property of the firm of Apostolidis, alternatively, payment of compensation. On April 14, 1956, the Embassy of Greece, referring directly to the property of the firm of Apostolidis at Volos, forwarded to the *Bundesamt* a memorandum dated March 28, 1956, which was accompanied by long lists of shipments of

chrome ore of this firm to Germany during the years 1942 and 1943 (records of the *Bundesamt,* pp. 10 to 20).

The compensation claims had been submitted by the Greek Government even before the entry into force of the Settlement Convention, namely by letter of October 14, 1949, of the Greek R.D.R. Mission to the R.D.R. Division, Detmold (records of the *Bundesamt,* p. 85). Thus the Greek Government is unquestionably entitled to litigate the present case, first before the *Bundesamt,* and then before the Arbitral Commission, pursuant to Article 4, paragraph 3, and to Article 7, paragraphs 2 and 3 (first sentence), of Chapter Five of the Settlement Convention. The competence of the Arbitral Commission to decide on the present application for review of the decision of the *Bundesamt* of November 8, 1956, is unquestionable and has not given rise to any controversy between the parties to the case.

(8) The proceedings before the Commission are characterised by the fact that they were divided in two parts and gave rise to two actions.

(a) The first application was submitted by the firm of Apostolidis, for it was on its representative, the lawyer Dr. Constant, that the decision of the *Bundesamt* had been served on November 10, 1956 (records of the *Bundesamt,* pp. 74 and 106). The application for review of this decision, dated December 6, 1956, and dispatched on December 8, was not received at the Registry of the Commission until December 12, 1956, after the expiry of the time-limit of thirty days as laid down in Article 7, paragraph 3, of Chapter Five of the Convention (Rule 23 of the Rules of Procedure).

The defendant raised a preliminary objection of preclusion in its Answer of June 5, 1957, by reason of the belated receipt of the application for review of the firm of Apostolidis.

In the same pleading, it raised a second preliminary objection contesting the capacity of the firm of Apostolidis to sue, on the ground that the firm cannot be considered a "party concerned" within the meaning of Article 7 of Chapter Five of the Settlement Convention, and that, moreover, only the Greek Government had been a party to the proceedings before the *Bundesamt.*

(b) The second application was submitted by the Greek Government after the decision of the *Bundesamt* had been served upon it through the Federal Ministry of Foreign Affairs on November 23, 1956; the application dated December 14, 1956, was filed with the Registry of the Commission within the time-limit prescribed by the Settlement Convention, *i.e.,* on December 18, 1956; it contains the following declaration:

> The Royal Embassy of Greece declares that the Greek Government, concurring wholly in the complaints contained in the appeal in question (that of the firm of Apostolidis) against the above-mentioned decision (of the *Bundesamt)* adopts the said appeal in full and makes it its own.
>
> Capetanides
> Ambassador of Greece

In its pleadings of June 5, 1957, the defendant extended its preliminary objections to this appeal, which it considered to be irregular as to form and which it requested be rejected as inadmissible.

(9) The three preliminary objections of preclusion, of claimant's incapacity to sue and of defect in form, which were raised by the defendant, gave rise to an exchange of lengthy pleadings between the parties.

By Order of September 9, 1957, the Commission decided to join the said preliminary objections to the merits, subject to the right of the Commission, provided by Rule 62 of its Rules of Procedure, to decide separately one or more of the issues raised by the parties.

Before considering the merits of the case, it is advisable to inquire whether these preliminary objections can be accepted at all; the Commission holds that it must first examine the one concerning the invalidity as to form of the application submitted by the Greek Government on December 18, 1956.

The unusual feature of this proceeding, namely the reference to and adoption as its own of the legal action of a private person, is to be explained by the fact that the Rules of Procedure of the Arbitral Commission had not been fully drafted at that date, and that they did not enter into force until April 1, 1957.

But the declaration contained in the letter from the Greek Government of December 14, 1956, is not only, as the complainant maintained in its Reply of August 28, 1957 (p. 137), an application of Article 11, paragraph 3, of the Charter of the Commission which provides that "any government agent shall be authorized to present orally and in writing arguments and submissions in cases to which a national or resident of his State is a party," a provision which is repeated in Rule 51 of the Rules of Procedure. It has much more far-reaching consequences because of the implied and declared will of the Greek Government and constitutes a truly independent claim which incorporates that of the firm of Apostolidis.

It implicitly has this character for it cannot be presumed that the Greek Government intended to subordinate its claim to that of its national to the point of sharing all its risks so that the barring of the national's claim could be pleaded against the Government. On the contrary, it is found that the Greek Government intervened in order to avoid this risk, which proves that it really had the intention of not making its claim dependent on that of the firm of Apostolidis.

It has the character of an independent claim because of the declared will of the Greek Government, which,

> by taking up the case of one of its subjects and by resorting to . . . international judicial proceedings on his behalf, . . . is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law *(P.C.I.J.,* Series A, No. 2, p. 12, *Mavrommatis Case,* Judgment of August 30, 1923).

The Greek Government clearly demonstrated its intention to become a party to the case. In its Reply of August 28, 1957 (p. 11), it declared that the contents of the claim of the firm of Apostolidis have become "an integral part of its own claim which must consequently be considered to contain the same text as the claim to which it refers". A proceeding having been carried on before the Commission over several years, this Government once more confirmed this point of view during the oral proceedings of January 20, 1959, through its agent who declared textually that

> the Greek Government adopts and takes up all the documents and all the submissions presented for discussion by the R. S. Apostolidis, including the claims asserted and the evidence or grounds invoked as well as the documents produced as far as they serve to support the claim and the submissions of this Government.

From this it follows that the problem of whether or not the claim of the Greek Government is admissible from the procedural point of view must be solved without taking into consideration the question of the admissibility of the claim submitted by the firm of Apostolidis.

It is clear that the Greek Government cannot be precluded, its application having been submitted within the time-limit of thirty days provided by Article 7, paragraph 3, of Chapter Five of the Settlement Convention; the text of this application fulfils the requirements of Rules 26 and 27 of the Rules of Procedure; the preliminary objection concerning the complainant which was raised by the defendant cannot be accepted.

In view of the action instituted by the Greek Government, the claim of the firm of Apostolidis has no longer any significance of its own, for it is completely absorbed by the former. The Commission points out that from the written application of the Greek Government of December 14, 1956, as well as from its Reply of August 28, 1957 (p. 12) it follows that compensation might possibly have to be paid to the firm of Apostolidis. The judgment of the Arbitral Commission on the merits could, therefore, in any case only have the same tenor and have the effect stipulated in Article 7, paragraph 5, of Chapter Five of the Convention. Any decision concerning the claim of the Greek Government will render nugatory the claim of the firm of Apostolidis so that the Commission can take up the merits without rendering a decision on the other preliminary objections of procedural law. In fact, the two actions deal with a review of the same decision of the *Bundesamt*. Although the *Bundesamt* had deemed it necessary to serve its decision not only on the Greek Government, which had properly brought an action before it, but also on the firm of Apostolidis which had declared itself a party concerned within the meaning of Section 5, paragraph 2, of the Annex to Chapter Five of the Settlement Convention, by letter of its representative dated June 9, 1956, forwarded to the *Bundesamt* by the Greek Embassy, but without having actually taken part in the proceedings before this German authority (records of the *Bundesamt,* pp. 74, 79 and 107),

any decision of the Commission on the application for review of the Greek Government will inevitably have consequences for the claimant firm.

It is on the basis of the property, rights and interests of the firm of Apostolidis that all former proceedings and the present proceedings have taken place, because by virtue of Articles 3 and 4, paragraphs 1 and 3, of Chapter Five, only the persons injured may claim compensation if the conditions laid down by the Settlement Convention are fulfilled even if the assertion of their claims forms the subject of an action brought by their national Government.

It is correct that on October 14, 1949, the Greek Government submitted through the Greek R.D.R. Mission to the R.D.R. Division, Detmold, a list containing several restitution claims for which it reserved the right to claim compensation (records of the *Bundesamt,* p. 85). But this first diplomatic *démarche* only proves, in compliance with the provisions of Article 4, paragraph 3, of Chapter Five of the Settlement Convention, that claims falling within the scope of paragraph 1 of this article have been filed with an agency of one of the Three Powers before the entry into force of the Convention and that they may thus be referred by that Power to the *Bundesamt* or directly filed with the latter by the claimant Government. But the claims of a particular claimant must have formed the subject of a separate claim before the *Bundesamt,* which has to examine whether there is a preclusion on account of non-observance of the time-limit of six months provided by the said article, and then to decide whether the conditions of Article 4, paragraph 1, of Chapter Five of the Settlement Convention were fulfilled, subject always to the possibility of a direct application to the Commission by the party concerned if the *Bundesamt* had not rendered its decision within the period of one year after submission of the claim, as provided by Article 7, paragraph 3, of the said Chapter Five.

(10) All requests of the Greek Restitution Mission to the Allied Authorities of June 28, August 31 and May 14, 1948, as well as the application of the Greek Government to the *Bundesamt* of October 26, 1955, concern restitution of, alternatively, compensation for, approximately 4,000 tons of chrome ore owned by the firm of Apostolidis. No reservation as to the claimed quantities appears in the records, and the firm of Apostolidis, which maintains the contrary in its pleading of October 12, 1957 (p. 29), did not prove the accuracy of its assertion. On the contrary, on May 4, 1956, the *Bundesamt* drew the attention of the Greek Embassy to its claim for restitution of, alternatively compensation for, 4,000 tons of chrome ore, stating specifically that it would recognise this to be the subject of the litigation "unless you adopt another point of view" (records of the *Bundesamt,* p. 21).

In view of its letters of June 11, June 25 and October 1, 1956, it must be conceded that the Greek Embassy fixed its claim at an amount of 4,000 tons of chrome ore, relying on an application for compensation dated June 9, 1956, from the representative of the firm of Apostolidis and sent to the *Bundesamt* by the Embassy (records of the *Bundesamt,* pp. 73, 74, 78, 79).

The letters of the representative of the claimant constantly speak of a claim covering 4,000 tons, and the figure of 40,000 tons appears for the first time in the application of December 6, 1956, of the firm of Apostolidis to the present Commission. The assertion of the claimant that the restriction of its claim to 4,000 tons is nothing but the consequence of a typing error (application of the claimant of December 6, 1956, p. 19) is by no means supported in the records.

The defendant also enlarged its preliminary objections to include the inadmissibility of submitting to the Commission claims higher than those submitted to the *Bundesamt* and on which the latter had been requested to decide and had actually rendered a decision. This objection was included in the Order of September 9, 1957, of the Commission which decided to join all the objections to the merits, subject to Rule 62 of the Rules of Procedure. In its Rejoinder of February 1, 1958, the defendant, without presenting a precise submission, suggested to the Commission that, to simplify the proceedings, a separate decision be rendered rejecting the claim in the amount of 34,754 tons, *i.e.,* 40,000 tons less the 5,246 tons which constitute the alternative claim of the complainant. The Commission did not deem it appropriate to follow this suggestion, since this point does not present special difficulties and may be settled in the final judgment.

The Commission holds that the claims submitted to it by the parties cannot be higher than those presented to the *Bundesamt*. This is true because higher claims constitute new claims which were not previously submitted for approval to the *Bundesamt* or a German court and which, consequently, do not fulfil the conditions or Article 7, paragraph 2, of Chapter Five of the Settlement Convention, pursuant to which only final decisions of the *Bundesamt* pursuant to Articles 1, 2 or 4, or of a German court pursuant to Article 3 or 4 are subject to review by the Arbitral Commission, unless no decision has been rendered by the *Bundesamt* or the German court within the year following the submission of the claim, which is not the case here. Any increase of the compensation claim would, moreover, be barred by a peremptory objection of preclusion in that it could no longer be submitted after the expiry of the time-limits fixed in Article 4, paragraph 2, of the said Chapter Five.

(11) The written proceedings were continued between the parties by the Reply of the claimant in two pleadings of October 9 and 12, 1957, and the Reply of the complainant of November 1, 1957, then by the submission of the Rejoinder of the defendant of February 1, 1958.

In its pleading of April 17, 1957, the complainant Government requested the hearing of several witnesses as to the removal of the chrome ore and its identification; it withdrew this request by letter of May 11, 1957. In its Answer of October 12, 1957 (pp. 21 and 28), however, it renewed its request for the hearing of these witnesses as well as of some others, particularly in order to determine the meaning of Article 4 of Chapter Five. The Commission did not deem it appropriate to grant this request, since the removal of approximately

4,000 tons of ore, the subject of the action, appeared sufficiently established, and since the question of identification and the interpretation of the Settlement Convention raise problems of law and not of fact which the Commission is entitled to settle independently.

It must also be mentioned that on September 4, 1957, the Italian Government, without claiming it was intervening in the proceedings of the case *sub lite,* suggested, with regard to the interest which the questions submitted to the Commission had for Italy, the granting of priority to the appeals involving test-cases; but the parties did not succeed in coming to an agreement on those which would have to be treated with priority so that the proceedings in each of the pending cases took their course.

The oral hearings took place on January 19 and 20, 1959, and the Greek Government requested the Commission to exclude by a preliminary decision the papers and documents produced by the Federal Government which related to the *travaux préparatoires* of the Settlement Convention, relying on Rule 62 of the Rules of Procedure, which confers on the Commission the right, in order to facilitate the proceedings, to hear and decide separately one or more issues raised by the parties.

The defendant requested the rejection of this application for a preliminary decision.

The Arbitral Commission did not allow this application of the complainant, since it did not consider pertinent the reasons invoked by the latter for obtaining a preliminary decision and since the application of Rule 62 of the Rules of Procedure is at the discretion of the Commission.

After the close of the oral hearings, the Commission by letters of April 21, 1959, again invited the parties to submit a variety of documents. In their answers of May 15, 1959, the parties complied with this request only in part, the Greek Government not having been able, in spite of its search of the records of the Apostolidis case, to find the documents requested.

C. The law

I. The limits of compensation pursuant to Article 4 *of Chapter Five of the Settlement Convention*

(12) The dispute primarily turns on the interpretation to be given to Article 4, paragraph 1, of Chapter Five of the Settlement Convention of October 23, 1954, which has the following tenor:

> If property to be restituted has, after identification in Germany, either been utilised or consumed in Germany before return to the claimant or been destroyed, stolen or otherwise disposed of before receipt by the claimant Government or by an appropriate agency of one of the Three Powers for despatch to the claimant, the Federal Republic shall compensate claimants who would otherwise be entitled to restitution under Article 1 or 3 of this Chapter, or who, at the entry into force of the present Convention, have had their claims for restitution approved by one of the Three Powers.

The present case also raises various problems concerning the meaning and the scope to be attributed to some related provisions of the said Chapter Five, especially Articles 3 and 5.

The interpretation of Article 4, paragraph 1, of Chapter Five of the Settlement Convention constitutes the central issue of the disputes which have arisen between the two Governments.

The restitution claims which did not fulfil the conditions laid down by these provisions do not give rise to any compensation if they cannot be satisfied. The Arbitral Commission holds that this point is absolutely beyond doubt. Entrusted by the Powers Signatory to the Settlement Convention with the mission of applying this Convention, the Commission considers itself, pursuant to the Charter which determines its functions, to be bound by the provisions of the Convention, which are of an imperative character, among which are the rules postponing the final settlement of all reparation for war damage caused by Germany until the conclusion of the peace. It should be recalled in this connection:

(a) Article 1 of Chapter Six of the Settlement Convention, which states concisely:

> The problem of reparation shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter, and

(*b*) Article 1, paragraph 6, of Chapter Ten of the same Convention, which has a general bearing and which stipulates very clearly:

> The provisions of this Article are not intended to cover compensation for loss or damage to property, rights or interests due to discriminatory treatment or resulting indirectly or directly from the war by any other means, but shall not affect the right of any of the United Nations to advance during negotiation for a peace settlement any claim for compensation of this nature with respect to its own or its nationals' property, rights or interests.

This principle has already been applied in several prior agreements, expressly reserved by the Settlement Convention, namely:

(a) in the Paris Inter-Allied Reparation Agreement of January 14, 1946, Part I, Article 2A, of which provides that all claims against the former German Government and its agencies resulting from the war will be covered by the respective shares of German reparations attributable to the signatory States;

(b) in the Potsdam Agreement of August 5, 1945, Section IV, paragraph 2, of which, in conjunction with section B of the Treaty between Poland and the U.S.S.R. of August 16, 1945, stipulates that reparation claims of Poland against Germany will be settled through German reparations for the benefit of the Soviet Union;

(*c*) by the Peace Treaties of February 10, 1947, concluded between the Allied Powers, on the one hand, and, on the other hand, Italy (Article 77, paragraph 4), Hungary (Article 30, paragraph 4), Bulgaria (Article 26, paragraph 4),

and Rumania (Article 28, paragraph 4), which stipulate that these four States waive on their own behalf and on behalf of their nationals all claims against Germany outstanding on May 8, 1945, especially all claims for loss and damage arising during the war;

(d) in the London Agreement on German External Debts of February 27, 1953, which stipulates in Article 5, paragraph 2, that the consideration of claims arising out of the war against the *Reich* and its agencies shall be deferred until the settlement of the problem of reparation.

In the light of these texts which, as *leges speciales,* created between the signatory States a legal position which takes precedence over general and customary international law as well as over the Regulations regarding the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 and over declarations of a political nature, such as the London Declaration of the Allied and Associated Powers of January 5, 1943, and Resolution VI of the Conference of Bretton Woods of July 22, 1944, the Arbitral Commission refuses to accept the responsibility of giving to Chapter Five of the Settlement Convention an interpretation contrary to all these treaty provisions establishing, in the relations with the Federal Republic of Germany, an exceptional set of rules for the reparation of war damages.

(13) The elliptical wording of Article 4, paragraph 1, of Chapter Five of the Settlement Convention is due to the fact that the provisions contained therein are actually founded on a former procedure which was familiar to the negotiators of the Convention, but which is not explained explicitly although there are several allusions to it in the text.

Thus it is said there that the property to be restituted must form the subject of an "identification in Germany" and that, to give rise to compensation, it must have been utilised or consumed in Germany "before return to the claimant," or destroyed, stolen or otherwise disposed of "before receipt by the claimant Government, or by an appropriate agency of one of the Three Powers for despatch to the claimant'; the obligation to compensate imposed on the defendant concerns either claimants "who would otherwise be entitled to restitution "or claimants "who", at the entry into force of the Convention, "have had their claims for restitution approved by one of the Three Powers". It should be added that paragraph 3 of the said Article 4 provides that "claims falling within the scope of paragraph 1 filed with an agency of any of the Three Powers before the entry into force of the present Convention "may be referred by this Power to the *Bundesamt;* moreover, Article 3, paragraph 3, and Article 4, paragraphs 1 and 4, of Chapter Five attribute conclusive power, either relative or absolute, depending on the case, to decisions of an agency of one of the Three Powers rejecting or approving claims for restitution of removed property.

In the opinion of the Commission, all these expressions presuppose a prior restitution and identification procedure, namely, a claimant requesting restitution or a claimant Government or an appropriate agency of one of the Three Powers charged with the delivery of the property to be restituted, *i.e.,*

property the restitution of which had been ordered, a designation of the beneficiaries who "would otherwise be entitled to restitution", the approval or rejection of a restitution claim by one of the Three Powers at the latest on the entry into force of the Convention, distinctions still to be made between the claims submitted to an agency of one of the Three Powers before the entry into force of the Convention and those which were submitted later, finally an obligation of the *Bundesamt* to recognise restitution claims approved by one of the Three Powers before the entry into force of the Convention, as well as certificates by one of them which establish that the property which forms the subject of a restitution claim was not received by an appropriate agency of the Power which had approved it, for despatch to the claimant.

There are thus numerous and obvious references to antecedent procedures; they cannot be disregarded when interpreting the Convention, which is shown by the fact that the Powers occupying Germany exercised and retained the authority in restitution matters until May 5, 1955.

During this period of ten years the accomplishment of restitution met with difficulties on account of the general shortage of replacement and consumer goods which made many goods located in Germany indispensable for the Occupation Powers, on the one hand, and for the maintenance of a German minimum economy, on the other hand, which these Powers had decided to guarantee to Germany. Restitution was subject to special provisions in the different zones of occupation, and it was carried out with the collaboration of agencies of the Occupation Powers, German agencies and Restitution Missions of the other Allied and Associated Governments.

(14) It would be impossible to give a reasonable meaning to these expressions by following the Greek theory which is based on the point of view that Germany is obliged to pay compensation once it has been proved that property was removed from Greek territory between October 28 1940, and May 1945 (Article 5 of Chapter Five of the Settlement Convention), that it was brought to Germany where its presence was ascertained, in any way and at any time, and that it was then consumed, utilised, destroyed or stolen or otherwise disposed of.

The complainant borrows from Article 3, paragraph 1, of Chapter Five the concept of "property to be restituted" used in Article 4 of that Chapter and maintains that Article 4 adopted the definition contained therein, with the result that any property which, notwithstanding provisions of German law to the contrary, may be the subject of a claim for restitution against its present possessor by "any person who, or whose predecessor in title, during the occupation of a territory, has been dispossessed of his property by larceny or by duress (with or without violence) by the forces or authorities of Germany or its Allies, or their individual members (whether or not pursuant to orders)" is property to be restituted which may give rise to compensation on the part of Germany if the conditions of Article 4 are fulfilled.

The defendant opposes the Greek argument by maintaining that "property to be restituted" within the meaning of Article 4, paragraph 1, of Chapter Five of the Settlement Convention is a much more restricted concept. It asserts that it is not sufficient that property fulfils in an abstract way the conditions of Article 3, paragraph 1, of Chapter Five in order to give rise to possible compensation. If such had been the intention of the Signatory Powers, they would not have used the expression "property to be restituted" in Article 4, but the more direct one of "property removed in the circumstances specified in Article 3".

According to the German theory, "property to be restituted" within the meaning of Article 4 is property which was removed from a country under German military occupation and brought to Germany during the war, found there and claimed for restitution. It is thus property which could have been restituted and which should have actually been despatched to the person entitled after the formal ascertainment of its identity with the property claimed during a restitution procedure in Germany, if, before its restitution to the claimant or its receipt by the claimant Government or an appropriate agency of one of the Three Powers, it had not disappeared as a consequence of the events mentioned in the said Article 4 which prevented such restitution. It is necessary that the property should first have been found in Germany and qualified as property removed from territories occupied by the German armed forces, and that its restitution should subsequently have been ordered by the appropriate authorities of the Allies during the occupation of Germany; it is further necessary that the property to be restituted should still have existed at the moment when the restitution claim was filed, otherwise restitution in kind would have been obviously impossible, any action for restitution would have to be suspended and in these circumstances the Settlement Convention does not create a right of compensation in favour of the claimant (German Answer of June 25, 1957, p. 33).

It follows from this point of view that the words "property to be restituted" denote property the restitution of which has been ordered, *i.e.,* a specific identified object and not any object the restitution of which could be claimed in application of Article 3 of Chapter Five of the Settlement Convention, because it had been taken illegally by the German forces or authorities or their individual members in countries occupied by Germany during the war.

(15) The concept of identification of removed property within the meaning of Article 4, paragraph 1, of Chapter Five of the Settlement Convention caused particularly vigorous disputes during the present proceedings.

Pursuant to this provision, property to be restituted, in order to give rise to compensation, must have disappeared for one of the reasons stated therein, but after its identification in Germany and before receipt by the claimant Government or by an appropriate agency of one of the Three Powers for despatch to the claimant.

None of the High Parties to this case denies the necessity of this identification in Germany itself, which is clearly laid down by the Settlement Conven-

tion, but they disagree on the question whether this expression must be given a special technical meaning or whether one should keep to its usual meaning since the Convention has not defined it.

(a) The Greek Government confers on the condition of "identification in Germany" an extremely broad meaning. It insists that Chapter Five of the Settlement Convention does not contain any precise provision as to a special identification procedure and as to the date at which it must have taken place, and concludes that this expression has no special technical meaning in the Convention and that it simply means that during a compensation proceeding the *Bundesamt* must examine whether the object for which compensation is claimed is identical with that which was removed by German forces during the occupation of Greece under the conditions indicated in Article 3 of the said Chapter. Consequently, it maintains that this identification can be proved by any means and at any moment before or after the disappearance of the claimed property. Since this disappearance by utilisation, consumption, destruction, theft or other act of disposal must have taken place before the return of the property to be restituted to the claimant, to the claimant Government or to the agency of one of the Three Powers, under the terms of Article 4, paragraph, 1 of Chapter Five, the complainant Government recognises that this requirement presupposes the actual existence of the claimed property in the territory of the Federal Republic of Germany after October 28, 1940, and it deduces therefrom that it is sufficient for the purpose of identification that it be proved that the property forming the subject of a compensation claim comes from territories in Greece which were once under military occupation and that it was removed and transported to Germany; in its opinion, the property, if it is not restituted, gives rise to compensation provided that it has been or can still be identified in one way or another. In this connection it accepts as sufficient evidence for identification the declarations of the firms and individuals in Germany which, subject to severe penalties, were obliged by General Order No. 6 of April 30, 1946 (published in the *Gazette of the Military Government in Germany,* British Zone, p. 206) to declare in writing the property and materials acquired during the war, coming from occupied countries and still in their possession at the moment when they made these declarations at the end of the war. A contrary interpretation of the requirement of "identification in Germany" would, in its opinion, solely serve the purpose of freeing the defendant from paying any compensation for property which was removed during a war-time occupation regime and was not transported to Germany (application of the claimant of December 6, 1956, pp. 4, 8 to 10; Reply of the claimant of October 12, 1957, pp. 11, 17 and 19; Reply of the complainant Government of November 1, 1957, pp. 11, 12, 19).

(b) In rebuttal of this argument, the Agent of the defendant maintains that the identification in Germany of property which was removed during the war-time occupation and which can be restituted in kind is a historical concept known to the Greek authorities, defined and specified in a practice of seven occupation years of Germany by the Three Powers and applied in one way or

another in thousands of precedents, on the basis of rules enforced by these Powers. The provisions of the Settlement Convention on compensation to be paid in certain contingencies to persons claiming restitution which, although ordered, could not be effected for the reasons listed in Article 4, paragraph 1, of Chapter Five, are closely connected with this practice, for they seek to terminate the restitution problem by ruling out cases which could not be settled during the occupation regime in Germany. The concept of identification was made the basis of this regulation.

The defendant points out that, pursuant to the said Article 4, paragraph 1, the complainant can only obtain compensation if the property restitution of which is requested had been subjected to a preliminary examination for the purpose of identification which led to the conclusion that restitution was possible but could not be carried out either because of the utilisation or consumption of the claimed property in Germany or because of its destruction, theft or other disposal.

It maintains that identification consists not only of the possibility of ascertaining the identity of the claimed object with the object to be restituted, but of the whole of the process of ascertaining this identity within the framework of a proceeding instituted for this purpose (German Answer of June 25, 1957, p. 28).

The Allied Control Council took a fundamental resolution concerning this matter which was entitled "Procedure of the Four Powers in the Matter of Restitution" on April 17, 1946 (Schmoller-Maier-Tobler, *Handbuch des Besatzungsrechts,* § 52, pp. 25–26), which specifies in Chapter I, paragraph 4, that the missions of the claimant countries are charged with inspecting the property on the spot and examining it with a view to its identification (*ibid.,* p. 28). This regulation was incorporated, with few modifications, in all the procedures adopted later in the various zones of occupation in Germany.

It is maintained that identification then implies a procedure in the course of which it is officially established by the competent authorities that the claimed property is still physically existent in Germany and that it is identical with the existing object so that its restitution is still possible; Germany's obligation to compensate arises only if the property is utilised or lost after the establishment of these facts.

In its opinion identification necessarily postulates that the property has been found in Germany, that it has been subjected to physical investigation with regard to its quality, nature and quantity, and that it has been recognised as corresponding to the claimed property. Identification is thus a legal concept constantly applied in the restitution procedure by the competent authorities of the Three Powers during the occupation of Germany, and it was taken over from this procedure when the Settlement Convention was negotiated. Compensation is not envisaged for property which is simply identifiable, the preliminary and actual ascertainment of its identity being indispensable. The unilateral declarations made pursuant to General Order No. 6 by German

firms and individuals that were in possession of property removed from the regions occupied by the German armed forces during the war cannot be and have never been equivalent to identification *(ibid.,* p. 31; German Reply of February 1, 1958, pp. 32–34).

(16) Neither of the two views set forth above finds any decisive support in the text of Article 4 of Chapter Five of the Settlement Convention.

The view maintained by the complainant Government is not conclusive since the right to compensation for non-executed restitution is subjected by the said Article 4 to the double condition that the utilisation, destruction or disappearance of the claimed property must have taken place after its identification in Germany and before its return to the claimant or to the claimant Government or to the appropriate agency of one of the Three Occupation Powers in Germany for despatch to the claimant. Evidently it must be property which existed in the territory of the Federal Republic at the time when it was claimed and which could have been physically restituted if the events listed in Article 4, paragraph 1, of Chapter Five which made restitution impossible had not occurred. The assertion of the Greek Government that compensation was due for any property which had been stolen, on the sole condition that its transport to Germany was proved, cannot thus be accepted by the Commission, for it is incompatible with the provisions of this Chapter, which concern only "external restitution "and under which the obligation to restitute can relate only to property existing and identified at the moment when restitution is granted. The same is true of compensation, which serves as substitute for the property restitution of which failed. Only within these limits is compensation envisaged by the Settlement Convention and any claim going beyond them falls within the general concept of reparation, the settlement of which is deferred by the same Convention to the conclusion of the peace treaty or of special agreements.

Nor can the Arbitral Commission admit that it would be compatible with the literal and grammatical meaning of Article 4, paragraph 1, of Chapter Five that the identification of the removed property could be effected at any time and in any way nor that it can result in particular from the declarations made in compliance with General Order No. 6 by the firms or individuals in Germany that held property removed from the countries occupied by this Power during the war. This interpretation would also lead to imposing on the Federal Republic of Germany obligations going beyond the scope of restitution and falling within the general concept of reparation the settlement of which has been postponed.

In fact, on the one hand the Settlement Convention unquestionably limits compensation to property removed and transported to Germany, which has disappeared after identification in that country but before restitution to the claimant or before receipt by the claimant Government or by the appropriate agency of one of the Three Powers for despatch to the claimant, *i.e.,* before one of those entitled to it became personally responsible for it, which necessarily implies a variety of measures, investigations and examinations established

by orders and regulations adopted by the Occupation Powers in Germany in execution of the Resolution of the Allied Control Council of April 17, 1946, concerning the procedure in the matter of restitution. Compensation being, even in the opinion of the complainant Government itself, a measure intended to take the place of restitution which had become impracticable, it is quite evident that it can only be paid if it is certain that restitution was authorised, this authorisation in turn depending on the identification of the claimed property; therefore, identification cannot take place at any time or in any way. The restitution measures, practically all of which took place before the entry into force of the Settlement Convention, have never been left without control by the Powers occupying Germany to the discretion of the claimants.

On the other hand, the declarations of the holders of the removed property in Germany have no probative value for establishing the identity of the claimed property because very often these holders were unable to ascertain it. Their declarations were always checked by the competent authorities of the Allied Powers in Germany. In practice they could only give rise to a presumption, which, moreover, was frequently approximative or even incorrect, as to the national origin of the property to be restituted. The Settlement Convention, moreover, does not contain any reference to the probative value of these declarations.

The Commission must recognise, however, that the German argument is not based on any absolutely clear text of the Settlement Convention laying down how, by what authorities and at what moment the identification of the property for which a substituted compensation is claimed must be effected. In this respect, Article 4 of Chapter Five of this Convention contains lacunae and obscurities which can only be filled in or removed by resorting to means of investigation other than the literal and grammatical interpretation of the text of the Convention; the natural meaning of the terms used by the Parties does not permit the unequivocal establishment of what they had in mind; it is therefore necessary to inquire into their common intent when they adopted Chapter Five of the Settlement Convention.

II. The travaux préparatoires

(17) It is universally admitted in international law that a teleological interpretation of international conventions may be resorted to in order to give them the full efficacy which the Parties meant them to have in the light of the purpose which they intended to achieve, this purpose being the common and reasonable purpose of the Convention at the time of its conclusion and not the purpose which each Party desired to achieve for its part and still less the purpose which the States subsequently acceding to the Convention might visualise.

The Commission must investigate whether the purpose which the Parties wished to achieve by the complicated text of Article 4, paragraph 1, of Chapter Five of the Settlement Convention can be elucidated by studying the *travaux préparatoires* for Articles 3 and 4 of this Chapter; by letter of December 11, 1957, it asked the High Contracting Parties to furnish these documents,

a request with which the latter complied by producing material relating especially to these articles. This selection consists of twelve documents, which were communicated to the complainant by letter of the Commission of September 18, 1958, and to the claimant on September 26, 1958.

The Commission is of the opinion that these documents suffice to disclose the meaning to be given to Articles 3 and 4 of Chapter Five of the Settlement Convention and that they are such as to bring out their *occasio legis,* by permitting the determination with certainty of the common purpose of the Contracting States when they adopted these provisions.

During the present proceedings the Greek Government, however, flatly opposed the taking into consideration of the *travaux préparatoires* by citing a rule of international law according to which the preparatory documents of a multilateral treaty cannot be invoked against the Parties which did not take part in their drafting and which were not in a position to acquaint themselves with these papers because they were not accessible to them.

The Settlement Convention undeniably is a multilateral treaty and, by virtue of Article 17, paragraph 3, of the Charter of the Commission, Greece became a principal Party to the agreement contained in Chapters Five and Ten of the Settlement Convention by acceding to the Charter. Not having taken part in the negotiations which led to the drafting of these two Chapters, however, the complainant maintains that these preparatory documents, which were neither published nor brought to its knowledge before its accession, cannot be set up against it, and requested the Commission in its Reply of November 1, 1957, "to exclude from the proceedings the papers and documents produced by the Federal Government which relate to the *travaux préparatoires* of the Bonn/Paris Convention".

The Commission examined this point of international law at great length in its decision of November 14, 1959, concerning Case No. 34 between the Italian Republic and the Federal Republic of Germany (*Decisions of [the Arbitral Commission],* vol. Ill, No. 70). It can only confirm the long argumentation contained in this decision and confines itself to pointing out that it is not an absolute rule of international law—which, moreover, does not contain any rule of customary law concerning the interpretation of treaties between States—that the *travaux préparatoires* of a multilateral treaty cannot be set up against a State which acceded to it without having taken part in the negotiations or without having had access to these *travaux préparatoires* (Oppenheim-Lauterpacht, *International Law,* 7th ed., § 553, p. 857). Its correctness was contested by Sir Hersch Lauterpacht in his Report on "*Interprétation des traités",* submitted to the Institut de Droit International at its Bath session of 1950; Judge van Eysinga, when he was a member of the Permanent Court of International Justice, also regretted that the Court is often unable to have available the records of the meetings in which conventions have been perfected because the Governments often consider them secret documents (Dissenting Opinion in the *Oscar Chinn Case, P.C.I.J.,* Series A/B, No. 63, p. I36).

The Commission shares the opinion of the Institut de Droit International which, in its Resolution adopted at the Granada session of April 19, 1956, brought about a decisive advance in international law by deciding that the problem of resorting to the *travaux préparatoires* of a multilateral treaty, even if they had not been published or made accessible to one of the Parties, must be left to the discretion of the judge and solved according to the special circumstances of the case at issue *(Annuaire,* 1956, p. 347).

It thus rests with the Commission in the exercise of its power of judgment to decide whether the *travaux préparatoires* should be used for the interpretation of Article 4, paragraph 1, of the Settlement Convention although Greece did not take part in the preparation of this diplomatic instrument and although it had no knowledge of these documents prior to its declaration of accession, or whether, on the contrary, they should be excluded from the proceedings by virtue of the special circumstances of the case before it, since the consideration of the said *travaux préparatoires* might lead it either to confirm or to invalidate the interpretation given by the complainant to the provision in question of the Convention (see, to this effect, Guggenheim, *Traité de droit international public* (1953), vol. I, p. 137).

(18) The twelve documents which were communicated to the Arbitral Commission by the Powers Signatory to the Settlement Convention as *travaux préparatoires* and most of which had previously been submitted with the Answer of the defendant of June 25, 1957, cover a period from August 5, 1950, to May 5, 1952; some of them were written before the beginning of the negotiations between the Three Powers and the Federal Republic of Germany which, according to the statements of the latter (Answer, p. 9), did not start until July 1951. The three documents (dated August 5, 1950, December 21, 1950, and April 12, 1951) therefore are not preparatory documents *stricto sensu,* such documents being limited to those in which all signatories to the treaty have taken part jointly during the negotiations and before the signing of the treaty (definition of Lord McNair in *Annuaire de l'Institut de Droit International,* 1952, vol. II, p. 367), and their evidential value for disclosing the intent of the Parties may be freely estimated by the Commission, even considering the Greek point, of view that the preparatory documents which were not available to it at the time of its accession to the Convention cannot be set up against an acceding State. These documents, however, which may be described as preliminary documents, already initiate the discussion on the questions which afterwards formed the subject of Article 4 of Chapter Five of the Convention and are linked directly with the documents exchanged after the official opening of the negotiations. The Commission considers this special situation a first reason for not removing from the files of the present case the preparatory documents themselves, for it cannot place reliance upon a documentation which would not enable it to know the complete development of the exchange of views between the High Contracting Parties.

A second reason is held by the Commission to be the fact that the complainant Government well knew, even before the conclusion of the Settlement Convention, what essentially would be the solutions which the Three Powers contemplated introducing with regard to the limited range of the indemnification to be required from Germany in respect of property removed which in certain circumstances could no longer be restituted. In fact, the Military Government Regulations (title 19, restitutions) copy of which is deposited in the files (Annex 9 to the Answer of June 5, 1957) show in the following terms that collaboration with the missions set up by the claimant States was envisaged:

> The Office of Military Government of each *Land* will render suitable cooperation to such missions of claimant nations as may be authorized by the Office of Military Government for Germany (U.S.) to visit the location of restitutable property for purposes of identification, examination, supervision of packing and snipping and signing of necessary receipts and other documents. (Original text.)

Foreign Missions, so-called Investigation and Restitution Missions, were accredited by numerous States—including the Greek Government—which had restitution rights to assert with the military commanders of each zone of occupation in Germany; they closely co-operated with each other and kept each other reciprocally informed as to any information obtained by them, as was established in the judgment of the Commission of November 14, 1959, in Case No. 34 between the Italian Republic and the Federal Republic of Germany (section 20). It appears from this judgment that on August 30,1949, the Allied Occupation Authorities sent a letter to all Investigation and Restitution Missions announcing their plan to deal with the question of compensation for restitutable property which could not be restituted since it had been used for the German economy under authority of Military Government officials, or destroyed, stolen or disposed of in other ways after receipt of the claim and identification. All the guiding ideas which were subsequently introduced in Article 4, paragraph 1, of Chapter Five of the Settlement Convention can already be found in this letter.

The Commission cannot encourage an interpretation of the Settlement. Convention which would lead to distinguishing between the Signatory Parties against whom the *travaux préparatoires* may undoubtedly be set up, and the Acceding Parties who, according to the view of the complainant Government, should be granted the right to oppose any resort to these *travaux préparatoires* for determining the rights and obligations resulting from their accession to the Convention. It considers such a duality of interpretation contrary to the principle of equal status of the States parties to the Convention and liable to create injustice; it is evident that the Acceding States can have under the Settlement Convention, Chapters Five and Ten, no other rights, and particularly no more far-reaching rights, than those granted to the Three Powers which concluded it with Germany. The Commission holds that any other interpretation would be incompatible with the tenor of Article 17, paragraph 3, of its Charter

which provides that "*tout État accédant à la présente Charte sera considéré de ce fait comme partie à l'accord conclu entre les États Signataires contenu dans les Chapitres Cinquième et Dixième de la Convention*", the English and German texts being even more categorical in providing that the Acceding State "shall be deemed a principal party", and that this State "*gilt damit voll als Partei*". These terms signify that the States which acceded to the Charter must be, as far as Chapters Five and Ten of the Convention are concerned, put on exactly the same footing as the Signatory States, and that, since the rights and obligations of the latter can be determined by consulting the *travaux préparatoires,* the same applies to the Acceding States.

The Arbitral Commission considers it superfluous to inquire whether the rule that *travaux préparatoires* cannot be invoked against a State acceding to a multilateral Convention in the drafting of which it had not taken part and to the *travaux préparatoires* of which it had no access could be justified if, by unpublished reservations, one or several of the Contracting Parties had assured to themselves a dominant position or special privileges as compared with the Acceding States, since it was neither alleged during the proceedings nor consequently proved that the provisions contained in the Settlement Convention would not be the same or that they would have a different significance and application for the Occupation Powers and for the Acceding States.

For these various reasons, the Commission decides that there is no occasion for excluding from the present case the documents described as *travaux préparatoires,* for they are of a nature to show the objective of the Contracting States when adopting Article 4 of Chapter Five of the Settlement Convention and to interpret it in conformity with the actual and common intent of these States.

(19) In its judgment of November 14, 1959, in Case No. 34 between the Italian Republic and the Federal Republic of Germany, the Arbitral Commission proceeded to a detailed analysis of the contents of these *travaux préparatoires* in connection with the origin of Articles 3 and 4 of Chapter Five and certain general provisions of the Settlement Convention; it reached the following results which it considers equally applicable to the present case, but which it has supplemented and adapted to meet the special features of this case, without, however, quoting, *brevitatis causa,* all the texts which were fully and lengthily cited in the said judgment.

It is obvious that the origin of Article 4, paragraph 1, of Chapter Five of the Settlement Convention is to be found in the communication from the Allied High Commission in Germany of August 5, 1950 (AGSEC [50] 1664], the contents of which largely correspond to the letter of the Allied Occupation Authorities dated August 30, 1949, to all Foreign Investigation and Restitution Missions. These two letters start from the assumption that a liability for compensation cannot be based alone on the impossibility of restituting property which had been removed and brought to Germany, and the letters from the outset limited the liability to be imposed on Germany, this limitation having

been stated in detail as follows in the later exchange of correspondence with the German authorities on this subject:

> 'By letter of April 12, 1951 (AGSEC [51] 629), the Allied High Commission pointed out once more that the compensation envisaged concerned only those goods which had been found and identified, but which, although judged restitutable, could not be returned because they consisted of
>
> (*a*) expendable raw materials utilized by the German economy, or
>
> (*b*) items which had been destroyed, stolen or otherwise disposed of.'

The Allied High Commission then specified that these compensation claims were chiefly based on the provisions of paragraph 19, section VI, of Proclamation No. 2 of the Control Council dealing with the additional requirements to be imposed on Germany, and added that in such cases the granting of compensation was justified by the general legal principles which are applicable whenever one party makes use of property over which another party has rights *(Travaux préparatoires,* No. 3).

The Federal Government of Germany having pointed out, in its memorandum of July 11, 1951, that property removed which can no longer be restituted gives rise to a reparation claim falling within the provisions of the Paris Agreement on Reparation (Annex letter F), which defer payment thereof until after the conclusion of peace *(Travaux préparatoires,* No. 5, paragraph 3), the Allied High Commission replied by memorandum of July 31, 1951, drawing attention to the previous exchange of correspondence (AGSEC [50] 1664 and [51] 629) in which it was clearly stated that the obligation to compensate concerned only property which disappeared or was utilised "after identification and before return to the claimant" *(Travaux préparatoires,* No. 6, paragraph 8).

It follows from these documents, which use the same expressions as Article 4 of Chapter Five of the Settlement Convention, that this article is the result of an effort to draw up in as condensed a form as possible the solutions which had been examined in the diplomatic correspondence between the High Contracting Parties and the perfecting of which was entrusted to an expert commission composed of one national of each of the Signatory Powers.

The goal which these experts set themselves is clearly apparent. It was not a question of providing for compensation for all property illegally removed by the German forces during the occupation of Allied countries and brought to Germany, whenever this property could not be restituted since it had been utilised, consumed, destroyed, lost, stolen or otherwise disposed of, for the right of the victorious States to obtain reparations was and still is reserved, but can only be settled upon the conclusion of a peace treaty with Germany.

The Commission has satisfied itself that the purpose of Article 4 of Chapter Five of the Settlement Convention is to meet an unusual situation, temporary in nature, which arose out of the termination of the military occupation of Western Germany, that of restitution which failed ("*vereitelte Restitutionen*"),

order to wind up the thorny problem of restitution. On the date of the signature of the Settlement Convention there was only a relatively small number of pending claims for restitution, and for those which might be submitted belatedly the provisions of ordinary German law concerning the restitution of removed or lost objects seemed sufficient.

The Signatory Parties introduced into the Settlement Convention a special provision covering cases where restitution could not be effected. Compensation is envisaged only for property removed from countries occupied during the war by German forces as laid down in Article 3, which had been found in Germany, which formed the subject of a restitution claim there and which was identified there, but which could not be restituted, since after this identification in Germany, but before return to the claimant or receipt by the claimant Government or the appropriate agency of one of the Three Powers for despatch to the claimant, it disappeared for one of the reasons listed in Article 4, paragraph 1, of Chapter Five of the Settlement Convention. All other claims for restitution which cannot be executed do not give rise to compensation before the conclusion of the peace treaty.

The firm belief of the Commission is moreover supported by the letter of May 5, 1952, which the *rapporteur* for the Settlement Convention, Mr. Debevoise, of the Office of the United States High Commission for Germany, addressed to Professor Kaufmann in his capacity as counsel for the defendant and to which special importance should be attached because it refers directly to the text of Article 4 of Chapter Five, including the few modifications of the wording which it underwent during the *travaux préparatoires.* After a summary of the said Article 4, this letter adds that "it provides for compensation, *inter alia,* when claimants have had their claims for restitution approved by one of the Three Powers prior to the entry into force of the Convention" *{Travaux préparatoires,* No. 12).

In vain does the claimant maintain that the text of this letter contemplates compensation in cases other than those where the claims have previously been approved within the framework of a special procedure, since the words "*inter alia*" imply exceptions (Reply of the claimant of October 12, 1957, p. 21). This observation is obviously the result of confusion. On the one hand, the letter envisaged only one of the prerequisites for compensation contained in Article 4 of Chapter Five, and the words "*inter alia*" were necessary to cover those cases where the claimant was entitled to restitution, but where his claim had not been approved before the entry into force of the Convention. On the other hand, the letter referred to the suggestion made by the Federal Republic of Germany to permit a re-opening of certain proceedings which had resulted in restitution cases decided by one of the Three Powers, without the Federal Government having had the opportunity of participating therein, or its nationals having been able to become a party to these proceedings. The Three Powers refused to contemplate a review of restitution cases approved by their agencies before the entry into force of the Settlement Convention, but were prepared to allow exchanges of

view between experts appointed by both parties concerning the lists of restitution claims sent to the defendant Government, as may be seen from the text of the letter (*Travaux préparatoires,* No. 12).

III. Correlation between the Settlement Convention and the restitution procedure

(20) Undeniably there is a close correlation between the rules adopted in the Settlement Convention for restitution which was not effected and the restitution procedure followed by the Allied Authorities during the occupation of Germany, of which the correspondence between Mr. Debevoise and Professor Kaufmann is a typical manifestation.

The restitution of removed property formed the subject of a regulation of the Four Powers promulgated on April 17, 1946, by the Reparations Deliveries and Restitution Directorate of the Allies and communicated to the Commanders of the four zones of occupation in Germany in order to co-ordinate their practice in this field (Schmoller, *op. cit.,* § 52, pp. 25–28).

It required, in chronological order and including some former texts:

(a) a compulsory declaration of all property in Germany which had been removed, stolen or looted in the territories of any of the United Nations occupied by German forces during the war (Control Council Proclamation No. 2, of September 1945, paragraph 19 [*a*] to [*c*], and General Order No. 6 of April 30, 1946);

(b) submission of a claim for restitution by the Government of a State which considered itself entitled to restitution, or by its authorised representative;

(c) investigations for the purpose of locating the claimed property and leading to its identification;

(d) either an authority for release, if the result of the investigations was favourable for the claimant, for part or the whole of the claimed property, or, on the contrary, the rejection of the claim, if the result of the investigations was negative.

The right to compensation is directly connected with this procedure since pursuant to Article 4, paragraph 1, of Chapter Five of the Settlement Convention it only arises in the case of utilisation, consumption or disappearance of the claimed property after its identification in Germany but before return to the claimant or to the claimant Government or the agency of one of the Three Powers for despatch to the claimant.

Identification therefore constituted one of the essential parts of this procedure. In doubtful or controversial cases, the investigation report of the agencies competent for restitution did not suffice, and the identification was definitively carried out only upon a positive decision of the Occupation Authorities to the effect that the property removed and claimed was identical with the property found in Germany. This procedure could also lead to a negative conclusion as a consequence of mixing, adding, transforming, specifications, etc., of the prop-

erty. The question whether the requirements of Article 3, paragraph 1, of Chapter Five for a claim for restitution of an object removed were fulfilled was not included in the identification procedure; it led to different solutions on the part of the Occupation Powers in Germany which finally admitted a presumption *juris tantum* that any person who, during the occupation of territories of the Allied and Associated Powers, had been dispossessed of his property by the forces or authorities of Germany or its Allies or by their individual members, had been dispossessed by larceny or by duress, with or without violence, the proof of the contrary lying with the German possessor, *e.g.* when he alleged that his acquisition was the result of normal business transactions, a proof which was only admitted on the basis of written documents (Schmoller, *op. cit.,* § 52, p. 15).

(21) The Commission has no doubt that Article 4, paragraph 1, of Chapter Five, in its description of restitution which could not be carried out, refers to claims for restitution which had already been instituted and which had reached a certain stage of development, but which, for the special reasons mentioned therein, had not led to the restitution of the claimed article. This statement corresponds to the declarations of intent which were addressed to the Federal Government by the Allied High Commission and which were notified to the complainant by the competent Agencies of the Occupation Powers, either as general communications or as relating to particular cases, as well as to the text of this provision of the Settlement Convention itself which necessarily implies that the property to be restituted must already have formed the subject of restitution proceedings which had not been brought to completion. The reasons themselves which might lead to the failure of restitution presuppose that external facts have interfered with restitution proceedings already in progress and have prevented their successful completion.

The same applies to the conditions requiring the Federal Republic of Germany to pay compensation for non-restituted property; the claimants have to prove that they would have been entitled to restitution under Article 3 of the said Chapter Five, or that at the entry into force of the Settlement Convention the claims for restitution had been "approved by one of the Three Powers "and that the re-opening of the proceedings which had already led to an approval of restitution had been refused. These conditions are incomprehensible if one does not take into account restitution proceedings which have been instituted and which have reached a certain stage of development. This is the only interpretation corresponding to the text of Article 4 of Chapter Five as well as to the *travaux préparatoires* of the Settlement Convention.

The complainant Government, however, tries to deduce the needlessness of any previous application for restitution from the terms of Article 4, paragraph *2,* second sentence, of Chapter Five which defines as follows the meaning of paragraph 1 of the same article of the Settlement Convention:

> The court stipulated in Article 3 shall, upon suit brought by the claimant otherwise entitled to restitution, render a decision on the compensation claim

> in respect of property the restitution of which could have been requested under Article 3 . . .

The complainant infers from this use of the conditional mood that the Settlement Convention does not require that the claim for restitution precede the claim for compensation and that it is sufficient that it fulfils the requirements for being filed; it thus concludes that the restitution proceeding, important for the proof of the removal of property, is not a legal condition for compensation.

This reasoning is not conclusive. The words "the claimant otherwise entitled to restitution" are meant to indicate the injured parties who would have been entitled to restitution if the property had not been utilised, consumed or destroyed after its identification in Germany, but whose restitution claims had not yet been approved by the Allied authorities, as against those who, in possession of such binding and definitive approval on the entry into force of the Settlement Convention, are entitled to substituted compensation without the defendant Government being able to request a review of this claim (Article 4, paragraph 1, *in fine,* of Chapter Five).

Moreover, the necessity for an application filed with the competent authorities is confirmed by the last sentence of Article 4, paragraph 2, of Chapter Five which provides:

> The filing of the application and the bringing of the suit must take place not later than one year after the entry into force of the present Convention or one year after notification to the claimant that the property is not available for restitution, whichever is later.

This provision quite obviously presupposes a former application for restitution which must be made in all cases to make it possible to decide whether or not there is a preclusion depending on whether the *dies a quo* is fixed at the entry into force of the Convention or at the date of the notification, especially if this latter took place after the entry into force of the Convention.

The Commission intends to leave open the question of compensation in cases which if they actually occurred would only be exceptions, restitution proceedings having virtually come to an end in 1951, where no restitution claim had been filed before the entry into force of the Settlement Convention, since this situation does not exist in the dispute presently under consideration.

(22) The expression "identification in Germany" used in Article 4, paragraph 1, of Chapter Five of the Settlement Convention means that there must be physical ascertainment by the senses and particularly by ocular perception that the property restitution of which is claimed is the same as that which had been removed under the conditions indicated in Article 3 of Chapter Five.

The Settlement Convention does not state, however, how this identification procedure is to be carried out. The Commission holds that this verification must, always form a restitution proceeding. The term "identification" which is used in the said Article 4, paragraph 1, of Chapter Five cannot have a meaning other than that of a proceeding which has led to the ascertainment,

by physical perception, that the property located is identical with the property claimed. This concept corresponds to the analysis which was given by the Board of Review of Herford in its judgment of January 28, 1952 *(Rechtsprechung zum Wiedergutmachungsrecht,* vol. III, 1952, pp. 110–111), part of which is quoted in the judgment of November 14, 1959, of this Commission (Case No. 34 between the Italian Republic and the Federal Republic of Germany, section 29—*Decisions of the Arbitral Commission,* vol. III, No. 70).

The Commission has thus reached the conclusion that the meaning of the word "identification" implies the possibility of ascertaining the identity of an object, and that, if this possibility itself does not exist, the identification must fail, as, *e.g.,* when the object no longer exists, or cannot be found at the moment when identification is to take place, or when it has lost its essential characteristics so that it is no longer identifiable. Thus the requirements for identification in Germany necessarily imply the existence of the article the ascertainment of which results from an application for the restitution of removed property which has led to investigations permitting the finding of the claimed object. A preliminary proceeding is thus indispensable for the realisation of the identification. The "identification" is by no means an abstract operation of description without the active meaning of a physical operation for the ascertainment of identity, but one which defines the condition of the removed property found in Germany at the end of hostilities and which must be restituted to the person entitled.

(23) The indubitable requirement, under the terms of Article 4, paragraph 1, of Chapter Five of the Settlement Convention, of identification in Germany itself before utilisation or loss of the article, only confirms the concept of property to be restituted, as has been stated by the Commission in its judgment of November 14, 1959 (Case No. 34) and in its present decision. Such property is not property which must be restituted because it fulfils only the conditions of Article 3 of Chapter Five, but property which could actually be restituted because it had been the subject of "identification in Germany"; compensation by payment of the replacement value is granted only for a claim for restitution which is recognised as justified and which ought to have led to actual return of the property in kind, had not the facts laid down in Article *4,* paragraph 1, of this Chapter interfered before its return to the claimant. The text of the Settlement Convention admits of no other interpretation, the less so as it corresponds to the intention of the Contracting Parties shown subsequently.

It is beyond doubt that the Parties signatory to this Convention did not intend to provide for payment of compensation in all cases in which the property removed could not be restituted in kind. The Greek Government cannot claim, on the basis of this Convention, to have more rights or other rights than those which the Three Powers secured for themselves.

From this the Arbitral Commission finds inadmissible complainant's reasoning which attempts to assert that it is always possible to proceed with the identification of property no longer existent, and that the identification has to

be considered as having been achieved when it has been proved, even long after the article has been utilised, destroyed, stolen or has disappeared and before any claim for restitution has been filed, that the property to be identified had been removed from occupied territories in Greece after October 28, 1940, and that it reached Germany, without a direct and physical ascertainment of its existence and even without a claim for restitution being necessary.

IV. The case of Apostolidis (No. 215)

(24) The meaning of Article 4 of Chapter Five of the Settlement Convention having been determined by the Commission, it should be examined whether or not the application for payment of compensation by the Greek Government is well-founded. It comprises three claims:

(a) Claim 163/7012, concerning 3,050 tons

As shown by the statement of facts, the identification procedure did not cover this total amount, but only the 1,662 tons which remained on December 4, 1948, when the investigation report of the R.D.R. Division, Detmold, was drawn up, after the authorised deduction of some chrome for the benefit of German industry. Anything thus used and consumed before this date cannot form the subject of compensation on the basis of Article 4 of Chapter Five of the Settlement Convention, which provides for compensation only for property which disappeared after its identification in Germany for one of the reasons listed there. In its decision of November 8, 1956, the *Bundesamt* admitted that 1,662 tons still existed on December 4, 1948, and this statement, which is not contrary to the records, must be recognised by the Commission.

The investigation report, however, states that only part of these 1,662 tons were identified as being the property of the firm of Apostolidis. Only the 403 tons are doubtful which came from Eisenerz G.m.b.H. of Berlin, which had received the ore from three different sources in Greece, and only a part of it, which cannot be defined exactly, from the firm of Apostolidis; for these 403 tons, identification has thus failed, and only the remainder, 1,662 less 403, *i.e.,* 1,259 tons, can be considered as identified and can give rise to compensation since this ore was not returned to its dispossessed owner after identification and since its consumption by the German economy can be considered the more certain as the Elektro-Werk of Weisweiler which had reported the 1,662 tons had already been granted a general authorisation by the Metallurgy Branch at Düsseldorf on December 10, 1947, to utilise the chrome ore in its possession for its purposes (records of the *Bundesamt,* pp. 37 and 43).

The Allied Occupation Authorities rejected the restitution claim for the sole reason that the chrome ore had been delivered to the firm of Possehl of Lübeck in execution of regular contracts with the firm of Apostolidis, which the latter contests categorically.

The complainant Government maintains that the rejection of its claim on this ground is unjustified, and it invokes the following circumstances:

The firm of Apostolidis and the firm of Possehl had entertained business relations already before the Second World War. But at the beginning of the war the firm of Apostolidis broke them off. The German firm had tried to renew them by letter of April 2, 1947, in which it stated that the imports of chrome ore to Germany were under official control at that time and that it would be able to obtain the permits necessary for importing it. On November 22, 1948, it sent to the telegraphic address of the firm of Apostolidis the following cable without stating the reason why it needed the information requested:

> Chrome Volos. On request of authority please confirm by cable that you made regular chrome deliveries to us before the war. Stop. Thanks in anticipation Erzpossehl. (Reply of the claimant of October 12, 1957, p.34).

On November 24, 1948, the firm of Apostolidis answered as follows:

> Confirm having made large consignments of chrome ore to you before the war—Chrome.

According to the complainant, the firm of Possehl forwarded this cable to the Gesellschaft für Elektrometallurgie of Weisweiler, which used it for obtaining from the Allied Authorities the authority to dispose freely of the chrome ore in its possession, maintaining that it was the result of transactions made before the war. The Occupation Authorities were thus misled, as shown by the letter written on February 2, 1949, by the firm of Possehl to the Greek Restitution Mission in which it recognises that the amount in question (2,019 tons) concerned the execution of a contract concluded with the firm of Apostolidis in 1943. A continuation of the pre-war contract was out of the question, since at that time the mines of this firm were requisitioned and exploited by the German Occupation Authorities in Greece; the contracts had been concluded in the name of Apostolidis, without this firm having been able to exert any influence on the conclusion of this contract (complaint of December 6, 1956, p. 14). Although the firm of Apostolidis had transactions with the firm of Possehl before the war, they had nothing to do with the ore which forms the subject of claim 163/7012, since it was removed illegally during the occupation of Greece by the German forces. The Greek firm invokes as evidence several communications written by the German Occupation Authorities in Greece, a certificate of the mayor of Rodiari of August 27, 1945, and the affidavits of several persons.

It appears from two letters of the firm of Possehl to the representative of the claimant firm of July 8, 1957, and August 29, 1957 (Reply of the claimant of October 12, 1957, Annexes 1 and 2) that these were not deliveries in execution of contracts entered into by the firm of Apostolidis before the war. The Allied Occupation Authorities had indicated that compensation was to be envisaged for 3,050 tons removed. No final decision was rendered, however, since the British Occupation Authorities were being dissolved.

In these circumstances, the complainant requests the Commission to examine the decisions of the British Military Government rejecting the claim for restitution of 3,050 tons of chrome ore taken away from the firm of Apostolidis, by applying by analogy Article 3, paragraph 3, of Chapter Five of the

Settlement Convention (Reply of the claimant of October 12, 1957, pp. 33 and 35). The defendant opposes this request.

(25) This request of the complainant raises the question whether the decision of the R.D.R., Detmold, of December 13, 1948, rejecting the restitution claim is legally binding upon the Arbitral Commission.

Concerning the probative force of the decisions of the Allied Occupation Authorities in Germany in the matter of restitution of property removed and brought to Germany during the war, Chapter Five contains some provisions for particular cases which are not all governed by the same rules. Property other than jewellery, silverware, antique furniture and cultural property is settled by Article 3, paragraph 3, which reads as follows:

> No restitution claim may be asserted if, prior to the entry into force of the present Convention, a request by a Government on behalf of the claimant for restitution of the property concerned was rejected as not well founded by an agency of one of the Three Powers, except in a case where evidence which could not previously be presented is adduced.

This provision relates only to restitution, and not to compensation claims. Article 4 of the said Chapter which settles the latter also contains some provisions concerning the binding effect of decisions taken by one of the Three Powers before the entry into force of the Settlement Convention; they relate also to restitution; paragraph 1, *in fine,* and paragraph 4, first sentence, provide that the Federal Republic is bound by restitution claims which have been approved by one of the Three Powers, and that the *Bundesamt* shall recognise them; moreover, paragraph 4, last sentence, stipulates that the *Bundesamt*

> shall . . . accept as conclusive a certificate by any one of the Three Powers that the property which was the subject of the claim has not been received by an appropriate agency of that Power for despatch to the claimant.

It follows from these provisions that the Settlement Convention does not concede exactly the same effects to the different decisions of the Allied Authorities in the matter of restitution; the negative decisions which lead to the rejection of a restitution claim are granted a relative probative value in that they may be reversed through the submission of new evidence; the positive decisions which imply an authority for release capable of giving rise to compensation if the property has disappeared after its identification, but before its return, pursuant to Article 4, paragraph 1, are granted an absolutely obligatory probative power against which new evidence is not admitted.

Article 4 of Chapter Five, which deals with compensation for restitution which was not effected, does not contain any rule concerning the probative force of a decision of the Allied Authorities in this matter, since actually it is not necessary, these authorities being incompetent to grant compensation, something which only the *Bundesamt* or a regular German court may do subject to the possibility of all their final decisions being submitted to the Arbitral Commission, pursuant to Article 4, paragraphs 3 and 4, and Article 7, para-

graph 2, of Chapter Five of the Settlement Convention. It is therefore superfluous to resort to an application by analogy of Article 3, paragraph 3.

When examining whether a compensation claim is well-founded, the Commission is inevitably required to make the following distinctions :

(*a*) on the one hand, it must examine whether or not the restitution claim is well-founded, *i.e.,* whether the conditions of Article 3, paragraph 1, are fulfilled;

(*b*) on the other hand, it must examine whether compensation is justified, *i.e.,* whether the conditions of Article 4, paragraph 1, are fulfilled, namely whether restitution which was ordered can no longer be executed because the property, after its identification in Germany, has been utilised or consumed before its return to the claimant, or destroyed or stolen or otherwise disposed of before receipt by the claimant Government or by the appropriate agency of one of the Three Powers for despatch to the claimant.

The Settlement Convention has clearly laid down the extent to which the Commission is bound by the decisions of the Allied Authorities:

(a) If a compensation claim is founded on a negative decision of the restitution claim by the Allied Authorities, considered erroneous by the claimant, the Commission is competent to examine whether, on the basis of evidence which had not been furnished before, this decision must be maintained or reversed, but it is bound by the probative value inherent in these decisions in the absence of new evidence. This conclusion evidently imposes itself, since it cannot be imagined how the Commission could revise a decision of the *Bundesamt* or of a German court which strictly corresponded to Article 3, paragraph 3, and Article 4, paragraph 4, of Chapter Five concerning the probative power of the decisions of the Allied Occupation Authorities.

(b) If a compensation claim is based on a restitution claim approved by the authorities of one of the Three Allied Powers, the Commission is not competent to revise this decision and must grant compensation amounting to the replacement value of the property in question, even if the defendant points out that the approval was unfounded, since it is the common intent of the Contracting Parties not to re-open proceedings for claims on which a decision in favour of the claimant has been rendered (Article 4, paragraph 4, of Chapter Five); it can only refuse compensation if the conditions of Article 4, paragraph 1, are not fulfilled (to this effect *cf.* the decision of the First Chamber of the Commission of April 29, 1960, Cases No. 346, 347, 348 and 349—*Decisions of the Arbitral Commission,* vol. III, No. *77).*

As to the question whether there is new evidence permitting the setting aside of a negative decision on a restitution claim rendered by an agency of the Three Powers, it can only be answered *in concreto,* in respect of particular cases, by interpreting this concept very strictly, in the interest of legal certainty, for in several cases it is no longer possible to know for certain the reasons on which this or that decision of the Allied Occupation Authorities are based.

(26) To justify a review of the negative decision of December 13, 1948, concerning claim 163/7012, the complainant Government mainly invoked the circumstances under which the firm of Apostolidis was induced to send its cable of November 24, 1948, to the firm of Possehl and the abusive use which the latter made of it; the claimant did not know these circumstances until after the negative decision which, part of the property having been identified by the Allied Authorities, was based on the absence of dispossession against the will of the owner, since in their opinion this chrome ore had already before the war formed the subject of deliveries which were continued during the hostilities between Greece and Germany.

These arguments are not based on new evidence, but they prove that the telegram in question was misunderstood by the Allied Occupation Authorities, since it does not indicate that the deliveries made during the war to the firm of Possehl were the result of pre-war contracts, nor that the firm of Apostolidis continued its business relations with the German firm during the war. The reasons given in the negative decision therefore seem to be erroneous. The Commission does not consider the fact relevant that the firm of Apostolidis was not clearly aware of what use the German firm concerned would make of its cable of November 24, 1948, and it is not proved that the Allied Authorities were deceived. It therefore does not consider the reasons advanced by the complainant to be new evidence within the meaning of Article 3, paragraph 3, of Chapter Five of the Settlement Convention.

On the other hand, the Commission finds that the negative decision on claim 163/7012 is in flagrant contradiction with the reasons indicated subsequently in the authority for release of September 13, 1949, for 424.980 tons of chrome ore, the subject of claim of the firm of Apostolidis, as well as those given in the decision of the same date concerning claim 590/14–15/R covering 258.090 tons.

In these two cases it is found that

> The Greek mines were under control during the occupation and the distribution and prices were ordered by the German authorities. The transport of ore from Greece during the occupation was exclusively a German undertaking and cannot be considered normal business dealings. The property is restitutable. (Records of the *Bundesamt,* pp. 62 and 69.)

These decisions bear the signature of the same British officer (Denison) who signed the rejection of December 13, 1948, of claim 163/7012 (records of the *Bundesamt,* p. 50). It is strange, too, that the latter decision was also confirmed by letter of November 8, 1949, that is after the decisions of September 13, 1949, concerning claims 1055/7015 and 590/14–15/R by the British officer who signed for the director of the R.D.R. Branch, Düsseldorf. The attitude of the British Authorities is thus obviously contradictory.

The Commission considers the authorities for release of September 13, 1949, which are doubtless correct, to be evidence which could not be furnished when the negative decision of December 13, 1948, was rendered,

and not even after that during the occupation of Germany, because restitution could no longer be obtained, the ore having already been utilised by the German economy, and because compensation for restitution which was not effected was not envisaged before the Settlement Convention. Recourse to this evidence in the case of claim 163/7012 was thus useless during the occupation; this is probably why the British Authorities did not proceed to a review of their decision concerning this claim when rendering a contrary decision on claims 1055/7015 and 590/14–15/R.

The Commission holds that it is competent to proceed to this review and finds that, the conditions for restitution laid down in Article 3, paragraph 1, of Chapter Five of the Settlement Convention being fulfilled and the property having been identified, to the amount of 1,259 tons before its utilisation, the compensation claim for this amount complies with the requirements of Article 4, paragraph 1, of Chapter Five of the said Convention.

(27) *(b) Claim 1055/7015*

In this case the Commission has to decide on a quantity of 450.020 tons of chrome ore only, as shown by the statement of facts. According to the investigation report of the Allied Occupation Authorities of November 25, 1948, this amount is expressly described as being of Yugoslav origin (records of the *Bundesamt,* p. 58). These authorities did not expressly reject the Greek restitution claim covering this amount; they did so only implicitly in the authority for release of September 13, 1949, concerning claim 1055/7015 in restricting their approval to another lot of 425 tons (records of the *Bundesamt,* p. 61). Consequently, the question arises whether the Commission is bound by the tacit rejection of a restitution claim, subject to the production of new evidence which could not previously be presented. The question can be left open for two reasons: first, because the letters of the Greek Restitution Mission of October 23, 1950, and January 12, 1951, to the R.D.R. Representative Office at Wahnerheide (of which only the second was inserted in the records), and the letter of the Eisenerzgesellschaft m.b.H. of August 21, 1950, communicated to the Commission during the oral hearings on January 20, 1959, by the complainant in order to prove that the 425 tons of ore came from Greece and that the firm of Wacker purchased during the war chrome ore of Greek origin, do not establish new facts and cannot be considered to be new evidence within the meaning of Article 3, paragraph 3, of Chapter Five. Moreover, it would be very risky to admit that no other decision could be taken on account of the fact that the Allied Occupation Authorities were being dissolved, for this dissolution did not take place until after the entry into force of the Settlement Convention in 1955, *i.e.,* several years after this correspondence; secondly and principally, because the identification of the 450 tons in question is not proved by the investigation report of November 25, 1948, which does not state that the ore found is identical with the ore claimed by the firm of Apostolidis, and since this identification can no longer be effected because the ore no longer exists.

As to the 1,314 tons of chrome ore which were likewise claimed by Yugoslavia, it is repeated that they were shipped on lighters which were sunk in the Rhine off Mayence in 1945, and that they were subsequently recovered by France which seized them; this ore has never been identified and cannot be identified at present, so that it does not fulfil the conditions of Article 4, paragraph 1, of Chapter Five of the Settlement Convention and cannot form the subject of compensation. This item of 1,314 tons could not be acted upon by the Commission in any case, on the ground that if it were added to the other Greek claims these would by far exceed the amount of approximately 4,000 tons on which the Commission can decide by virtue of its competence.

(28) (*c*) *Claim 590/ 14–15/R*

Pursuant to the investigation report of January 13, 1949, mentioned in the statement of facts (records of the *Bundesamt,* p. 67), this claim covers 589.213 tons of which 259.644 could be restituted to Greece by virtue of the authority for release of September 13, 1949, the remainder, *i.e.,* 329.569 tons, not being of Greek origin. The complainant contests the correctness of this latter statement, asserting that the contradictory declarations of the firm of I.G. Farben are not reliable, for the ore had been imported from Greece which was proved by the fact that it had never been returned to Yugoslavia. The complainant maintains that the matter ought to have been taken up again by the British Authorities but that it could no longer form the subject of a new decision on their part (letter of the R.D.R. Division to the Greek Restitution Mission of December 12, 1949, submitted by the complainant during the oral hearings of January 20, 1959).

These assertions, however, are not supported by any new evidence and cannot serve as the basis of a review by this Commission of the negative decision of the restitution claim recorded in the statement in the authority for release of September 13, 1949, for 259.644 tons of chrome ore that the "remaining quantities are not of Greek origin" (records of the *Bundesamt,* p. 68). It follows therefrom that the 329.569 tons in question have not been identified, that they no longer can be identified, and that, consequently, the conditions laid down in Article 4, paragraph 1, of Chapter Five of the Settlement Convention for obtaining compensation are not fulfilled.

(29) Since the Arbitral Commission concludes that payment of compensation to the complainant is justified, in the interest of the claimant firm, the firm of Apostolidis of Volos, for chrome ore which disappeared after having been identified in Germany, the sum shall be fixed "in the amount of the replacement value of the property concerned as of the date of the award" (Article 4, paragraph 5, Chapter Five, of the Settlement Convention). This value must be determined according to today's price of chrome in Germany according to expert opinion. The claim of the complainant for interest is not supported in any way by this article, since it would imply an increase of the compensation for which it provides, which cannot be granted in the absence of an express provision in the Settlement Convention.

Pursuant to Article 7, paragraph 4, Chapter Five, the present case should be remanded to the *Bundesamt* which has to fix the amount of the compensation due in accordance with the present instructions.

For these reasons, the Arbitral Commission decides:

(1) The objections of inadmissibility raised by the defendant against the claim of the claimant, the firm of Apostolidis, are purpose- less, and the objections of defect in form and inadmissibility raised by the defendant against the claim of the Greek Government are rejected as not well-founded.

(2) The Federal Republic of Germany is ordered to pay to the complainant Government, in the interest of the firm of Apostolidis, Volos, claimant, compensation for part of the chrome ore the restitution of which became impossible after its identification in Germany, *i.e.,* for 1,259 tons. All other submissions for compensation of the complainant are declared unfounded and are dismissed.

(3) The present case is remanded to the *Bundesamt* for the determination of the sum of compensation corresponding to the replacement value of 1,259 tons of chrome ore, pursuant to the instructions contained in the present decision and subject to the right of each party to appeal to the Arbitral Commission.

(4) The parties shall bear half of the court costs each.

Case of the Government of the Kingdom of Greece (on behalf of Karavias) *v.* Federal Republic of Germany, decision of the Second Chamber of 28 June 1960[*]

Affaire concernant le Gouvernement du Royaume de Grèce (au nom de Karavias) c. la République fédérale d'Allemagne, décision de la Deuxième Chambre du 28 juin 1960[**]

Compensation claim—Convention on Settlement of Matters Arising out of the War and the Occupation—request for revision of judgment of the German Higher Prize Court—request for compensation for absence of restitution of a seized steamship—only claimants entitled to restitution can be compensated.

State sovereignty—sovereignty of State over its merchant fleet on the open sea—open sea cannot be assimilated to occupied territory.

International law of naval warfare—right of visit of neutral States vessels by belligerent States—seizure of the steamship on the open sea considered to be lawful.

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[*] Reproduced from *International Law Reports* 34 (1967), p. 267.

[**] Reproduit de *International Law Reports* 34 (1967), p. 267.