# ARMSTRONG CORK COMPANY CASE—DECISION No. 18 OF 22 OCTOBER 1953 [1]

[1] *Collection of decisions*, vol. I, case No. 6.

The Conciliation Commission composed of Messrs. Emmett A. Scanlan, Jr., Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Republic and José Caeiro da Matta, formerly Rector and Professor of the University of Lisbon, Counsellor of State, Third Member selected by mutual agreement of the American and Italian Governments;

On the Petition filed on November 30, 1950 by the Government of the United States of America represented by its Agents, Messrs. Lionel M. Summers and Carlos J. Warner *Versus* the Italian Government represented by its Agent, Mr. Francesco Agrò, State's Attorney at Rome in behalf of the Armstrong Cork Company.

STATEMENT OF FACTS:

A. The Agent of the Government of the United States, in the Petition of November 30, 1950, set forth the following:

The claimant company, as a legal person, is now and always has been since it was organised on December 30, 1891, an American national. Prior to June 10, 1940 the claimant company had purchased at Djidjelli, Algeria, 2,395 bales of cork of different types, weighing 296,305 kilos, becoming the legitimate owner thereof.

On June 3, 1940 the cork was placed aboard the vessel *Maria*, of the "Italia" Steamship Company, en route to New York and addressed to the claimant, as was stated in the Bill of Lading issued on that date. On June 6, 1940, the Italian Government, in contemplation of war, published an Order recalling all ships of the Italian merchant marine and, by virtue of that order, the vessel *Maria* interrupted its voyage, changed its course and arrived at Naples on June 9, 1940.

On June 10, 1940 Italy undertook a war of aggression. The cork was unloaded and placed in storage in the general warehouse of the "Italia" Steamship Company.

As a result of the opening of hostilities, the claimant company lost all possibility of control over the cork, as it could not have it shipped to the United States or to a more favourable market, nor take any measure designed to preserve the merchandise of which it was the owner.

The claimant Company intended to maintain the right of ownership over this merchandise as it had insured it not only when it was in transit but also when it was in storage in the warehouses of the Company at Naples as soon as it was informed of this fact.

On June 17, 1941 the "Italia" Steamship Company applied to the Ministry of Foreign Trade for authorization to proceed with the sale of the cork in order to pay itself for storage and other expenses which, in its opinion, exceeded the value of the cork. This authorization was granted by the Ministry of Foreign Trade on June 28, 1941.

On July 15, 1941 the Naples Court appointed an expert in order to establish the value of the cork and to proceed with its sale at auction; on August 21 the same Court authorized the sale to a private individual for the sum of 167,747.75 Lire and the Società "Italia" thus recovered the aforementioned expenses.

The claimant Company following the Order of June 6, 1940 suffered a loss as a result of the war and more especially as a result of the circumstances resulting from causes beyond its control brought about by the order of June 6, 1940.

In the month of August, 1948 the value of cork of similar types and of the same quantity was $29,064.36, to which there should be added the amount which the claimant Company had advanced, i.e., 15,487.15 French Francs

(equivalent to $278.77 at the then prevailing rate of exchange) and $847.03 premium for the insurance covering the cork.

Basing itself on Article 78 of the Treaty of Peace with Italy and on the supplementary or interpretative agreements thereof, the Government of the United States of America requests the Conciliation Commission:

(*a*) to decide that the claimant Company is entitled to receive from the Italian Republic a sum sufficient, at the date of payment, to acquire property equalling the quantity of lost cork and to compensate for the loss suffered, a sum which was estimated in the month of August, 1948, to be $30,217.16, except for variations in value occurring between the month of August 1948 and the actual date of payment;

(*b*) to order that the expenses with regard to this claim shall be borne by the Italian Government;

(*c*) to order any other or further relief that may be considered as just and equitable.

B. In his Answer of December 29, 1950, the Agent of the Italian Republic denies the responsibility of his Government and states:

(*a*) the claimant Company had been informed of the unloading of the cork at Naples and had been invited to take the measures it believed would be useful;

(*b*) legal proceedings for the purpose of obtaining the payment of a debt owed to a transport company cannot engender the Italian Government's responsibility;

(*c*) the defendant Government can only regret the interruption of the voyage of the vessel *Maria* and the measures which followed, as well as the judicial sale of the merchandise;

(*d*) the interruption of the voyage does not engender international responsibility for the Italian Government, in view of the fact that the measures were adopted before the existence of a state of war and before the date of June 10, 1940 to which express reference is made in Article 78 of the Treaty of Peace with Italy;

(*e*) Article 81 of the Treaty of Peace recognizes the legitimacy of the Italian carrier's claim to obtain the payment of a debt resulting from obligations which were in existence prior to the existence of a state of war and, consequently, the forced sale which followed the non-payment of the freight and storage charges cannot constitute the subject of an international claim;

(*f*) in the instant case there is no causal relationship between the fact of the war and the economic damage suffered by the Armstrong Cork Company;

(*g*) the document presented by the plaintiff Government, that is, the Order of June 6, 1940, does not establish the Italian Government's responsibility, in view of the fact that it did not have a discriminatory nature and does not constitute an act of war, as it was only a question of the simple carrying out of a maritime police measure at a date when a state of war had not yet been declared, and did not exist from an international point of view;

(*h*) Article 4 of the Memorandum of Understanding signed by the two Governments at Washington on August 14, 1947, considers as prewar claims all claims arising out of contracts and obligations prior to December 8, 1941;

(i) under the terms of Article 78 of the Treaty of Peace Italy's obligations of an economic nature towards nationals of the United States of America start from December 8, 1941 since a state of war did not exist between the two Governments prior to that date;

concludes by requesting that this claim be rejected, the Italian Government reserving the right to submit evidence

(*a*) that other firms, in a situation similar to that of the Armstrong Cork Company, were able to take measures to withdraw merchandise stored in Italian ports at the beginning of the war or to sell it on the Italian market at a just and profitable price;

(*b*) on the value that the Italian Government attributes to the cork in question.

On October 25, 1951, the Italian Government, in conformity with the Order of the Conciliation Commission of August 6, 1951, filed six documents and stated that these documents represented everything which the Italian Government's agencies were able to gather for the purpose of a complete clarification of the disputed case.

Following the request made on November 15, 1951, in agreement with the Order of the Conciliation Commission, the Agent of the Government of the United States of America submitted on December 29 a Brief of his Government's point of view.

The Brief reasserted the principles of law set forth in the Petition and concluded:

(*a*) that the claimant Company is entitled to assert this claim under the provisions of Article 78 of the Treaty of Peace and the supplementary or interpretative agreements thereof;

(*b*) that the claimant Company is entitled to receive two-thirds of the amount necessary to purchase similar property, that is $30,217.16 or 18,885,274 Lire;

(*c*) that the claimant Company is entitled to receive 5% interest on the principal amount from November 18, 1949 or, at least, from February 18, 1950.

The Agent of the Italian Government did not submit any Counter-Reply within the time-limit established by the Conciliation Commission. After having very carefully considered the arguments maintained and the principles of law cited by the Agents of the two Governments, the two-Member Commission stated the impossibility of reaching agreement on the questions of fact as well as on the questions of law with regard to the rights, if any, of the claimant Company, on the basis of Article 78 of the Treaty of Peace and the agreements supplementary thereto and interpretative thereof.

Therefore, on May 25, 1953 the Conciliation Commission decided to appeal to the Third Member whose addition is contemplated by Article 83 of the Treaty of Peace, and to submit the dispute to him, each of the Representatives of the two parties reserving the right to transmit directly to the Third Member the questions that he may consider to be useful for the purpose of reaching a solution of the dispute.

The two Governments agreed to appoint as Third Member Mr. José Caeiro da Matta, formerly Rector and Professor of the Faculty of Law of the University at Lisbon, Counsellor of State.

CONSIDERING AS A MATTER OF LAW:

A. Among the problems which have called forth the meeting of the Italian-United States Conciliation Commission, completed by the Third Member, the most important one appears to be the question as to whether the responsibility of the Italian Government, as defined in paragraph 4 (*a*) of Article 78 of the Treaty of Peace, extends to all losses that the war has caused to a United Nations national as owner of property in Italy on June 10, 1940, or exclusively to the losses which are the consequence of acts of war. We shall see later whether the provisions of the aforementioned Article are applicable to this Petition.

It is necessary first of all to analyse certain questions arising from this Petition.

I. *Recall of ships of the Italian merchant marine by the Order of June 6, 1940.*

Following the Order of the Italian Government issued on June 6, 1940 all ships of the Italian merchant marine had to return immediately to Italian ports. The vessel *Maria* was thus forced to interrupt her voyage, change course, and she arrived at Naples on June 9, 1940. Hostilities commenced on June 10, 1940. This is the starting point of the series of actions which led to the loss suffered by the claimant Company.

Obviously, the order issued in contemplation of war was the determinant cause of the situation which faced the American corporation, the Armstrong Cork Company, with regard to the cork, its rightful property. The facts which occurred and the ensuing loss were the result, direct or indirect, of the Order of June 6, 1940. It is not the case to invoke the generally accepted doctrine according to which, in case of external war, a State may be induced to hold in its ports all national or foreign commercial ships (among so many others, Albrecht, Basdevant, Alberic, Rolin) for the simple reason that Italy was not yet at war; war against France and Britain was declared on June 10, 1940, and against the United States much later, on December 11, 1941.

The instant case involves a fact which occurred prior to the existence of a state of war. And prior to the declaration of war it is the peacetime obligations which control (Fauchille, *Manuel de Droit International Public*, n. 1028).

But it must be pointed out that if Italy was still at peace, nevertheless she may not escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law.

> One must consider as illicit actions (as has been stated by Strupp (*Das Wolkerrechtliche Delit*, 1920), producing the responsibility of those performing such actions and allowing the State which has suffered or whose subjects have suffered damage to demand reparation, all actions of a State which are in contradiction with any rule whatsoever of international law.

Are we confronted by actions which are only the application of maritime police rules, as has been alleged by the Italian Government? Or, on the contrary, is there the injury to a right?

The responsibility of the State would entail the obligation to repair the damages suffered to the extent that said damages are the result of the inobservance of the international obligation.

And in the case under discussion the international responsibility of the State would be direct, in view of the fact that it would arise out of an action performed by the Italian Government.

It is not necessary to say that the action performed by the State within the limits of its rights or inspired by the protection of its own defence does not constitute an illegal international act (Fiore, Oppenheim). And one must not confuse the right of legitimate defence, which is the legitimate protection of the right of preservation of the State, with the right of necessity which very often is only an expedient created in order to legalize the arbitrary. In the instant case, therefore, and in agreement with the great majority of writers, the Italian State is obligated to indemnify. We shall see whether the way that has been adopted is the one which is most in accordance with the law and the provisions of the Treaty of Peace.

II. *Can the Order of June 6, 1940 be considered as a war measure?*

This Order was issued four days before the outbreak of hostilities: it was on June 10 that there occurred the passage from the state of peace—normal juridical régime– to the state of war—extra-juridical régime.

Therefore, legally, it is the date of June 10 which fixes the time from which the Italian Government can be considered responsible, as a result of the war, for the damages caused to the Allied and Associated Powers or to their nationals.

Whatever the relationship between the measure adopted by the Italian Government on June 6, and the declaration of war, under the strictness of principles, the responsibility of the State is not therein involved with respect to the provisions of the Treaty of Peace. It is very reasonable to assume that the purpose of the measure taken by the Italian Government was to avoid the capture, seizure or sinking of ships of the Italian merchant marine located in the Mediterranean.

And one cannot invoke, as was done by the United States of America, the Italian War Law, approved by Royal Decree of July 8, 1938 which could have been applied even prior to the existence of a state of war, because, according to Article 3, its application depended upon the publication of a Royal Decree. Now, this Decree was published only on June 10. Therefore, a measure taken before the war cannot be considered to be a war measure. And one could argue, together with the Italian Government, and also in accordance with a large part of legal literature, that ships are not automatically considered as being in a state of war as a result of the application of the War Law: a specific order of mobilization or of war operation would be necessary. When the vessel *Maria* arrived at the port of Naples it had not been the subject of any measure on the part of the military authorities (control, sequestration, etc.).

III. *Interference of the Italian authorities in the actions pertinent to the sale of the cork.*

Here too there are two viewpoints, one opposed to the other: the American Government claims to see in the authorization accorded by the Ministero per gli Scambi e Valute for the sale of the cork the proof of the Italian control over the merchandise, and at the same time the act giving rise to the loss. According to the Italian Government, authorization is an action which, by its nature, excludes all responsibility of the authority granting it: it is a question of a permission, not an imposition. The authorization was necessary even in normal times, in peacetime. The documents which have been produced and the observations which have been made are not sufficient to invalidate this viewpoint.

B. Let us come back now to the question which was set forth above and which has been considered to be the essential question: the application of the provision of Article 78, paragraph 4 (*a*) of the Treaty of Peace to the instant case. In case the Italian Government's responsibility could be admitted in the light of the principles, could that responsibility come under the Treaty of Peace? This is what matters with regard to the solution of this claim in view of the fact that the Decision of the Conciliation Commission, completed by the Third Member, must be limited to the specific terms of the Petition.

Article 78, paragraph 4 (*a*) is worded as follows:

> The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a *result of the war*, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals.

Thus the problem hinges on the phrase *as a result of the war*. It has been stated that, in the instant case, the letter of the Treaty is so clearly stated and so formal that any interpretation appears to be useless, even dangerous.

We all know the rule which is very frequently quoted: "It is not permitted to interpret that which does not require interpretation", and "when a document is worded n clear and precise terms, when its meaning is manifest and does not lead to anything absurd, there is no reason to deny the meaning which such document naturally presents." This comes from Vattel. It is the theory of the ordinary meaning, so frequently invoked in arbitral and judicial proceedings, but its drawback is that it postulates as an established fact that which remains to be proved: it takes as a starting point of the research that which, normally, should be the result thereof.

As has been stated by Professor Hyde, in his noteworthy study on the interpretation of treaties (*International Law, Chiefly as Interpreted and Applied by the United States*, 1945, vol. II, p. 4470) ". . . one must reject as unhelpful and unscientific procedure the endeavor to test the significance of the words employed in a treaty by reference to their so-called 'natural meaning' . . .". This could not, at best, be treated other than as a presumption *juris tantum* which can be rebutted.

One must always follow the methods of logical interpretation in determining the content of the legal rule, especially in cases like that of Article 78, paragraph 4 (*a*) of the Treaty, where the text is very far from revealing the intention behind it. The wording adopted can give rise to different interpretations as regards the extent of Italy's economic obligations towards United Nations nationals.

It must first of all be stated that we can only agree with the viewpoint of the Government of the United States of America that an interpretation of the Treaty of Peace contained in a decision of other Conciliation Commissions is in no way binding for the Italian-United States Conciliation Commission. This does not prevent one from analysing the arguments formulated in similar cases, which have been the subject of discussion and decision by other Conciliation Commissions, such as the Pertusola case,[1] submitted to the Franco-Italian Conciliation Commission, and to which the Agent of the Italian Republic has made special reference. Moreover, the American Government, in the Memorandum of October 1, 1953, has extensively discussed the decision of the Franco-Italian Conciliation Commission on this question.

We shall not follow all this lengthy discussion, which is not necessary in our case. We shall limit ourselves to pointing out the conclusions arrived at by the two parties.

In order that the right to compensation of United Nations nationals against the Italian Government may be invoked, it is necessary, according to the decision of the Pertusola case:

1. that these nationals have suffered a loss;

2. that there exist a link of causality between the loss and the war;

3. that the loss be in connexion with the property located in Italy;

4. that this property have been owned by the United Nations national on June 10, 1940;

5. that this property suffered injury or damage;

6. that the loss to be made good be the consequence of said injury or damage.

And since one must exclude an intentional redundancy on the part of the legislator, as would be the case in speaking of a loss suffered by reason of damage, the express on damage must mean an act due to the state of war touching the property.

According to the letter and the spirit of Article 78, paragraph 4 (*a*), that

[1] Volume XIII of these *Reports*.

which has to be indemnified is not the loss caused by the state of war to the United Nations national as owner of property in Italy, but the loss resulting to him from a damaging act, from an injury by which said property has been stricken as a result of the state of war.

War damage is said to be damage caused by acts of war. The American party does not admit this conclusion: even if it were accepted that the damage presupposes a specific act as the cause of a loss, there is nothing to show that this specific act must be an act of war, either because the phrase war damages does not appear in paragraph 4 (*a*) of Article 78, or because the wording used was proposed by the American Delegation and, in contrast with Italian and French legislation, American legislation has never adopted the continental expression acts of war. And the statement made was curiously weakened by saying that it is *above all and first of all* as a result of acts of war that the state of war injures *property*.

The comparative study which was attempted of the expressions adopted in other articles of the Treaty has not brought forth any elements for the solution of the problem; the terminology of the Treaty, which was not submitted to the technical competence of the Legal and Drafting Commission, lacks all scientific precision and no attention was given to the problems of concordance (Vedovato, *The Treaty of Peace with Italy*, 1947, page XXIII). Alongside incomplete provisions there are some superfluous provisions. One must not forget that there existed the necessity of reaching an agreement between the victorious Powers whose interests were often divergent on several political, military and economic questions.

An imperfect analysis of the sources led to erroneous conclusions in the Pertusola case.

The attitude taken by the Italian Government at the Peace Conference and which is revealed by the Memorandum presented at the time is the proof that Italy clearly recognized that her obligation to indemnify was larger than that which resulted from acts of war. It should be added that the expression war damages is not a technical expression with the same content in all countries: it is a general concept with a large variety of meanings, not necessarily limited to damages due to acts of war.

The error committed in the Pertusola case is due to the desire to interpret according to the continental technique the provision of a Treaty the origin of which is Anglo-Saxon: it is also due to the desire to assert a theoretical, abstract conception of causality in the interpretation of the Treaty, discarding the normal doctrines of causality. Besides, as was stated in the reasoning in the Pertusola case, "the question whether in a specific case, a loss has been suffered by reason of injury or damage caused to property in Italy, which in other words is whether the damage has a sufficiently direct causal connexion with the war for the Italian Government to be obligated to compensate, is a question of interpreting a concept set by the Treaty which does not, in this connexion, refer to any national legislation on compensation for war damages".

C. I have just set forth in their general lines the opposite viewpoints on the interpretation of Article 78 of the Treaty of Peace and I have done this for the simple reason that the two parties have considered this interpretation as if it were at the base of the decision to be made. Nevertheless, this analysis was not necessary, in my opinion. The claim of the Armstrong Cork Company is not admissible inasmuch as it finds no basis in Article 78, paragraph 4 (*a*) of the Treaty. Not by virtue of the interpretation that has been given to the so much disputed expression *du fait de la guerre, as a result of the war,* but for the following reasons:

(*a*) the act chargeable to the Italian Government, that is, the Order issued on June 6, 1940, is prior to the declaration of war. Consequently, there is not involved, legally, an act or measure of war, whatever the meaning that may be

attributed to this expression, notwithstanding the fact that the Order had been issued in contemplation of war. War did not yet exist, not only in the relations of Italy with the United States of America, but also in the relations with all the other Powers. One could not apply the law of war, the provisions of the treaty, to a country which was at peace. It was only on June 10, 1940 that war was declared on France and Great Britain.

Article 78, in paragraph 1, took expressly, as a starting point, the date of June 10, 1940.

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

(*b*) After war was declared, no measure was taken with regard to the case under discussion which can be considered, in international law, a war measure (control, sequestration, etc.) The evidence produced and the observations made could in no way lead to such a conclusion. If the initial action, which is fundamental, cannot come under the provisions of the Treaty of Peace and if, as has been held, the actions performed must be considered as being strictly linked together (I would say: like a complex fact), how could the subsequent, secondary actions, the consequence of the former, and performed, moreover, in harmony with ordinary Italian law, be considered as actions of war according to the Treaty? We would have the *cause action* outside of the Treaty and the *effect actions* within the same Treaty. The acts which have been committed are normal legal acts. The procedure which was followed flows from legislation which had been in force for a long time. The *legal* intervention of the Italian authorities (administrative or judicial) in no way alters the nature of the actions performed. The juridical concept of Acts of State is not involved.

There can be no doubt in this connexion. But if there were any doubt, the rule should be invoked according to which the debtor party must profit from the benefit of the doubt and also that, in case of doubt, restrictive interpretation is necessary (Podestà Costa, *Manuel de Droit International Public* 1947, pp. 197, 198; Charles Rousseau, *Principes Généraux du Droit International Public*, vol. I, 1944, pp. 678 *et seq.*).

(*c*) This case cannot be included within the framework of the Treaty of Peace.

DECIDES:

I. The Petition submitted by the Agent of the Government of the United States of America, in behalf of the Armstrong Cork Company, under Article 78 of the Treaty of Peace, is rejected.

II. This decision is final and binding.

This decision is filed in English and in Italian, both texts being authenticated originals.

DONE in Rome, at the seat of the Commission, Via Palestro, this 22nd day of October, 1953.

| *The Representative of the United States of America on the Italian-United States Conciliation Commission* | *The Third Member of the Italian-United States Conciliation Commission* | *The Representative of the Italian Republic on the Italian-United States Conciliation Commission* |
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| Emmett A. SCANLAN, JR. | José Caeiro da MATTA | Antonio SORRENTINO |

## STATEMENT OF THE UNITED STATES MEMBER FOR HIS DISSENT IN THE DECISION OF THE ITALIAN-UNITED STATES CONCILIATION COMMISSION ADOPTED ON OCTOBER 22, 1953 IN THE DISPUTE CAPTIONED THE UNITED STATES OF AMERICA EX. REL. ARMSTRONG CORK COMPANY VS. THE ITALIAN REPUBLIC

According to the Decision of the Neutral Third Member, the two Governments were in agreement that the dispute in this case turned on the interpretation of the phrase "as a result of the war" which is to be found in paragraph 4 (*a*) of the Treaty of Peace. The Third Member was not in agreement with this premise and this case has been resolved on the ground that

(*a*) the act chargeable to the Italian Government, that is, the order issued on June 6, 1940, is prior to the declaration of war;

(*b*) after war was declared no measure was taken with regard to the case under discussion which can be considered in international law a war measure (control, sequestration, etc.).

The Italian-United States Conciliation Commission composed of two Members in its Decision filed on April 11, 1952 in the case captioned *The United States of America ex rel. Erich W. Hoffman* vs. *The Italian Republic*,[1] stated that

> The Commission observes that the phrase "as a result of the war", as used in paragraph 4 (*a*) of Article 78 of the Treaty of Peace, could be subject to various interpretations *and therefore must be construed in the light of all the facts in a particular case.* The Commission finds that there must be a sufficiently direct causal relationship between the war and the occurrence which causes the loss. The obligation assumed by Italy is the payment of compensation for a loss sustained by reason of injury or damage to property in Italy which is attributable to the existence of a state of war; and a loss sustained as a result of an occurrence in which the war was not a determinate factor can not be construed as creating an obligation under the provisions of paragraph 4 (*a*) of Article 78. (Emphasis supplied.)

There can be no question, therefore, that before the Conciliation Commission can apply the phrase "as a result of the war" in a particular case, there must be a finding of facts. In the present Decision, it is important to note, no finding of facts has been made. Irrespective of the statements made in the pleadings and in the briefs, it is the responsibility of the Conciliation Commission to evaluate the evidence or the lack thereof.

It is obvious that the evidence to establish what happened to this cargo of cork after the M/v *Maria* arrived in the harbour of Naples at 11.40 on June 9, 1940, by the very nature of the circumstances surrounding this loss, had to be produced by the respondent Government. The claiming Government has the right to have reasonable inference drawn from the failure of the Italian Govern ment to produce evidence which would explain certain occurrences.

In the Decision of the Third Member, the defences raised by the Italian Government are summarized, but it is pertinent here to point out, as the Third Member did not do, that no evidence to substantiate any of the allegations of fact made in the Answer was submitted by the respondent Government. This lack of supporting evidence was recognized by the Conciliation Commission

[1] *Supra*, p. 97.

of two Members, and in the Order of August 6, 1951 it was specified that the Agent of the Italian Republic should submit certain documentary evidence to which reference will be made later. Nevertheless, essential evidence regarding material facts in this case was not produced.

Now what are the issues and the facts on which the United States Member considers this case should have been resolved?

With regard to the first ground, there is no doubt—and the Third Member himself states—that the order issued by the Italian Government to the Italian Merchant Marine was issued in *contemplation* of Italy's declaration of war. Nor is there any doubt that the Italian Government, when it issued the order of June 6, 1940, knew or could have known that Italian ships were carrying cargoes which would be discharged in Italy and that a loss to the owners thereof would be the result. The opinion of the Third Member holds that the order of June 6, 1940 was the immediate and direct cause of the loss of the Armstrong Cork Company but concludes nevertheless that, since said order was issued four days before the declaration of war on June 10, 1940, the Italian Government is not responsible under Article 78 of the Treaty of Peace. In my opinion, however, the fundamental question in this case is whether the non-returnability of property of a United Nations national was caused by any action or failure to act by the Italian Government caused by the existence of a state of war and after June 10, 1940, whether the action or failure to act occurred after June 10 or not.

With regard to the second grounds, I should like to make the following observations.

According to the opinion of the Third Member, all of the subsequent actions which affected the cork in question and which resulted in its loss are merged into the order issued by the Italian Government on June 6, 1940, and the Third Member considers as normal legal acts all actions subsequent to June 6, 1940; such acts are described as the "consequence" of the order of June 6, 1940 rather than as a separate series of events. With this concept of the facts the United States Member is not in agreement, believing that in this case there were actions taken after Italy's declaration of war by the Italian Government with respect to the claimant's property which could have fixed the liability of the Italian Government under Article 78 of the Treaty of Peace.

Among the evidence which the Agent of the Italian Government was directed to produce by the Commission's Order of August 6, 1951 were the following:

> 3. (*c*) a certified true copy of the original Order issued to the *SS Maria* to discharge at Naples the cargo of cork owned by the Armstrong Cork Company, and evidence of the date on which said Order was given,
>
> (*d*) evidence of the date on which the cargo of cork owned by the Armstrong Cork Company was completely unloaded from the *SS Maria* and warehoused in the port of Naples,
>
> (*e*) a certified true copy of the original Declaration of "completed voyage" of the *SS Maria* at the port of Naples, and evidence of the date on which said Declaration of "completed voyage" was made;

as well as evidence on the basis of which it was stated in the Answer of the Italian Republic that

> 4. (*a*) 'The Company owning the cargo was advised, also officially, of the discharge of the goods that had taken place and was invited to provide therefor".

The evidence specified above, which the Conciliation Commission of two Members believed essential to a determination of thsuwe ise, as never submitted by

the Italian Government. It is true, nevertheless, that the Italian Government requested the Società Anonima di Navigazione "Italia" to furnish such evidence and quoted verbatim the provisions of the Commission's Order of August 6, 1951, in its request to said company.

In reply to the Italian Government the "Italia" stated in its letter of October 10, 1951 that the only document which had been discovered in the archives of their Branch Offices in Naples and Trieste, and in the records of the Head Office in Genoa (in translation) ". . . from which some useful information may be obtained in connexion with the matter in question . . ." was the "General Report of Voyage No. 11 of the M/v *Maria*. Said report of Voyage No. 11 contains no entry of any kind *after 11.40 hours on June 9, 1940* when the M/v *Maria* arrived in the harbour of Naples. The owner and operator of the M/v *Maria*—the Società Anonima di Navigazione "Italia"—in the letter of October 10, 1951 made no reference to the order given the M/v *Maria* to unload the cargo of cork in Naples, no reference to any declaration of "completed voyage", and no reference to any notice to the Armstrong Cork Company that its property had been landed at Naples. The M/v *Maria* carried at least 2,300.4 metric tons of cargo when the vessel arrived in Naples on June 9, 1940 and there is no evidence in this record to show what happened to the M/v *Maria* or its cargo after 11.40 hours on June 9, 1940.

Is it not unusual that the "Italia" was unable to furnish this information? *But is this unusual fact not explained* in that portion of the same letter which reads as follows:

> As the [Italian] Ministry [of the Treasury] is certainly aware, the orders relating to changes in course of merchant ships, in the days that preceded Italy's entrance into the war, were sent out by the competent Ministries of the Navy, and of the Merchant Marine. *Therefore, a search with regard to the matter in question should be made in the archives of these Departments.* (Emphasis supplied.)

If the owner and operator of the M/v *Maria* thought that a search of the archives of the Ministry of the Navy and of the Merchant Marine might explain "the matter in question", is not the Conciliation Commission entitled to draw some reasonable inference from the failure of the Italian Government to fulfil its obligation, under the Treaty of Peace and the Agreements between the two Governments supplemental thereto and interpretative thereof, to make such search of these archives? And should cognizance not be taken of the fact that military considerations at the outbreak of the war enshroud with secrecy ships' movements, the loading and unloading of cargo, and the conversion of merchant ships to military uses? Certainly the Conciliation Commission has a right to evaluate such a statement as that made by the owner and operator of the M/v *Maria* in the light of common knowledge of what transpires when a maritime nation declares war on other maritime powers.

Is it not also pertinent to a determination of this case that after it was landed at Naples, this cargo of cork was subject to the provisions of the Italian domestic legislation which prohibited the exportation of cork even from customs-free storage? Cork was a critical and strategic material during the war and this limitation on the claimant's ability to remove the cork was not the result of the order of June 6, 1940 but of the order issued in the port of Naples to off-load the cargo of the M/v *Maria* after her arrival in that harbour at 11.40 on June 9, 1940.

Since the cork was in Naples, it is pertinent here to point out that on February 12, 1941 the Italian Government requested that the Consulates of the United States of America at Palermo and Naples be moved to a place as far north as Rome, or further north, and to a place that was not on the sea-coast; that, due

to subsequent developments, the President of the United States of America on June 14, 1941 issued an Executive Order freezing immediately all German and Italian assets in the United States; that on June 17, 1941 by Royal Decree No. 494 the Italian Government blocked property and credits in Italy owned by nationals of the United States of America; and that on June 19, 1941 the Italian Government requested that all American Consular establishments in Italy be promptly closed. These international developments are important since the evidence establishes that the first step taken to sell the cork was a request made *on June 17*, 1941 by the Società Anonima di Navigazione "Italia", Naples Office, to the Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) for "*authorization* to sell the cork . . .". On June 28, 1941 the Italian Ministry in Rome *authorized* the sale of the cork. Thereafter, on July 15, 1941 proceedings were instituted in the Italian court at Naples which resulted in the actual sale of the cork on August 21, 1941.

There is no evidence that any measure was taken by the Italian Government, by the Società Anonima di Navigazione "Italia", or by the Italian court at Naples to give the owner of the cork notice of any of these proceedings or to protect its ownership rights.

In the Decision of the Third Member it is stated that "the documents which have been produced and the observations which have been made are not sufficient to invalidate . . ." the contention of the Italian Government that "authorization is an action which, by its nature, excludes all responsibility of the authority granting it". With this conclusion I must take exception.

Where an authorization is required by the Italian Government, there must exist some degree of control, if only by virtue of the power to grant or deny the authorization. Without the authorization of the former Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) I am convinced that the sale of the cork would not have taken place.

There is no reference in the Answer or in any document submitted by the Italian Government as evidence in this case of the precise role played by the former Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) in the sale of this cork.

The Italian-United States Conciliation Commission in its Decision filed on June 25, 1952 in the case captioned *The United States of America ex rel. Norma Sullo Amabile* vs. *The Italian Republic* [1] stated that:

> The Conciliation Commission has no authority to compel the appearance and testimony of witnesses or to conduct an investigation of any allegation of fact made in a particular case. The Commission must act through the Agents of the two Governments but this does not mean that the Commission, in its quest for the truth, does not have the right to rely confidently upon each of the two Governments and upon each of the Agents of the two Governments before the Commission for the highest degree of co-operation, *including a full and complete disclosure of all the facts in each case insofar as such facts are within their knowledge or can reasonably be ascertained by them.*

In view of this right to rely (customary in international arbitrations), the answer to the question why the Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) was required to authorize the sale of the cork in the instant case should have been resolved by the production in evidence of file No. 2625241/DA of the former Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) referred to in the Memorandum of

[1] *Supra*, p. 115.

the "Italia" submitted in evidence by the Agent of the Italian Government on October 25, 1951.

The authorization referred to by my colleagues as being "necessary even in normal times, in peace time" is an authorization for foreign exchange transactions. But the power of the former Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) was not limited during the war solely to foreign exchange transactions. In Decision No. 14 of this Conciliation Commission in the case captioned *The United States of America ex rel. Alexander Bartha* vs. *The Italian Republic*, a finding of fact was made that:

> By letter No. 254944/DA dated May 6, 1943, *the Office of Requisitions in the Ministry of Exchange and Currencies of the Italian Government (Ministero per gli Scambi e per le Valute)* requested the Prefect of Trieste to sequester the chattels of emigrating Jewish refugees which had been declared on April 22, 1943 by the 'General Warehouses' in Trieste. (Page 3.)

Again, in the case of *The United States of America ex rel. Henry Fischer, Jr. and Chester T. Heldman* vs. *The Italian Republic*, evidence exists showing

> . . . that the *235* bales of wool which had been unloaded from the S.S. *Perla* in Trieste in July 1940 had been *requisitioned* on November 12, 1940 by the Prefect of Trieste *by order of the former Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute)*. (Order dated October 23, 1953.)

It can be seen, therefore, that the former Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) did exercise some degree of control in cases of this type, to say the least.

In the considerations of law in the Decision of the Third Member it is stated that

> . . . the most important one appears to be the question as to whether the responsibility of the Italian Government, as defined in paragraph 4 (*a*) of Article 78 of the Treaty, extends to all losses that the war has caused to a United Nations national as owner of property in Italy on June 10, 1940, or exclusively to the losses which are the consequence of acts of war. . .

It is interesting to note that this question as phrased bears a marked similarity to the question propounded by Judge Bolla in the Decision handed down on March 8, 1951 by the Franco-Italian Conciliation Commission in the Pennaroya-Pertusola Case.) [1] However, the United States Government has never taken the broad, theoretical position that the Italian Government is responsible for "all losses that the war has caused to a United Nations national". It is respectfully submitted that the phrasing of the question in this manner does not correctly represent the interpretation of the Government of the United States of America of the phrase "as a result of the war" which is found in paragraph 4 (*a*) of Article 78 of the Treaty of Peace. The United States proposal of the provision which subsequently became paragraph 4 of Article 78 as presented to the Paris Peace Conference is to be found on page 114 of the Department of State's publication No. 2868 entitled *Paris Peace Conference—1946—Selected Documents*, and contains the following definition:

> *4—U.S. Proposal*
>
> (*d*) As used in this Article the phrase "as a result of the war" includes the consequences of any action taken by the Italian Government, any action taken by any of the belligerents, any action taken under the Armistice of September 3rd, 1943 and any action or failure to act caused by the existence of a state of war.

[1] Vol. XIII of these *Reports*.

The observations of the Italian Government on the draft Treaty of Peace made in Paris in August 1946 were based on this proposal and there can be no question that this definition was recognized by the Italian Government as being the interpretation placed on the phrase "as a result of the war" by the United States Government. Due to the give and take necessary among the Allied and Associated Powers in hammering out the Treaty of Peace with Italy, this definition did not find its way into the final text, but the fact remains that the meaning attributed to the phrase "as a result of the war" by the United States Government before the Italian-United States Conciliation Commission at all times has been consistent with its proposed definition of this term as submitted to the Paris Peace Conference.

In the opinion of the United States Member, there is in this case a sufficiently direct causal relationship between the war and occurrences which caused the loss; the war was a determinate factor in the issuance by the Italian Government of its order of June 6, 1940; the war was a determinate factor in the series of events which occurred after the M/v *Maria* arrived on June 9, 1940 in Naples where the cargo of cork was subsequently off-loaded. As has been seen, the Società Anonima di Navigazione "Italia", when requested by the Italian Government to submit a copy of the original order to the M/v *Maria* to discharge its cargo at Naples, and a copy of the declaration of "completed voyage", if any, was unable to comply with the request and clearly indicated in its statement that a search for such evidence should be made in the archives of the Ministries of the Navy and of the Merchant Marine, and that such archives possibly contained the information which the Italian Government had requested it to submit.

The consequence of the off-loading of the claimant's cargo of cork was that it was subsequently lost as a result of developments over which the claimant corporation had no control. The consequence of the Italian Ministry of Foreign Exchange and Commerce (Ministero per gli Scambi e per le Valute) authorization of the sale of the cork was that the cork was sold and the claimant corporation lost its property. This is the type of case in which the most important elements in the case are available only to the respondent Government. In the instant case there is nothing in the record which would indicate that the necessary evidence could not have been produced by the Italian Government. The question of fact in this case was a determining factor in the dispute submitted to the Third Member and in my inability to concur with the Decision of the Third Member. I feel that in this case the documentary evidence submitted by the claimant Government placed a responsibility on the Italian Government and that in cases of this type the clear purpose of Article 78 of the Treaty of Peace to restore the property of United Nations nationals within the meaning of the language used therein will be realized only when the respondent Government produces the documentary evidence which it would appear could be reasonably produced before this Conciliation Commission, or makes a satisfactory explanation as to why such evidence cannot be produced. This is absolutely necessary where the interpretation of the phrase "as a result of the war" is dependent upon a finding of fact that there was "a sufficiently direct causal relationship between the war and the occurrence which causes the loss".

It is for these reasons that I have set out my observations on the foregoing aspects of the Decision in this case.

DONE in Rome this 26th day of October, 1953.

Emmett A. SCANLAN, Jr.
*Representative of the United States of America on Italian-United States Conciliation Commission*