

UNITED AFRICA COMPANY LIMITED CASE—  
DECISION No. 189 OF 15 JULY 1961

The Anglo-Italian Conciliation Commission established pursuant to Article 83 of the Treaty of Peace signed on 10 February 1947 between the Allied and Associated Powers and Italy, composed of Avvocato Antonio Sorrentino, Representative of the Government of the Republic of Italy at Rome, and Mr. E. A. S. Brooks, Representative of the Government of Her Britannic Majesty, at London, and of M. Paul Guggenheim, Professor of the Faculty of Law at the University of Geneva and at the Graduate Institute of International Studies at Geneva, in the dispute arising out of the claim by the United Africa Company Limited for compensation pursuant to Article 78, paragraph 4, sub-paragraph (b), of the Treaty of Peace, takes cognizance of the following facts:

1. The United Africa Company Limited, hereinafter referred to as "the English Company", was incorporated in England pursuant to the English Companies Acts 1861-1928, on 30 April 1929. It acquired, on 13 November 1929, 10,000 shares in the Società Anonima Africane Riunite (hereinafter referred to as S.A.A.R.), which comprised one-half of the 20,000 shares in the issued capital of the latter undertaking which has its head office at Genoa.

2. S.A.A.R. bought the whole capital of the Compagnia Italiana Depositi Olli Società Anonima (hereinafter referred to as C.I.D.O.S.A.) having its head office also at Genoa. The merger had legal effect as from 26 March 1947.

3. By a contract No. 266 dated 9 January 1933, the Consorzio Autonomo del Porto di Genova, granted to S.A.A.R. a concession for the temporary occupation of an area at Ponte Paleocapa, for the discharge of vegetable oils, for a period of thirty years, at a rental of Lire 30,925. By a contract No. 281 dated 31 January 1934 the Consorzio granted a concession to C.I.D.O.S.A. likewise authorizing it to occupy an area of land known as Paleocapa, in the Port of Genoa, for the purpose of storage installations, for a period of 26 years, commencing on 9 February 1934. By annual licences No. 61 of 20 February 1939 and No. 124 of 24 April 1939, the Consorzio granted certain rights to S.A.A.R. and C.I.D.O.S.A. in connexion with the use of the leased properties.

4. Following the grant of the concessions and the above-mentioned licences, the two companies carried out certain works. On the outbreak of war between the United Kingdom and Italy, the installations were fully active. After the outbreak of hostilities, the two companies, because half of the capital was in the ownership of the claimant, a British Company, were placed under sequestration by the Italian Government. At the request of the Administrator of the sequestrated property, the Consorzio Autonomo del Porto di Genova authorized the transfer of the concessions granted to the companies S.A.A.R. and C.I.D.O.S.A. to the Consorzio Italiano per il Commercio Estero. On 2 June 1941 the Consorzio Autonomo extended the duration of the concessions to 9 March 1965.

5. The Port of Genoa suffered heavy damage in the course of the Second World War, as a result of naval bombardment by the British fleet and aerial bombardment by Allied forces. The property of the S.A.A.R. being thereby severely damaged. Other damage had been caused by German occupying forces and also by the Consorzio Italiano per il Commercio Estero which had conducted the business of the S.A.A.R. during the war. It had removed certain installations during the air raids and hidden dismantled machinery in the mountains.

6. Under Decree Law No. 36 of 1 February 1945 and No. 140 of 26 March 1946, as well as under the Decree of the President of the Council of Ministers of the Italian Republic of 9 April 1946, all provisions and measures taken in relation to property belonging to United Nations nationals were revoked. The S.A.A.R., the C.I.D.O.S.A. as well as the claimant company re-assumed their rights.

7. By legal provisions, the existence of which have not been contested by the parties in the course of these proceedings, the duration of the Consorzio Autonomo del Porto di Genova itself was extended until 30 June 1973. As a consequence the British Government in their claim contend that the greater part, if not all, the concessions granted by the Consorzio were also prolonged to the same date. This statement has not been contested by the Italian Government in the course of the proceedings. It must therefore be considered to be in conformity with the facts.

8. The S.A.A.R. in which the C.I.D.O.S.A. had been merged as mentioned above, obtained an extension of the duration of its concession until 30 June 1973 by a document executed by the Consorzio Autonomo del Porto di Genova on 13 December 1948. The request for an extension of the concession of the S.A.A.R. was dated 25 January 1947. The document prolonging the concession refers to this request in the following manner:

(i) *Che con domanda in data 25 gennaio 1947 . . . la Società Anonima Africane Riunite S.A.A.R. ha chiesto la proroga, fino al 30 giugno 1973 del contratto . . . in considerazione dei danni subiti, per effetto di azioni di guerra, dal deposito situato alla Calata Sanità, ed allo scopo di consentire l'ammortizzo dei capitali necessari al completo ripristino degli impianti.*

(Translation: "That by an application dated 25 January 1947 . . . the Limited Company Africane Riunite S.A.A.R. requested the extension of the contract, until 30 June 1973 . . . in consideration of the damage suffered as the result of acts of war, to the depot situated at Calata Sanita, and for the purpose of permitting the amortization of the capital necessary to put the plant into complete good order.")

The document grants the extension by its Article No. 4 which provides:

*La durata del contratto . . . è prorogata fino al 30 giugno 1973.*

(Translation: "The duration of the contract . . . is prolonged until 30 June 1973.")

9. The Treaty of Peace with Italy came into force on 15 September 1947. The claim for compensation for the damage sustained was presented by the claimant company on 2 February 1949, and the amount was specified at Lire 33,018,650. On 7 July 1949 the claim was presented by the Government of the United Kingdom to the Italian Government.

10. On 17 June 1958 the Italian Ministry of the Treasury expressed views on this claim. It was of the opinion that the company should consider its itself as already compensated under Contract No. 369 of 13 December 1948.

The above-mentioned document, *con la quale il Consorzio Autonomo del Porto di Genova ha prorogato a favore della S.A.A.R. fino al 30 giugno 1973 la convenzione del 9 gennaio 1933, No. 266, risulta che tale proroga è stata richiesta da tale società in considerazione dei danni subiti per effetto di azioni di guerra ed allo scopo di consentire l'ammortizzo dei capitali necessari al completo ripristino degli impianti.*

(Translation: "with which the Consorzio Autonomo del Porto di Genova has extended Contract No. 266 of 9 January 1933 in favour of S.A.A.R. until 30 June, 1973. It appears that such extension has been requested by the said company in consideration of the damage suffered as the result of acts of war and for the purpose of permitting the amortization of the capital necessary to put the plant into complete good order.")

11. By *note verbale* of 15 December 1958, Her Majesty's Embassy at Rome informed the Italian Ministry of Foreign Affairs that the British Government "are unable to concur in the aforementioned decision and consequently consider that a dispute within the meaning of Article 83 of the Treaty has arisen . . . which Her Majesty's Government intend to refer to the Anglo-Italian Conciliation Commission unless it is settled by agreement within twenty-one days".

12. The opening submission dated 31 March 1960 was presented by the Agent of the British Government on 18 April 1960. The prayer of the British Government was [that the Commission should]:

(a) Affirm that the extensions granted after the war by the Consorzio to the Italian Company do not affect the obligation of the Italian Government to pay compensation under Article 78 (4) (b) of the Treaty of Peace with Italy to the Claimant Company;

(b) Fix the amount of the liability of the Italian Government at 50% of two-thirds of the sum necessary at the date of payment to repair the damage to the property comprised in the concessions granted by the Consorzio to the Italian Company which at 1949 prices amounted to Lire 33,018,650;

(c) Order that the amount of the liability of the Government of Italy so ascertained be paid by the Government of Italy to the Claimant Company;

(d) Order that such sum as this Honourable Commission finds to represent the amount of reasonable expenses incurred in establishing the claim including the assessment of loss or damage be paid to the Claimant Company by the Government of Italy;

(e) Order that any payment ordered by this Honourable Commission's decision to be paid by the Government of Italy, shall be paid within 60 days from the date of this Honourable Commission's decision;

- (f) Provide for the costs of and incidental to this Submission;
- (g) Give such further or other relief as may be just and equitable.

In their Answer of 30 June 1960 the Italian Government prayed the rejection of the British claim. In their Replication of 13 September 1960 the British Government maintained their original demands "in accordance with the prayer contained in paragraph 10 of the Submission dated 31 March 1960".

13. The Representatives of the two governments met in Rome on 9 March 1961, established the points on which they disagreed which form the subject of this controversy.

*e ravvisata la necessità di riprendere in esame la controversia in presenza di e con l'assistenza del Terzo Membro.*

(Translation: "and recognized the necessity of re-examining the dispute in the presence of and with the assistance of the Third Member.")

The Third Member appointed on 11 March 1961 by the two Governments, was M. Paul Guggenheim, Professor of the Faculty of Law at the University of Geneva and at the Graduate Institute of International Studies at Geneva. He accepted the nomination.

#### HAVING CONSIDERED THE LEGAL POSITION:

##### A.

In favour of their contention that the extension of the concession until 1973 could not be considered as compensation for war damages in substitution for that provided by Article 78 (4) (b) of the Treaty of Peace with Italy in favour of United Nations nationals who hold directly or indirectly ownership interests in corporations or associations which are not United Nations nationals (for example: Italian nationals) the British Government adduced the following arguments:

(a) The request for the extension of the concession made by S.A.A.R. was made on 25 January 1947 at a time when the Treaty of Peace was not yet in force. The request was therefore made before the right provided by Article 78 (4) (b) had come into existence—and moreover was made not to the Italian Government but to an independent organization.

(b) The request for extension of the concession made to the Consorzio was not founded upon the right provided by Article 78 (4) (b) of the Treaty of Peace which is restricted to United Nations nationals and persons assimilated to them. The two matters, that relating to the extension of the concession and that concerning compensation, are different and should not be confused.

(c) As to the opinion expressed by the Italian Government that the damage sustained by S.A.A.R. was compensated by the extension of the concession, this argument would only be valid if it could be proved that if no damage had been sustained the extension of the concession would not be granted. The Italian Government is not, however, in a position to show this. Actually, according to the British Government, all or the greater part of the persons holding concessions from the Consorzio at Genoa without discrimination obtained the extension of their concession to 30 June 1973 independently of whether or not damage had been suffered as a result of the war. The extension of the concessions granted by the Consorzio was a consequence of the extension of the life of the Consorzio itself, the term of which was originally fixed until

1965, but was extended after the war until 30 June 1973. The extension of the concession would, therefore, have been made even if the installations of the S.A.A.R. had not suffered any damage.

(d) Even if the main contention of the British Government is not admitted, that is to say if the concession of the S.A.A.R. would not have been extended in the absence of damage sustained by the latter, the right to compensation for the damage would not be excluded. Compensation would, however, in that case be limited to the extent to which the loss had not been made good by the extension of the concession.

## B.

The Italian Government replied to the British case as follows:

(a) The Italian Government maintain that if 25 January 1947, the date of the request for the extension of the concession by the S.A.A.R., is accepted as the relevant date, the damage no longer existed at the time of the entry into force of the Peace Treaty which took place on 15 September 1947; because Article 78 provides in paragraph 1:

Insofar as *Italy has not already done so*, Italy shall restore all legal rights and interests of the United Nations and their nationals as they existed on June 10, 1940 . . .

(b) On the other hand, if the Conciliation Commission accepts as the relevant date for the compensation of the damage the date of the entry into force of the new agreement (Contract No. 369 of 13 December 1948) that of 28 December 1948—which appears more correct in the opinion of the author of the Italian reply—the agreement relating to the extension of the concession of 13 December 1948 would constitute one of the arrangements which can be substituted “in lieu of the provisions of this Article” in accordance with Article 78 paragraph 8 of the Peace Treaty, that is to say, an arrangement which would replace the provisions relating to restitution and compensation for United Nations nationals and persons deemed to be such.

(c) In these circumstances the Italian Government also deny the subsidiary British contention according to which the extension of the concession by eight years (from 1965 to 1973) would have at least partially compensated the damage.

In their reply of 13 September 1960 the British Government maintain their contentions. They point out that some Italian companies obtained compensation for war damages without reference to the fact that their concessions had been extended. This being so, the British reply bases its claim for compensation also upon Article 78, paragraph 4 (a), which provides:

In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals.

## C.

The first question to which the Conciliation Commission must reply is the following: Does the extension of the concession from 1963 to 1973 granted by the Consorzio as a result of the agreement of 13 December 1948 constitute compensation of the British company as provided by Article 78, paragraph 4 (a) of the Peace Treaty with Italy?

(a) A preliminary observation is necessary upon this point. The extension of the concession granted to the S.A.A.R. by the Consorzio does not arise from

a request by the British company, but from a request addressed to the Consorzio by the Italian Company (S.A.A.R.) dated 25 January 1947. This request therefore occurred at a time before the entry into force of the Treaty of Peace.

On the other hand, it was made « *en considération des dommages subis par effet d'actions de guerre* », « *del deposito situato alla Calata Sanità, ed allo scopo di consentire l'ammortizzo dei capitali necessari al completo ripristino degli impianti.* »

(Translation: "in consideration of damage suffered as a result of acts of war, to the depot situated at Calata Sanità, and for the purpose of permitting the amortization of the capital necessary to put the plant into complete good order.")

Nevertheless, the reasons which gave rise to the request of the S.A.A.R. are mentioned only in the preamble to the agreement for the extension of the concession of 13 December 1948, and not in Article 4 of that document itself which specifies the extension of the concession until 30 June 1973. The reason for the request for extension given by the S.A.A.R. is not, however, of less importance since the Comitato Consortile (the Comitato of the Consorzio Autonomo of the Port of Genoa) in its preliminary decision of 19 December 1947, decided in favour of this extension without giving any reason. This absence of statement of reasons in favour of the extension of the concession of the S.A.A.R. in the preliminary decision of the competent organization, that is to say, the Comitato Consortile, as well as in Article 4 of the document itself, can be interpreted to mean that the extension is not compensation for the war damage which had been sustained. All the more so, inasmuch as all or the greater part of the holders of concessions from the Consorzio obtained extension of their concessions until 30 June 1973; irrespective of whether they had or had not suffered any war damage. This allegation made by the British Government has not been questioned by the Italian Government in the course of the proceedings. The British contention must therefore be presumed to conform with the facts. It must therefore be admitted that the extension of the concessions in favour of the holders from the Consorzio is the consequence of the extension of the duration of the Consorzio itself to 30 June 1973. Even if the installations of the S.A.A.R. had not been damaged the concession would have been extended. There is consequently no reason to distinguish between the S.A.A.R. and other concession holders from the Consorzio.

(b) Furthermore, it must be remembered that the request for the extension by the S.A.A.R. made on 25 January 1947 was made at a time before the entry into force on 15 September 1947 of the Peace Treaty. On the other hand, the claim of the British Company, founded upon Article 78, paragraph 4 (b) of the Peace Treaty, dates from a time after the entry into force thereof.

On 2 February 1949, the date of the British Company's claim, the extension of the concession to the S.A.A.R. had already been granted. The claim of the British Company is therefore directed to compensation for actual losses and damage suffered and is based upon the right accorded exclusively to United Nations nationals and persons deemed to be such. This damage is assessed at Lire 33,018,650, whereas the total of the damage sustained was not stated by the S.A.A.R. when on 25 January 1947 it requested an extension of the concession. In these circumstances it is not possible to admit that Italy has already restored the rights and interests of the British Company by extending the concession of the S.A.A.R. to 1973. Such a restoration would only have taken place had the damage specified in the British claim been previously compensated or if the extension of the duration of the concession had been the compensation

sought by the British Company that suffered the damage. The extension of the duration of the concession would therefore have had to correspond to the criterion of reparation of damage laid down by Article 78, paragraph 4 (a) of the Peace Treaty. This nevertheless has not been shown in the proceedings of the Conciliation Commission. It is, moreover, impossible, since Article 78, paragraph 4 (a) of the Peace Treaty admits as compensation the payment of "a sum in Lire", but does not recognize compensation in the form of the extension of the concession.

(c) There remains the question of ascertaining whether, as the Italian reply states, the extension of the concession constitutes one of the "arrangements in lieu of the provisions of this article" (Article 78, paragraph 8 of the Peace Treaty). For this contention to be accepted by the Conciliation Commission it would be necessary to show that the prolongation of the concession had replaced, in accordance with the wish of the Parties—of Italy and of the United Kingdom—compensation in Lire for the war damage. However, the document granting the concession to the S.A.A.R. of 13 December 1948 does not contain any indication supporting such a substitution. It has no clause from which it could be inferred that the extension of the concession would replace compensation for war damages under Article 78, paragraph 4 (a) of the Peace Treaty. Moreover, the contract granted by the Consorzio Autonomo del Porto di Genova is signed on the one part by the representatives of the Consorzio and not by the Italian Government, and on the other part by the representatives of the S.A.A.R. and not by the representatives of the British Company. Now only the British Company, a United Nations national, as owner of property which has sustained damage, and the Italian Government themselves, as the party liable to make compensation for the damage would have been competent to conclude an agreement which could fall within the provisions of Article 78, paragraph 8 of the Peace Treaty. It is impossible to substitute for these two contracting parties to the arrangement, the S.A.A.R. on the one hand and the Consorzio on the other unless authority had been delegated to them by the contracting parties. The document of 13 December 1948, however, does not contain any provision enabling it to be asserted that there was any such delegation.

(d) Finally, in the statement of their case, the British Government have drawn attention to a decision of the Franco-Italian Conciliation Commission, No. 146 of 21 January 1953, in the case of Collas and Michel (4th volume, page 140, of the Collection of Decisions of the Franco-Italian Conciliation Commission.)<sup>1</sup> The passage in question reads:

*La Commission de conciliation retient avant tout que les amortissements internes que la propriétaire d'un bien peut avoir faits à titre de mesure de prudence, ou même en application d'une obligation légale, ne diminuent pas la valeur du bien en question à l'égard d'un tiers tenu à indemniser, soit en vertu du droit interne, soit en vertu d'une obligation internationale. Par contre, la valeur intrinsèque des installations construites pour l'exploitation d'une concession d'Etat ne peut être déterminée en faisant abstraction de la cause de la concession elle-même.*

(Translation: "The Conciliation Commission accepts in the first place that the amortization which the proprietor of a property may have effected for his own purposes, out of prudence, or even in compliance with a legal obligation, does not diminish the value of the property in question in relation to a third person who is liable to indemnify him, whether under either domestic law or some in-

<sup>1</sup> Volume XIII of these *Reports*.



ternational obligation. On the other hand, the intrinsic value of the installations constructed to exploit a State concession cannot be determined without taking into consideration the reason for the concession itself.”)

In the opinion of the British Government this passage from the above-mentioned decision of the Franco-Italian Conciliation Commission justifies the conclusion that the “improvement of assets” of the S.A.A.R. Company by the fact of the extension of the concession would not diminish the obligation of the Italian Government to make reparation for the damage in relation to the British Company. This view of the Government of the United Kingdom is correct. The prolongation of the concession of the S.A.A.R. has thus not diminished the damage which Italy is bound to compensate by virtue of its obligation under Article 78 of the Peace Treaty in relation to the British Company.

(e) In these circumstances it is not necessary for the Conciliation Commission to examine whether the Italian Government are right when they assert that the agreements concluded by the Consorzio Autonomo del Porto di Genova come from an entity indistinguishable from the State, or whether the agreements with the Consorzio were made by an entity independent of the Italian Government, as the British Government affirm.

In fact, if the extension of the concession is not the compensation due under the Peace Treaty and if no arrangement has been made for the purpose of substituting another form of compensation for this compensation in Lire, the question whether the authority prolonging the concession is identical or not with the Italian State is of no importance for the solution of this dispute.

(f) Neither need the Conciliation Commission examine the argument of the United Kingdom Government in its subsidiary contention that the extension of the concession in favour of the S.A.A.R. provided only partial compensation for the damage sustained by the British Company.

(g) The Conciliation Commission records that the Italian Government could have raised other defences. But as they have not done so, the Conciliation Commission considers that it should not take them into account since it is under no legal obligation to do so.

(h) So far as the amount of the damage to be made good is concerned, it has been calculated in “Allegato E” annexed to the British claim of 2 February 1949, at Lire 33,018,650 at 1949 values. It includes damages sustained by the S.A.A.R. (Società Anonima Africane Riunite) as well as damage suffered by the C.I.D.O.S.A. (Compagnia Italiana Depositi Olii Società Anonima). As the function of the Conciliation Commission as at present convened is to decide only the questions essential to the dispute, the discussion concerning the amount of the compensation to be paid by the Italian Government will be undertaken later between the respective Representatives of the Italian Government and the Government of the United Kingdom.

#### DECIDES THAT:

(a) The claim of the United Kingdom Government is accepted in principle:

(b) A period of three months from the notification of the present decision is fixed for the Italian Government and the British Government to agree upon

the amount to be awarded to the British Company (The United Africa Company Ltd.);

(c) The present decision is final and binding.

DONE at Geneva, 15th July, 1961.

*Representative of Italy on the Anglo-  
Italian Conciliation Commission*

*Representative of the United Kingdom  
of Great Britain and Northern Ireland  
on the Anglo-Italian Conciliation  
Commission*

A. SORRENTINO

E. A. S. BROOKS

*The Third Member of the  
Anglo-Italian Conciliation Commission*

M. Paul GUGGENHEIM