Decisions [1] of the Anglo-Italian Conciliation Commission

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

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

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

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

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

THE FOLLOWING BEING THE FACTS OF THE CASE:

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

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

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

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

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

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

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

The British Government requests:

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

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

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

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

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

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

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

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

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

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

The Third Member accepted the charge.

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

CONSIDERATIONS OF LAW:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CONCILIATION COMMISSION RULES:

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

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

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

(3) This decision is final and binding.
