WOLLEMBORG CASE—DECISION No. 146 OF 24 SEPTEMBER 1956 [1]

The Italian-United States Conciliation Commission, established under Article 83 of the Treaty of Peace between Italy and the Allied and Associated Powers, and composed of Messrs. Alexander J. Matturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic and Plinio Bolla, former President of the Swiss Federal Court, Third Member chosen by mutual agreement between the United States and Italian Governments, on the Petition of the Government of the United States, represented by its Agent, Mr. Carlos J. Warner and subsequently represented by its Agent, Mr. Edward A. Mag at Rome, on behalf of Mr. Leo J. Wollemborg of the late Leone, residing in New York, *versus* the Government of the Italian Republic, represented by its Agent, State's Attorney, Prof. Dr. Francesco Agrò at Rome.

[1] *Collection of decisions*, vol. IV, case No. 109.

CONSIDERATIONS OF FACT:

A. Leo J. Wollemborg (hereinafter the claimant), an Italian national of the Jewish race was born in Rome on August 30, 1912. In 1939 he took refuge in the United States to escape racial persecution in Italy. From May 20, 1943 to May 23, 1946 the claimant served in the United States Army and became an American national by naturalization on December 2, 1943.

B. Leo J. Wollemborg was and is the owner of land covering a surface of 4789,25 hectares and of three rural buildings in the municipality of Loreggia, Italy. As a consequence of the measures taken against the Jews and in compliance with a telegram of the Head of the Province dated December 13, 1943, this property was taken over by the Podestà of Loreggia on December 16, and was taken care of by the Jewish Property Commissioner at Padua from the end of December 1943 through May 10, 1945 on which date it was returned to its legitimate owner. The statement of account drawn up by Commissioner Ugo Vittadello showed a balance of 25,884.05 to the claimant's debit who paid said sum to the afore-mentioned Commissioner's office on April 5, 1946.

C. On September 11, 1945 and on December 11, 1946, Leo J. Wollemborg deposited with the Intendenza di Finanza at Padua two claims directed at obtaining compensation covering two-thirds (Article 78, paragraph 4 (*a*) of the Treaty of Peace) of the war damage which his real and personal property at Loreggia had suffered during the months of January and February 1945. The claimant, with regard to his active right to claim, invoked Article 5 of the Italian-U.S. Agreement of August 14, 1947, known as the Lombardo Agreement, under which

> for the purposes of this Memorandum of Understanding, the term "nationals" means individuals who are nationals of the United States of America, or of Italy, or corporations or associations organized under the laws of the United States of America or Italy, at the time of the coming into force of this *Memorandum* of Understanding, provided, that under Article 3 above, nationals of the United States of America shall, for purposes of receiving compensation, also have held this status either at the time at which their property was damaged or on September 3, 1943, the date of the Armistice with Italy.

The claimant was naturalized on December 2, 1943, and therefore after September 3, 1943, but before the property was damaged as a result of the war.

D. On September 19, 1947 Mrs. Alda Menichini, claimant's attorney, filed with the District Office of Direct Taxation of Camposampiero a statement concerning the special progressive tax on property, established by Law Decree No. 828 of the Italian Republic on September 1, 1947. Said statement covered all the personal and real property owned in Italy by the claimant. On September 3, 1951, Mrs. Menichini, still acting as the claimant's attorney, accepted a compromise settlement (*concordato*) with the Tax Collector of Camposampiero, on the basis of which the taxable property for the purposes of the special progressive tax on property was fixed at 118,000,000 lire and the amount of the tax at 22,195,800 lire, plus an additional 2% beginning January 1, 1947 and the collection premiums.

E. On December 30, 1952 the Embassy of the United States of America submitted a claim to the Government of the Italian Republic, on behalf of Leo J. Wollemborg, directed at obtaining exemption from the payment of this special progressive tax on property, and this in application of Article 78, paragraph 6 of the Treaty of Peace.

At the time the claim was filed Mr. Leo J. Wollemborg had already paid

part of the sum agreed to under the compromise settlement for said tax. Subsequently, the claimant was requested to pay, and did in fact pay, further instalments of that sum. The balance was held in abeyance pending this decision.

The Government of the United States took the position that the request for the payment of further instalments which was made after the claim was filed on December 30, 1952, was to be interpreted as a rejection of said claim and, on December 28, 1954, placed the dispute before the Italian-United States Conciliation Commission.

F. Prior to the opening of these proceedings, the Embassy of the United States of America in Rome had written to the Ministry of the Treasury in Rome requesting that the two claims submitted on September 11, 1945 and December 11, 1946 be considered as war damage claims filed under Article 78 of the Treaty of Peace and the Agreements interpretative thereof and supplemental thereto. This communication is still unanswered to date.

G. The Petition filed on December 28, 1954 by the Agent of the United States of America concludes by requesting that the Commission:

(*a*) Decide that the claimant is to be considered a United Nations national within the meaning of paragraph 9 (*a*) of Article 78 of the Treaty of Peace;

(*b*) Decide that the claimant is entitled to exemption from the Extraordinary Progressive Patrimonial Tax imposed on his property by the Italian Government;

(*c*) Order that any sums paid by the claimant to the Italian Government under the tax assessment dated September 3, 1951 be refunded to the claimant and that the claimant be granted interest thereon at the rate of 5%;

(*d*) Order that the costs of and incidental to this claim including the necessary expenses of the prosecution of this claim before this Commission be borne by the Italian Republic.

According to the Agent of the United States Government, the claimant is a United Nations national, not only within the meaning of the first paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace, as amended by Article 5 of the Lombardo Agreement, but also within the meaning of the second paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace; in fact, because he was a Jew, the claimant was treated as enemy under the laws in force in Italy during the war; this conclusion is reached by the fact that his property at Loreggia was placed under sequestration in December 1943 and was restored to him only on May 10, 1945.

H. In his Answer of Feburary 3, 1955, the Agent of the Italian Government concludes by requesting that the Conciliation Commission

declare the Petition submitted by the Hon. Agent of the Government of the United States of America on behalf of Mr. Wollemborg to be inadmissible for lack of right to claim or at least to reject it completely.

The Agent of the Italian Government takes the position that it is impossible to find treatment as enemy under the laws in force in Italy during the war in acts connected with the so-called laws of the Republic of Salò which—because it was itself outside the law—had neither right nor title to issue "*laws*". The Agent of the Italian Government espouses the dissent of the Italian Representative, set forth at the end of the Decision rendered in December 1954 by the Italian-United States Conciliation Commission (Swedish Judge Emil Sandström acting as Third Member) in the Jack Feldman Case.[1]

[1] *Supra*, p. 212.

The Agent of the Italian Government considers that also the merits of the case are groundless; he states that we are faced with a tax settlement freely entered into by the lawful representative of the present claimant with the Italian Finance Offices at a time subsequent not only to the coming into force of the Treaty of Peace but also to the well known decision rendered by the Franco-Italian Conciliation Commission on August 29, 1949, concerning the patrimonial tax.[1] The Conciliation Commission, in the exercise of its powers, even though very broad, cannot proceed to an examination (not subordinate but a major issue) of that settlement which belongs wholly and entirely within the sphere of Italian domestic law.

I. The Agent of the United States Government filed a Reply on August 8, 1955 while the Agent of the Italian Government filed a Counter Reply on October 12, 1955.

The Reply and Counter Reply deal mainly with the exception raised by the Italian Government with respect to the tax settlement of September 3, 1951.

The Agent of the United States refers to the decision issued by the Supreme Court of Cassation and by the Central Commission of Direct Taxation in Italy, according to which the tax settlement (*concordato fiscale*) is not a compromise settlement entered into by the fiscal authorities and the tax-payer, and binding for the parties, but an administrative act of the Government which is agreed to by the tax-payer and therefore represents the combination of a public act (the assessment of the tax on the part of the authorities) with a private act (the agreement of the tax-payer to consider said assessment as final); the settlement does not prejudice the question of law which may again be raised within the prescribed time-limit before the competent agencies, in view of the fact that the settlement hinges and can only hinge on the amount of the tax to be levied, on the extent of the taxable property. In the instant case the settlement referred only to the amount of the tax payable by the claimant.

In his Counter Reply the Agent of the Italian Government has admitted that the settlement (*concordato*) does not constitute a compromise agreement in the private law sense of the term; according to the Italian legal system in matters of taxation, there is no possibility of a compromise agreement; on the other hand, the signing of the fiscal agreement at the time and under the conditions in which it was signed by Wollemborg's attorney, represents an act of acquiescence in the tax claim of the Italian Government; that this act of acquiescence which occurred in terms of domestic law, cannot be attacked on the international level; that by such act the legal relationship of taxation became extinct through the extinction of the fiscal obligation; and international jurisdiction is completely incompetent for the purpose of reviving this relationship.

J. By *Procès-verbal* of Non-Agreement dated October 24, 1955, the Representative of Italy and the Representative of the United States of America on the Italian-United States Conciliation Commission agreed to resort to a Third Member "in order to resolve the disputed questions raised by this claim".

L. The Conciliation Commission, completed and presided over by the Third Member, Dr. Plinio Bolla, former President of the Swiss Federal Court at Morcote (Switzerland) heard the Agents of the two Governments during the discussions held at Rome on March 12, 1956.

The Agents confirmed their contentions, arguments and conclusions.

[1] Volume XIII of these *Reports*, Decision No. 32.

CONSIDERATIONS OF LAW:

1. This decision does not deal with the claims submitted by Leo J. Wollemborg on September 11, 1945 and December 11, 1946 directed at obtaining compensation for the war damages suffered by his property in Italy. The Italian Government has not yet taken a position on these claims so that they have not, so far, become the subject of a dispute within the meaning of Article 83 of the Treaty of Peace.

In the absence of a dispute, the Commission cannot even render an opinion on the preliminary question of Mr. Leo J. Wollemborg's active right to file a claim for war damages. The request contained in paragraph No. 1 of the conclusions of the Petition of December 28, 1954 can only concern the claim relating to the special progressive tax on property.

The claimant should however be advised that, during the discussion of the case before the Commission, the Agent of the Italian Government admitted that Leo J. Wollemborg should be considered as a United Nations national within the meaning of Article 5 of the Lombardo Agreement for the purpose of obtaining compensation for the war damages suffered by his property in Italy, under Article 78, paragraph 4 (*a*) of the Treaty of Peace, on the condition that it is proved that these damages occurred after the claimant became an American national by naturalization.

2. The active right of the claimant to avail himself of paragraph 6 of Article 78 of the Treaty of Peace is disputed; on the other hand it is not disputed by the two Governments that the special progressive tax on property falls under the provisions of the afore-mentioned paragraph 6.

The claimant derives his right in the first place from Article 5 of the Lombardo Agreement, which amended the first paragraph of paragraph 9 (*a*) of the Treaty of Peace, extending the benefit of certain provisions of Article 78 from individuals who were United Nations nationals on September 3, 1943 to individuals who became United Nations nationals at a later date but prior to the date when their property was damaged. Nevertheless, Article 5 of the Lombardo Agreement only considers cases in which the property, or the interests of United Nations nationals in property in Italy were damaged and hence have a right to receive compensation. This appears unquestionably either by the reference made in Article 5 of the Lombardo Agreement to Article 3 thereof, which deals exclusively with sub-paragraphs (*a*) and (*d*) of paragraph 4 of Article 78, or by the two expressions contained in the afore-mentioned Article 5: "for the purposes of receiving compensation" and "at the time at which the property was damaged".

The Agent of the Government of the United States finds that there is contradiction in the fact that a national of the United States of America, who is entitled to receive partial compensation for the war damages suffered by his property in Italy, should be forced to pay to the Italian State the special progressive tax on property which was established to meet the expenses arising out of the payment of war damage compensation also. This contradiction, if there is a contradiction, would lie solely in the contentions of one of the contracting parties and in any case would not be so broad as to allow the interpreter to wander from the clear text of Article 5 of the Lombardo Agreement; there are no grounds whatever for doubting that the expressions used in this article have faithfully interpreted the intentions of the contracting parties, nor are there any positive elements to assume a different intention to that expressed in the words used (cf. Balladore Pallieri, *Diritto internazionale pubblico*, p. 236). In Article 5 of the Lombardo Agreement the Italian Government made a concession to the United States Government by accepting, in certain specific

cases and for specific purposes, a date subsequent to that established by the first paragraph of paragraph 9 (*a*) of the Treaty of Peace concerning the possession of *statua*; the effects of this concession cannot be extended by the interpreter beyond the clear limits of the Agreement for the sole reason that the Government of the United States might have had resonable grounds for requesting such an extention from Italy during the negotiations.

3. In the second place the claimant derives his active right to claim from the second paragraph of paragraph 9 (*a*) of Article 78, namely, because he was considered ("*traitée*", "treated") as enemy "under the legislation in force during the war".

On the interpretation to be given to this provision the Commission has rendered an opinion in the two Decisions issued this date in the cases of Vittorio Leone and Amalia Levi Sacerdote,[1] and Peter G. and Gino Robert Treves.[2] Specific reference is made here to these Decisions.

In view of the arguments set forth in the afore-mentioned Decisions, the Commission is of the opinion that the provision to be interpreted intended to subordinate the similarity required by it to a condition of fact, namely that the effective treatment as enemy should be linked with legislative provisions in force in Italy during the war, hence also subsequent to the Armistice (September 3, 1943), little mattering whether enacted by the national Government or by the Government of the Italian Social Republic, the legitimacy of the legislative enactments of the latter being unprejudiced. The Commission also believes, still for the reasons set forth in the decisions referred to above, that the application of the second paragraph of paragraph 9 (*a*) of the Treaty of Peace does not require that the legislation in question have in the abstract and specifically declared certain Italian nationals as enemies, and, as such, subjected them to the War Law; it is sufficient that it required the application against them of measures which, in substance, permitted a treatment as enemy.

The only peculiarity in the instant case is that the measures directed against the claimant's property (inventory and beginning of the administration by the Jewish Property Commissioner at Padua) were taken before the coming into force (January 10, 1944) of the Legislative Decree of the Duce, No. 2, of January 4, 1944, published in the Official Gazette No. 6 of January 10, 1944. By this Decree, containing new provisions concerning property owned by citizens of the Jewish race, confiscation and sale of the property owned by said Jews was ordered. The State was the beneficiary of the proceeds of said sale "as partial recuperation of the expenses sustained in assisting and in paying subsidies and compensation for war damages to persons rendered homeless by enemy air attacks" (Article 15). By this Decree, a treatment which was even more severe than that provided for enemy owned property was made lawful with respect to property owned by Italian Jewish nationals.

The question as to whether or not the programme approved in November 1943 by the First Assembly of Republican Fascism may be considered as "legislation" can remain unsolved. Point 7, included in this programme reads as follows:

> Individuals of the Jewish race are aliens. During the war they belong to enemy nationality.

It is a fact that, in pursuance of this policy, certain property owned by Italian nationals of the Jewish race was placed under sequestration in December 1943 (see, in the records, the Decree of December 28, 1943 of the Head of

[1] *Supra*, p. 272.
[2] *Supra*, p. 262.

the Province of Brescia concerning Vittorio Coen di Edmondo, which refers to the "instructions issued by the Ministry of the Interior on December 1, 1943" and which contains in the "having seen" paragraphs, the sentence: "having seen that Jews are considered as subjects of an enemy State").

The more decisive factor is that said measures were in any event made lawful *a posteriori* by the Decree of the Duce of January 4, 1944. There could be nó justification in conferring Italian nationals of the Jewish race a different treatment, when implementing the second paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace, according to whether the measures taken against their property by the agencies of the Italian Social Republic were in actual fact taken before or after January 10, 1944; and that the benefits of the said provision should be denied primarily to those individuals who were the first to be attained and therefore for a longer period.

4. As regards the merits of the case, the Agent of the Italian Government opposes to the Petition the fact that on September 3, 1951 the claimant's attorney signed an agreement with the Italian financial administration concerning the special progressive tax on property and that the sums paid by the claimant were paid in fulfilment of this agreement (*concordato*) and that, also in fulfilment of this agreement, claimant was requested to pay further instalments.

The parties have discussed at length and learnedly the nature and the effects of the tax settlement (*concordato*) under Italian domestic law. The Commission does not believe it should follow them on this ground. The proceedings started by the United States Government are in the sphere of international law, because they are based on paragraph 6 of Article 78 of the Treaty of Peace.

Without it being necessary to embark here on an academic discussion as to whether or not the question of relationship between international and domestic law should be solved according to the teachings of the doctrine of monism or of dualism (cf. Rousseau, *Principes généraux du droit international public* I. p. 54 through 75, above all 74), one thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation. Judicial decisions of the Permanent Court of International Justice are all identical on this point:

(*a*) in the consultative advice of February 21, 1935 (matter of exchange of Greek and Turkish peoples), the Court refers to "the self explanatory principle according to which, a State that has validly subscribed to international obligations is bound to provide its legislation with such amendments as are necessary to ensure the fulfilment of these obligations";

(*b*) in the consultative advice of July 31, 1930 (matter of the Greek-Bulgarian community), the Court expressed the following opinion: "It is a generally recognized principle of human rights that in the relationships between Powers who are contracting parties to a treaty, the provisions of a domestic law shall not prevail over those of the treaty";

(*c*) this principle is restated in the decision of June 7, 1932 in a dispute between France and Switzerland (matter of the free areas) "France cannot avail itself of its legislation for the purpose of restricting the scope of its international obligations".

In any event, within these limits, the priority of human rights over domestic law in the relationships between treaty and law must be recognized by the international court established under the treaty itself.

Article 78, paragraph 6 of the Treaty of Peace, after having charged the Italian Government with the obligation of exempting United Nations nationals

from certain specific taxes (and it is undisputed between the parties that these taxes include the special progressive tax on property), imposes on the Italian Government the obligation to return all sums which may have been collected for that purpose. Restitution should be made also in the event that the Italian fiscal legislation, like that of certain other States, should rule out in a general and absolute manner any restitution by the fiscal authorities of sums unduly collected.

Viewed from the international standpoint, the cited settlement (*concordato*) could be relevant only as a waiver of a right on the part of its principal (Balladore Pallieri, op. cit. p. 251). Certainly, the waiver is, save in exceptional cases, binding on the subject from whom the unilateral declaration of relinquishment emanates (*ibid.*). But waivers cannot be presumed and there is nothing in the instant case that authorizes one to admit that there was intention to relinquish. The claimant's attorney, according to the sworn statement contained in the records, was unaware, at the time of the signing of the settlement (*concordato*) of the provisions of the Treaty of Peace concerning the exemption of United Nations nationals from certain taxes; the attorney, as a good administratix, could not take any heed of the consequences of the notification of September 19, 1947 and, in settling by compromise the amount of the taxable property, certainly did not intend to relinquish any possible rights which may have been due to the claimant, of which she was unaware, and wished to oppose every imposition of this kind. As to the claimant, he was absent from Italy; even though the French-Italian Conciliation Commission had admitted on August 29, 1949 the applicability of Article 78, paragraph 6 of the Treaty of Peace to the special progressive tax on property,[1] it does not appear that he became aware of this until September 3, 1951. Neither did he learn before this date of the Exchange of Notes of June 13, 1950, by which Italy acknowledged the applicability of said exemption to the United States of America also; until then no action whatever had been taken on his claims filed on September 11, 1945 and December 11, 1946 for war damage compensation and the Italian Government denied, and still denies, that Italian nationals of Jewish origin, racial persecutees under the Italian Social Republic, have a right to be considered as "United Nations nationals" within the meaning of the second paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace. It was excluded therefore that the exceptions raised by the claimant could be made the subject of a trial, and in no event of a favourable trial on the part of the Italian fiscal authorities; it was only possible to have recourse to an international court (Article 83 of the Treaty of Peace) and it was not necessary to make any specific reservation in this connexion.

5. It follows that the claimant is entitled to be exempted from the payment of the special progressive tax on property established by the Italian Republic by Law Decree No. 828 of September 1, 1947, and that the sums already paid by the claimant for this purpose are to be reimbursed to him by the Italian Government.

Paragraph 6 of Article 78 of the Treaty of Peace makes no reference to interest on delayed payments and there is therefore no legal basis thereto.

6. The claimant requests that the expenses for the legal proceedings, including those incurred in the proceedings before this Commission, be charged to the Italian Government.

Article 83, paragraph 4 of the Treaty of Peace provides that each Government shall pay the fees of its Member on the Conciliation Commission and the

[1] Volume XIII of these *Reports*, Decision No. 32.

fees of its Agent. The fees of the Third Member and the joint expenses of the Commission shall be borne by the two Governments on a fifty-fifty basis.

The claimant can avail himself only of Article 78, paragraph 5 of the Treaty of Peace under the terms of which "all reasonable expenses incurred in Italy in establishing claims, including the assessment of loss or damage, shall be borne by the Italian Government". This provision is brought to the knowledge of the claimant, who has so far mentioned no figures in this connexion; wherefore the Commission finds it impossible to fix a specific amount (Article 13 of the Rules of Procedure dated June 29, 1950).

DECIDES:

1. The Petition is admitted in the sense that the claimant, Mr. Leo J. Wollemborg, in application of Article 78, second paragraph of paragraph 9 (*a*) is acknowledged to be lawfully entitled to be exempted from the payment of the special progressive tax on property established by the Italian Republic by Law Decree No. 828 of September 1, 1947, and to receive reimbursement from the Italian Government of all sums paid under this heading; the reimbursement of these sums paid by the claimant shall be made within sixty (60) days from the date on which this Decision is notified to the Agents of the two Governments.

2. This Decision is final and binding.

Rome, September 24, 1956.

The Representative of the United States of America
Alexander J. MATTURRI

The Third Member
Plinio BOLLA

DISSENTING OPINION OF THE REPRESENTATIVE OF THE ITALIAN REPUBLIC IN THE LEO J. WOLLEMBORG CASE

I do not feel I can agree with the Decision of the majority Commission for the reasons I have fully set out in my dissenting opinion in the Treves Case.

Rome, October 11, 1956.

The Representative of the Italian Republic
Antonio SORRENTINO
