ARTHUR DE LEON CASE — DECISIONS NOS. 218 AND 227 OF 15 MAY 1962 AND 8 APRIL 1963 [1]

[1] *Collection of decisions*, vol. VII, case No. 274.

DECISION NO. 218 OF 15 MAY 1962

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of the Italian Republic, pursuant to Article 83 of the Treaty of Peace with Italy dated February 10, 1947, and composed of Messrs. Leslie L. Rood, Representative of the Government of the United States of America, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Government, and Georges Sauser-Hall, Professor *Emeritus* of International Law at the Universities of Geneva and Neuchatel, Switzerland, Third Member chosen by mutual agreement between the United States and Italian Governments,

Having seen the Petition dated February 11, 1957, filed on the same date with the Joint Secretariat of the Commission by the Agent of the Government of the United States of America,

v.
The Government of the Italian Republic
in behalf of
Arthur De Leon, claimant,

Having seen the Answer of the Agent of the Italian Government dated May 22, 1957;

Having seen the Proces Verbal of Non-Agreement dated June 4, 1957, signed by the Representatives of the Parties to this dispute, in which it was decided to resort to a Third Member, as provided for in Article 83 of the Treaty of Peace with Italy and the Rules of Procedure of the Commission, for the purpose of resolving the disputed issues raised by the instant case;

Having seen the Request dated November 18, 1959, in which the Agent of the United States demanded that the claimant, De Leon, and seven witnesses be heard on three of the controversial points set forth in the Petition;

Having seen the Order issued by the Commission on November 20, 1959 granting this request and directing that certain documentary evidence be produced, all questions of law being reserved;

Having heard the testimony under oath of three witnesses, Messrs. Pietro Comparini, Alessandro De Giorgis and Mario Boffa, during the session of the Commission held in Rome on December 10, 1959, the Plaintiff Government having waived the right to have other witnesses heard and to examine the claimant, and, having seen the stenographic recordings of the statements made by the witnesses during the aforesaid session;

Having seen the documents filed with the Joint Secretariat on December 15, 1959 by the Agent of the Plaintiff Government;

Having seen the Order issued by the Commission on December 11, 1959 directing the Agents of both Governments to file with the Joint Secretariat, within a time limit of thirty days beginning from the date on which the aforesaid Order was notified to them, their observations on the questions of law involved in the controversial issues of the instant case, and, within a time limit of sixty days beginning from the date of notification referred to above, their final observations (this latter time limit was extended, by Order, to March 11, 1960);

Having seen the Observations on the questions of law submitted by both Parties, namely, the Rebuttal of the Agent of the United States Government and the Brief of the Agent of the Italian Republic, filed with the Joint Secretariat of the Commission;

Having considered that the Agents of both Parties renounced oral hearings, but that in his Brief of March 5, 1960 the Agent of the Italian Government nevertheless requested that the Commission order a hearing to be held, if in the Commission's opinion such an oral discussion was warranted; and that the Commission, on the strength of the fact that a new Representative of the United States had taken office beginning on May 1, 1961, following the resignation of his predecessor and that he had not attended the session of December 10, 1959, the Commission held that a final oral discussion was necessary;

Having noted that this final session was scheduled to be held on October 16, 1961 in Rome, where in point of fact it was held;

Having heard, on the aforementioned date, the oral arguments of the Representatives of both Parties;

Having considered that the Agent of the United States Government reached the conclusions set out hereunder, which conclusions were further confirmed by him in both written and oral proceedings, namely that this Commission:

(a) Decide that the claimant is a United Nations national within the meaning of the second sentence of paragraph 9 (a) of Article 78 of the Treaty of Peace;

(b) Decide that the claimant is entitled to receive from the Italian Government under Article 78 of the Treaty of Peace and the agreements supplemental thereto and interpretative thereof two-thirds of the sum necessary at the time of payment to make good the losses suffered by him, which sums were estimated as of February 1947 to be in total 243,450,930 lire, divided as follows:

	Lire
Turin building	24,774,056
Turin plant	166,874,602
Turin installations	11,439,790
Milan branch	40,362,482
TOTAL	243,450,930

subject to any necessary adjustment for variation of values between that date and the date of final payment;

(c) Decide that the claimant is entitled to receive from the Italian Government the entire sum of 1,200,000 lire, representing the reasonable expenses incurred by him in Italy in establishing his claim.

Having noted that in his Answer the Agent of the Italian Government concludes by requesting that the Petition be declared inadmissible; and that during the proceedings he insisted on its inadmissibility, in that only the "Fratelli De Leon" corporation would eventually be entitled to take action;

Having noted that during the final session the Agent of the Plaintiff Government advised that the claimant had died at San Remo on May 4, 1960, without however producing formal evidence of this demise, and submitted a request relating to the exemption from all inheritance taxes on any indemnity eventually paid by the Italian Government; that this request was in point of fact filed with the Joint Secretariat of the Commission on October 19, 1961, following the completion of all written and oral proceedings.

A. CONSIDERATIONS OF FACT

1. The claimant, Arthur De Leon, of Italian origin and of the Jewish faith, left Italy in order to avoid the racial persecutions foreshadowed by the antisemitic campaign conducted by the Fascist Government beginning in

1938. He went to the United States on July 31, 1939 and acquired American nationality on November 7, 1945; he never changed this nationality thereafter, as appears from the certificate of naturalization, the accuracy of which is not denied, and which is attached to the records of the case. He was domiciled at New York, 18 West 27th Street.

The Commission's jurisdiction to pass on his claim cannot be doubted and has given rise to no objection on the part of the defendant Party.

2. The losses sustained by the claimant during the war arise out of the confiscation of a part of his property in Italy, and, mainly, from true and proper war damage caused by air bombardments which destroyed a building and industrial installations which he claims to own in Turin and in Milan.

3. The measure of confiscation directed against his property affected only a very small portion of his belongings. By decree No. 23520/488, dated September 4, 1944, implementing Decree-Law No. 2 of January 4, 1944, enacted by the Italian Social Republic, also known as the Republic of Salo', the Chief of the Province of Turin directed that Arthur De Leon, though at that time an Italian national, be considered as an enemy national because he belonged to the Jewish race and that his property, consisting of a credit in the sum of 2,279.05 lire in a free banking account, be confiscated. (Petition, Annex 2, Exhibit 2.)

4. The real property and the industrial installations he claims to have owned in Italy, were not subjected to any measure of seizure or attachment on the part of the Italian authorities, but were extensively damaged by the air bombardments which occurred between November 28 and December 5, 1942 at Turin and on February 14, 1943 at Milan.

This property so damaged and partly destroyed, comprised:

(a) a building located at Collegno, Turin, Corso Savoia 179, used as dwelling quarters and as industrial premises; claimant had acquired ownership title thereof by purchase on March 29, 1934, and was, personally, the sole owner;

(b) an industrial plant, with a complete stock of tools and implements for automobiles and trucks, usable in performing eleven different types of services, located at Collegno, Turin, Corso Savoia No. 179;

(c) a branch establishment located at Milan, Corso Sempione 33.

The items of property referred to in sub-paragraphs b) and c) were owned, during a period of eleven years, by Arthur De Leon personally, but, subsequently, by several corporations, as the claimant had tried to conceal them from the cognizance of the Italian authorities by a transfer to corporation composed of third parties who, being Aryans, were not considered as suspects in Italy.

5. It appears from the documents submitted to the Commission that, in this connection, the items of property referred to in sub-paragraphs (b) and (c) were subjected to the various legal arrangements which are set out below:

(a) A partnership of unlimited liability was established on December 15, 1924 under the style of "*Fratelli De Leon*" with head office at Turin, by the brothers Attilio, Arturo and Giorgio De Leon; the power to sign for and represent the corporation belonged to Arthur De Leon alone (Petition, Annex 2, Exhibit 3; declaration of the Chamber of Commerce of Turin of September 3, 1951).

(b) On June 14, 1929, the brothers Attilio and Giorgio withdrew from the partnership and Arthur De Leon became sole owner ("consolidatario") of the enterprise; the place of the partnership of unlimited liability was taken

by a personal company under the style of "*Fratelli De Leon di Arturo De Leon*", and was recorded as such with the Chamber of Commerce of Turin; the claimant purchased and paid for his brothers' shares. (Petition, Annex 2, Exhibit 3; declaration by the Chamber of Commerce of Turin dated September 3, 1951 and declaration by Counselor Cuniberti dated January 20, 1956; Boffa testimony during the session of December 10, 1959.) Throughout the above period, Arthur De Leon's brothers were merely his employees and did not receive any share of the enterprise's revenue.

(c) On October 20, 1940 the Arthur De Leon's personal company was converted into a *de facto* company, that is to say, into an irregular company of the type provided for in Articles 98 and 99 of the Trade Code of 1882, at that time in force in Italy, and entailing a joint management of the business. This alteration was brought about by the addition, in the quality of associates, of the brothers Emilio and Attilio De Leon; the purpose was to facilitate the future establishment of a joint-stock company. This *de facto* company lasted only two months and its existence was therefore of an ephemeral and transitory nature.

(d) On December 20, 1940, by instrument drawn up by notary Dr. Silvio Mandelli of Turin, registered under No. 4274 on December 24, 1940, and approved by the Civil and Criminal Court of Turin by Decree of December 23, 1940, a joint stock company was established, effective January 1, 1941 and for the duration of thirty years, that is, until December 31, 1970, under the style of "*Fratelli De Leon S.A.*" (Foglio Annunzi Legali della R. Prefettura di Torino", dated January 3, 1941, recorded under No. 54, p. 1088, insertion No. 1788; "Bollettino Ufficiale delle Società per Azioni", dated January 16, 1941, file No. 3, 1st part).

The company's head office was established at Turin, Corso Vittorio Emanuele 38; its purpose was the same as that of its predecessor and its main plant was also located at Collegno. On February 21, 1941 it advised the Chamber of Commerce of Turin that it had two branch establishments, one in Milan and the other in Rome (Register of Meetings, p. 10).

Under act of November 17, 1941, the company changed its style to "*Elettrauto Società Anonima*" (Register of Meetings, p. 10). When German occupation of Italy came to an end, once again, by resolution of the General Meeting of the Stockholders of July 3, 1945, the style of the Corporation was changed back to the style that had been selected at the time of its establishment, namely, "*Società per Azioni Fratelli De Leon*"; it exists even today under this denomination (Petition, Annex 2, Exhibit 4, Declaration of the Chamber of Commerce of Turin dated August 31, 1951, Exhibit 5, Cuniberti's declaration of June 20, 1956, Register of Meetings, p. 44).

6. The Register of Meetings and a certificate dated June 14, 1946 prepared by notary Silvio Mandelli of Turin, who drew up the articles of incorporation of the Corporation, as well as the subsequent acts modifying its organization, show that:

(a) The Joint Stock Corporation "Fratelli De Leon", established on December 20, 1940 had a capital of 990,000 lire, divided into 990 shares of stock of 1,000 lire each, of which Arthur, Attilio and Emilio De Leon each possessed 330, namely 330,000 lire.

These shares were registered shares with the possibility of being converted into bearer shares at the shareholder's expense (art. 5 of the Articles of Incorporation); beginning with Italian Decree No. 1148 of October 25, 1941, all shares of stock became obligatorily registered shares.

The nature and value of the contributions made by each associate were not specified. The minutes of the Stockholders' Meeting of the joint stock corporation disclose (p. 2) that the contributions did not include any real property (art. 2 of the Memorandum of Association) a fact which is categorically confirmed by Mario Boffa's testimony during the Commission's hearing of December 10, 1959. The corporation sustained no real property war damage.

The Corporation's balance sheet does not show any real property assets at the beginning of its existence (Register of Meetings, pp. 2, 15, 26, 34). For the first time an item "building" appears in the balance sheet of June 30, 1944 in the amount of 600,000 lire (ibid. pp. 40, 55); in the balance sheets as late as December 31, 1958, the figure shown for real property is 25,203,910 lire.

(b) By notarial act dated May 15, 1942, the corporation's capital was brought to 1,990,000 lire, an increase which was necessitated by the merging of "Elettrauto S.A." with "Restat, Resine Stampate Torino", a joint stock corporation whose capital amounted to 1,000,000 lire, and whose shares of stock had been purchased by Arthur De Leon in 1936 (Boffa's testimony, pp. 101-102); this merger had been decided upon by the stockholders at their Special Meeting of December 15, 1941 (Register of Meetings, p. 13); one thousand new shares of the denomination of 1,000 lire each were issued on that occasion and assigned to new stockholders.

On the date of October 15, 1942, the entire corporate capital stock, in the form of registered shares, was distributed among eight persons, all of them Aryans, as follows:

	Shares
Canova, Luciana	20
De Giorgis, Alessandro	380
Comparini, Pietro	400
Alpozzo, Italo	300
Parolini, Bardo	125
Bruna, Giovanni	150
Gaggiari, Vanda	175
Vigozzi, Camillo	440
	1,990

in the denomination of 1,000 lire each, namely 1,990,000 lire.

Arthur De Leon did not participate in this Corporation.

(c) Following the conclusion of the War, the Corporation, by resolution of the stockholders at their General Meeting of October 26, 1945, raised the corporate capital stock to 2,090,000 lire, by issuing 100 new shares in the denomination of 1,000 lire each, an increase necessitated by the merging of the "Società per Azioni Fratelli De Leon" with "S.A. Officine Meccaniche Colombatto" in Turin which was also owned by Arthur De Leon (Register of Meetings, pp. 57 et seq.; Boffa's testimony, p. 108).

The stockholders at their General Meeting of June 5, 1946, proceeded with a third capital increase, raising the corporate capital stock to 5,225,000 lire by the issuance of 3,135 registered shares in the denomination of 1,000 lire each; they also decided to do away with the rights of the registered stockholders to participate in this issue, thus permitting Arthur De Leon to purchase all the new shares (Register of Meetings, p. 63) thereby becoming once more a stockholder.

(d) The claimant sent to his brother Giorgio De Leon, from the United States, a general power of attorney, notarized on June 1, 1940 by Notary

Public Joseph Drago of New York, which was deposited on November 28, 1940 with notary Mandelli at Turin, because the aforesaid brother Giorgio, until the establishment of the Italian Social Republic known as the Republic of Salo', did not come under the restrictive provisions of the antisemitic laws by reason of the fact that he had participated in Gabriele D'Annunzio's expedition at Fiume during World War I. He was thus able to hold the position of President of the Board of Directors and of Managing Director of the "Fratelli De Leon S.A."; but when in his turn he was obliged to escape racial persecutions his duties were turned over to Italo Alpozzo, another shareholder.

Arthur De Leon reappeared on the scene for the first time after the war on October 31, 1958, at the General Meeting of the corporation's stockholders; he was at that time a United States national; he held several offices, namely, that of President and Managing Director of the Corporation (Register of Meetings, p. 76) and presided over all subsequent meetings, with the exception of the meeting of June 9, 1952. During this latter assembly the Articles of Association of the corporation were amended (Articles 10, 13 to 15 and 18); the Board of Directors was dispensed with and replaced by one single director; following the resignation of the entire Board of Directors, Arthur De Leon became a sole director.

On May 15, 1952, the claimant presented to the corporation his complete set of certificates of stock of the corporation's capital stock, as they had been endorsed over to him by stock broker Mantalcini, on the basis of written statements, the signatures of which were duly legalized, by the shareholders. Consequently, Arthur De Leon became the owner of the entire capital stock after the war. (Petition, Annex 2, Exhibit 6.)

(e) By a fourth capital increase the Corporation's capital stock, following a resolution passed during the General Meeting of October 19, 1957, was raised to 50,000,000 lire (amendment of Art. 5 of the Articles of Incorporation; Register of Meetings II, p. 74).

The Articles of Incorporation were again amended by the stockholders at their General Meeting of March 25, 1958 (Register of Meetings II, pp. 89 et seq.); the sole director was dispensed with and was again replaced by a Board of four members, composed of Arthur De Leon, Giorgio De Leon, Mario Boffa and Servi (Register of Meetings, II, p. 87).

7. Such were the transformations of the property of which the claimant alleges to be the owner; in the first place, owner of a partnership of unlimited liability, then of a company in his name, which was converted into a *de facto* corporation, and finally into a joint stock corporation which changed its style several times, merged with other joint stock companies, increased its capital stock several times, the shares of which, almost invariably registered shares, were assigned to eight persons, who in 1952 through Mr. Giorgio De Leon's agent handed over to Arthur De Leon the certificates of the registered shares of stock that had been delivered to them; the claimant became sole owner of the corporation and was sole director thereof from 1952 to 1958, in view of the fact that a four-member Board of Directors was established thereafter (Petition, Annex 2, exhibits 3 to 6, Register of Meetings II, 87).

The Plaintiff Party explains and justifies these repeated changes by stating that they were due to the claimant's conviction that the only manner in which he could avoid the measures adopted against the Jews in Italy was to interpose third parties of the Aryan race. His property was constantly exposed to a material threat of confiscation because, though his flight from Italy had sheltered his person from the physical dangers such as those to which one of

his associates, his brother Attilio, became a victim — (his brother was arrested some years later by the Germans and deported to Germany from where he never returned) — , it did not protect him from the dangers of the economic measures directed at that time against the property and interests of persons of the Jewish race.

8. The Plaintiff Government contends it was only because of these measures that Arthur De Leon managed to save the bulk of his property in Italy.

The corporation's industrial installations, of which the claimant is in fact sole shareholder, sustained considerable war damage, and the party in interest believes he is entitled to receive compensation therefor.

During the war the Italian authorities recognized the "Elettrauto" joint stock company as a legal person and paid the global sum of 3,500,000 lire under Italian legislation as advance payment on the compensation due for these damages; this sum was received without reservation by the company which thereby accepted treatment on the same footing as other Italian corporations. The aforementioned sum is made up as follows:

(a) by the Intendenza di Finanza of Turin, 2,000,000 lire on May 31, 1943, and 500,000 lire on March 24, 1945, these payments concern only the damages sustained by the industrial establishment located at Corso Savoia 179 at Collegno, but not the damages sustained by the building itself;

(b) by the Intendenza di Finanza of Milan, 1,000,000 lire on December 30, 1943, for the damages sustained by the branch establishment at Corso Sempione, 33, Milan.

9. The claimant has estimated that the total amount of the damages that he sustained either directly, where his personal property was affected, or indirectly, where the corporation's property was affected — his estimate is supported by expert advice — reaches the figure of 243,450,930.—.

On August 29, 1952, the Embassy of the United States in Rome applied to the Ministry of the Treasury for the purpose of obtaining full compensation in behalf of Arthur De Leon, a national of the United States, on the grounds that Italy was responsible for the payment of such compensation under the provisions of Article 78 of the Treaty of Peace.

In its letter dated May 25, 1955 (No. 404503), the Italian Ministry of the Treasury rejected this claim, on the grounds that the claimant was not a United States national either on the date of the air bombardments or on the date of the Armistice, September 3, 1943, and that he had not been created as enemy under the Italian legislation in force during the war. Up to the final stages of the proceedings the Agent of the Defendant Government persisted in these conclusions.

B. Considerations of law

10. Arthur De Leon manifestly does not fulfill, and this point is not denied by the Plaintiff Party, the conditions of Article 78, paragraph 9 (a), sub-paragraph 1 of the Treaty of Peace in the sense that the United States nationality with which he is now vested cannot authorize him to receive war damage compensation as a national of the United States of America.

As he was naturalized in 1945 in the United States, he does not fulfil the condition of having already been in possession of this nationality on September 3, 1943, the date of the Armistice with Italy, although he did possess the status of a United States national on September 15, 1947, the date of the coming into force of the Treaty of Peace.

The claim submitted to the Commission's judgment can therefore only be based on Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of

Peace which provides that the expression "United Nations nationals" includes also individuals who, under the laws in force in Italy during the war, were treated as enemy.

11. In this connection, the Commission cannot refrain from noting that Arthur De Leon, as a person belonging to the Jewish race, suffered only a very nominal direct damage as a result of the confiscation of his bank deposit of 2,279.05 lire; this is the only item of his personal property that the Italian Fascist authorities seized; the real property that belonged to him personally was never subjected to any measure of sequestration or confiscation, and the same thing can be said with regard to the property representing part of the assets of the corporation.

This disproportion between the wrong actually done to the claimant by the measures adopted against him by the Italian authorities in implementing the laws in force in Italy during the war, and the benefits he now claims, places on this Commission the obligation of investigating whether or not the compensation for war damages he is said to have suffered indirectly can be accorded to him under the provisions of Article 78, paragraph 4 (a) and (b) of the Treaty of Peace.

In an unvarying jurisprudence the Commission has decided that Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace, does not have the effect of including in the "United Nations nationals" persons who had been considered as enemies in the abstract under the terms of the laws in force in Italy during the war and who had not materially been treated as such by the Italian authorities (Cases: Bacharach, No. 22;[1] Flegenheimer, No. 20;[2] Treves, No. 95;[3] Wollemborg, No. 109;[4] Società Generale dei Metalli Preziosi, No. 167;[5] this latter decision is in the "Recueil des Decisions de la Commission de Conciliation Franco-Italienne", 5e fascicule, p. 12).

The Commission has conceded that this provision of the Treaty of Peace is a rule of an exceptional nature in that it extends the protection of the United Nations to individuals who do not actually fulfil the conditions of nationality required by the Treaty, but who, by the operation of a legal fiction, are considered as "United Nations nationals". The Commission believes that, like all exceptions, this provision must be interpreted strictly in that it deviates from the general rules of the law of nations on the international protection of injured persons.

Does the confiscation of the sum of Lire 2,279.05 belonging to the claimant represent the hostile treatment required by Article 78, paragraph 9 (a), sub-paragraph 2 in order that he be allowed to benefit by the status of "United Nations national"? Or should one refuse to consider as a "United Nations national" a claimant who demands compensation of a size that is out of all proportion to the very slight loss sustained by the bulk of his property merely because he was treated as enemy during the war under the laws in force in Italy at that time? Particularly, since there are here involved true and proper war damages, caused by air bombardments directed against both the Italian people, who sustained personal injury and property losses, and aliens in Italy, should one reject a claim formulated in the aforesaid terms because of the general principle of law which permits one to construe international treaties in a manner which avoids an unjust result?

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[1] Volume XIV of these *Reports*, p. 187.
[2] Ibid., p. 327.
[3] Ibid., p. 262.
[4] Ibid., p. 283.
[5] Volume XIII of these *Reports*, p. 578.

12. The Commission must, however, note that the Treaty of Peace does not establish any minimum limit on the amount of damage a party in interest must have sustained in order to be permitted to benefit thereby; it is enough that he sustained such damage as a person who was considered as enemy, in his quality of "United Nations national"; the Commission holds that it can still less, on the basis of "*de minimis non curat lex*", refuse to consider the claimant on the same footing as a "United Nations national", because the application of this maxim is implicitly ruled out by several provisions of the Treaty of Peace to which it is expedient to refer.

Article 78, paragraph 3 provides that "the Italian Government shall invalidate transfers involving property, rights and interests of any *description* belonging to United Nations nationals where such transfers resulted from force or duress exerted by Axis governments or their agencies during the war."

Paragraph 4 (b) of this same article provides that "United Nations nationals who hold *directly* or *indirectly* ownership in corporations or associations which are not United Nations nationals within the meaning of paragraph 9 (a) of this article, but which have suffered a loss by reason of injury or damage in Italy, shall receive compensation in accordance with sub-paragraph (a) above".

And finally, paragraph 9 (c) of this same article 78, in defining the expression "property", states that this expression is intended to mean not only "all movable or immovable property, whether tangible or intangible, including industrial, literary and artistic property", but also "all rights and interests of *any kind* in property".

It follows from those texts that any impairment of the property, rights and interests of a United Nations national, whatever its nature and extent, is considered as hostile treatment which entitles an individual treated as enemy to benefit by the status of "United Nations national", even if he was not such on the relevant dates of the Treaty of Peace, and to claim the compensation provided by Article 78 thereof.

The Commission refers to its unvarying jurisprudence on the matter concerning the ascertainment of the fact that the legislative measures enacted by the Salo' Republic against persons belonging to the Jewish race, were laws in force in Italy within the meaning of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace (Cases: Treves, No. 95;[1] Levi, No. 96;[2] Willemborg, No. 109;[3] Falco Bolasco, No. 270;[4] Fubini, No. 272;[5] and Baer, No. 264[6]).

On the basis of treaty provisions whose application has been entrusted to it by the signatory Powers of the Treaty of Peace, the Commission must therefore acknowledge the fact that Arthur De Leon possesses the status of a United Nations national.

13. Among the various elements forming the claim submitted by Arthur De Leon, a distinction should be made with regard to those concerning the war damages sustained by:

(a) the building located at Collegno, Turin, Corso Savoia 179 (formerly Corso Francia 179) of which claimant is sole owner in his own name, as ap-

[1] Volume XIV of these *Reports*, p. 262.
[2] Ibid., p. 272.
[3] Ibid., p. 283.
[4] Ibid., p. 408.
[5] Ibid., p. 420.
[6] Ibid., p. 402.

pears from the Plaintiff Government's petition, a fact which is not denied by the Defendant Government (Brief of January 22, 1960, p. 28) and from the documents attached to the records of the case; (Petition, Annex 2, exhibits 7 and 8; Cadastral Certificate dated July 30, 1951 and Certificate of the "Conservatoria dei Registri Immobiliari" of Turin dated August 8, 1951). In December 1956 the party in interest valued the damages sustained by this building at *24,774,056.*— on the basis of a coefficient of 3, established by the "Centro per la Statistica Aziendale" of Florence;

(b) the property owned by *Società Fratelli De Leon S.A.* (formerly Elettrauto S.A.) namely: an industrial plant, also located at Collegno, Turin, Corso Savoia 179, with a complete specialized stock of tools, and a branch establishment at Milan, Corso Sempione 33, which sustained war damages estimated, in December 1952, at *218,676,874* lire globally, after deduction of the following amounts already paid by the Italian Government as part payment of the indemnities due to "Elettrauto S.A." Corporation as an Italian establishment: 2,500,000 lire for the Turin plant, re-evaluated by the factor of 29,48, equals 73,700,000 lire, and 1,000,000 lire for the Milan establishment, re-evaluated by the factor of 18,29, equals 18,290,000 lire.

Although prices have increased since 1952, the claimant has accepted this basis of calculation.

14. Regarding the first figure of 24,774,056, since the Commission recognizes that Arthur De Leon possesses the status of a "United Nations national" it is merely a question of applying purely and simply Article 78, paragraph 4 (a) of the Treaty of Peace which provides:

> . . . 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.

The claimant is therefore entitled to receive compensation from the Italian Government in the amount of two thirds of the damages sustained by his personal property.

15. On the other hand, the second figure of 218,676,874 has given rise to a heated argument between the Parties to this dispute. The Agent of the Government of the United States contends that the industrial property damaged actually is and always has been owned by the claimant, while the Agent of the Italian Government maintains that this property was owned, at the time it was hit by bombs, namely on November 28 and December 5, 1942, and February 14, 1943, by a corporation, which, though a change in style has occurred several times, has always been legally the same and that the property of this corporation does not come within Arthur De Leon's personal property.

16. The arguments of the Plaintiff Party are not always consistent. They dwell at considerable length on the genesis of the aforesaid corporation and lay stress on the fact that claimant always has been sole owner of the corporation's property: at first after the dissolution of the partnership of unlimited liability "Fratelli De Leon" and the substitution thereof by the company "Fratelli De Leon di Arturo De Leon" which lasted from 1929 to 1940; and later when this latter company was converted into a *de facto* corporation, and still later changed into a joint stock corporation under the style of "Fratelli De Leon S.A." on December 20, 1940. This latter corporation was

established only for the purpose of permitting the claimant to screen his personal property from the antisemitic persecution measures adopted by the Fascist Government in Italy, especially after Royal Law Decree No. 1728 of November 17, 1938, concerning the protection of the Italian race, and Royal Law Decree no. 126, dated February 9, 1939, completing and implementing the former, which required among other things, the obligatory sale or disposal of all commercial and industrial enterprises owned by Jews in Italy. The proceeds of the sale or disposal of these enterprises were to be invested in non-transferrable Government bonds, Jews still being able to be the owners of shares of stock of corporations.

Under the terms of the general power of attorney issued by the claimant to his brother, Giorgio De Leon, the latter was authorized "to purchase and transfer ownership title of commercial enterprises, liquidate them, establish corporations in any form, invest capital in these enterprises or add shares to the capital stock of corporations belonging in part or in whole to the principal, represent him at meetings, vote at meetings, and in every way act at these meetings as the principal himself would if he were present, transfer head offices of commercial enterprises, merge them in whole or in part with other enterprises including joint stock corporations, accept shares of stock in payment or stipulate any pertinent condition."

It was in his capacity as the claimant's general Agent, for the purpose of saving the latter's property, that Giorgio De Leon, his brother, took the initiative of establishing the joint stock corporation, which at the outset consisted of only the three De Leon brothers without their respective contributions ever being specified. The shares of stock, registered shares in the beginning, were converted into bearer-shares immediately after the establishment of the corporation (Boffa testimony, p. 100). But following the enactment of Royal Law Decree of October 25, 1941 relating to the obligation that all shares were to be converted into registered shares, Giorgio De Leon hastened to find eight persons of the Aryan race, relatives or friends of the claimant, who would consent to have the shares "fictitiously" registered under their names. However, each one of the new shareholders entered an "endorsement" on each of the certificates of the shares turned over to him "in favor of Giorgio De Leon"; they never received the shares themselves, which remained in the possession of Giorgio De Leon who administered them in behalf of his principal (testimonies of Comparini, De Giorgio and Boffa, pp. 26 to 30, 47-48, 54-55, 90-91, 95).

The Plaintiff Party reaches the conclusion that straw-men were here involved as name lenders who consented purely as a matter of courtesy to become a screen on behalf of an Italian individual belonging to the Jewish faith; a person who, in actual fact, had never ceased to be the sole owner during the War of all the shares of stock of "Società Elettrauto S.A.", subsequently "Fratelli De Leon S.A.", and who, consequently, had preserved the right to claim compensation from the Italian Government for the war damages sustained under Article 78 of the Treaty of Peace (Rebuttal of the United States of January 22, 1960, p. 27).

Nevertheless, the Agent of the Plaintiff Government tried to deny that only a fictitious corporation was involved and stated that he had "never contended that it [the corporation] had never existed legally or that it were . . . something fictitious" but that he had confined himself to maintaining "that the claimant was forced to establish the company in order to preserve his business from the measures that threatened to be adopted against it as a result of the racial laws and that the shareholders appearing in the company's book of shareholders were merely a number of obliging dummies who

had not been and could not be swastika branded by the anti-Jewish persecution . . ." (Rebuttal of the United States of January 22, 1960, p. 28).

Subsequently, however, in his Rebuttal Observations ("Riassunto in Replica") of April 6, 1960, the Agent of the Government of the United States bases his entire argument on the simulated character of the enterprise from the very first change of the company into a *de facto* corporation which occurred on October 20, 1940, and the subsequent change, which occurred on December 20, 1940 from a *de facto* corporation into a joint stock company. He contends that simulation in matters of contracts of corporations is not ruled out by Italian law, and supports his contention by a considerable documentary material consisting of authoritative legal writings and jurisprudence (Rebuttal Observations, pp. 8-9 and 13). He concludes by saying that as the simulated contract produces no effect between the parties (Art. 1414 Italian Civil Code) and that as the Italian Government cannot be considered as a Third party, within the meaning of Article 1415 of the Italian civil code, under the public international law relationship submitted to this Commission for consideration, the property belonging to Arthur De Leon could not have been legally transferred to the Corporation and the claimant remained legal owner; as such he is entitled to receive compensation for the war damages sustained by him. (Rebuttal Observations p. 13, 19-20).

17. In opposition to the foregoing the Agent of the Italian Government is of the opinion that the damaged industrial plants are not the property of Arthur De Leon, but of the joint stock corporation itself which was regularly established; the claimant's Petition, he believes, should therefore be rejected for lack of qualification, in view of the fact that it was not submitted on behalf of the corporation.

In his defense of January 16, 1960, he takes an outright position even against the mere possibility of simulation in matters of corporations; he stresses the fact that even if one were to consider the theory of his opponent purely as a matter of hypothesis, it is undoubted that under Italian law the simulated contract does not have any effect whatever between the parties, since simulation can never be opposed to a *bona fide* third party (Article 1415 of the Italian civil code); he contends that the Italian Government should be considered as a *bona fide* third party, as it stayed outside not only of the corporation's contract but also of the several acts stipulated between the claimant's agent and the straw-man stockholders; as it (the Italian Government) was not an assignee of one of the contracting parties, the exception of simulation cannot be opposed to it in order to deny the grounds of its refusal to pay compensation to the claimant. (Defense cited p. 6.)

In abandoning this hypothesis which he considers to be incorrect, the Agent of the Italian Government goes still further in considering that there is no simulation in the instant case, but a legal fiduciary act (*fiducia cum amico*) in which certain interposed persons are not the fictitious members of a joint stock corporation but are the effective members of an existing corporation, fulfilling all the requirements of Italian law, and the registration of which in Italian public registers is of a nature giving rise to a right (Article 2331 of the Italian Civil Code). He concludes by asserting categorically that there is not involved in the instant case a simulated transfer but an indirect legal act of the fiduciary type, and that "during the period of time that is of interest, the Italian Government must not and cannot consider Arthur De Leon as having a direct or indirect ownership in the subject corporation, but merely as a creditor, under a concealed pact, of the apparent associates". (Defense of January 16, 1960, pp. 13-14.)

18. This Commission, in performing the task that has been entrusted to it by the signatory Powers of the Treaty of Peace, must merely make sure that certain provisions of this Treaty are applied; in the instant case it must only investigate if, under the provisions of Article 78, paragraphs 4 (a) and (b) of the Treaty of Peace, Arthur De Leon is or is not entitled to receive compensation for the war damages sustained by the two sets of property specified above.

In the fulfilment of this task it cannot be denied that it has the necessary jurisdiction for passing on the preliminary questions involving domestic law on the solution of which may depend the application or interpretation of the provisions of the Treaty of Peace and the acts related thereto over which the Commission has jurisdiction as set forth in Article 2 of its Rules of Procedure. It cannot exempt itself from this investigation in the instant case where the qualification, the validity and the effects of the contracts of corporations are disputed issues between the Parties. These questions which are not governed either by the Treaty of Peace or by the law of nations in general, must manifestly be determined in accordance with Italian law as there are here involved contracts that were entered into in Italy, between individuals who were Italian nationals at the date of their conclusion, and which were to be executed in Italy. Particularly, Arthur De Leon's change of nationality on November 17, 1945 can in no way affect the determination as to which law is applicable to the subject contracts, to the establishment of the "Fratelli De Leon S.A." joint stock corporation and to the various changes this corporation underwent in its earlier stages.

19. It is primarily important to establish whether or not it is possible that claimant resorted to the process of simulation, or whether this process should be automatically excluded in matters involving joint stock corporations.

According to Article 1414 of the Italian Civil Code, simulation can flow from either of two cases:

(a) from a seeming agreement covering no reality at all, and, consequently, outright fictitious; a simulation described as absolute in authoritative Italian legal writings;

(b) from two agreements made between the same contracting parties, one of them only apparent, the other real and intended by the parties, even though it remained secret, to amend or cancel the effects of the former (concealed contract, counter-deed in French law; a simulation described as relative simulation in authoritative Italian legal writings). In the former of the foregoing cases the agreement has no effect between the parties.

In the latter case the seeming agreement has no effect between the parties, but they are bound by the secret act — the concealed contract — provided that the facts and form of that contract actually materialize in a manner which would make the contract valid if it had been openly made.

Under the terms of Article 1415 of the Italian Civil Code, in both cases *bona fide* third parties are protected and simulation cannot be opposed to them either by the contracting parties or by their assignees, or by the creditors of a simulated transferee, when they have acquired rights from an apparent owner.

20. The process of simulation which Arthur De Leon claims to have resorted to is that of creating a fictitious corporation by means of contracts of fictitious corporations, but these contracts do not constitute a real agreement (absolute simulation).

Simulated corporations are dealt with both in qualified legal writings and case law of a considerable number of States; their Courts have been frequently called upon to pass on matters relating to seeming corporations (in France,

Planiol-Ripert, "Traité pratique de droit civil français," volume VI, 1930, paragraph 334, p. 460; Abeille "La simulation dans la vie juridique et particulièrement dans le droit des sociétés", 1938; pp. 54-55, paragraphs 131 et seq.; J. Rousseau "Essai sur la notion de simulation", 1937, p. 27).

The possibility of simulating a corporation contract is also extensively recognized in authoritative Italian legal writings and case law; it is recognized by the Supreme Court ("Corte di Cassazione") in its decisions of February 12, 1945 ("Giurisprudenza Italiana 1945, I. 1, 105") and of September 18, 1948 No. 1616, as well as by a number of Italian Courts of Appeal, amongst which noteworthy are the decisions rendered by the Turin Court of July 8, 1948 and March 29, 1949 (Diritto Fallimentare, 1948, II, p. 225, and 1949, II, p. 226). An opposite tendency is noted in the decisions rendered by the lower Courts (Tribunal of Florence, March 20, 1956, v. "Banca, Borsa e Titoli di Credito 1956" II, 417; Tribunal of Milan, March 4, 1957, v. "Foro Padano XII, 1957, p. 614). These latter decisions rejected the concept of simulated corporation, either for the purpose of ensuring third parties the protection of their rights against the corporation (Article 2332 Italian civil code), or because Article 2331 of the Civil Code confers a presumption of regularity on the recording of a joint stock company in the register.

This Commission holds that simulation of a corporation contract is not rejected by Italian civil law, because a corporation can be declared null on grounds of simulation, but the effects thereof are limited with regard to *bona fide* third parties. A simulated memorandum of association is not productive of effects between the parties, but it cannot be opposed to a *bona fide* third party, and it is not therefore completely void and of no effect. The Commission's view is supported by the jurisprudence of the Italian Supreme Court especially by the decision of July 28, 1943 (Fabrizio vs. Giardino Case) wherein it was ruled that "with regard to *bona fide* third parties who have had dealings with a duly established corporation, which was subsequently declared to be fictitious, the subject corporation is considered to be actually in existence until such time as it is formally declared to be null. This nullity with regard to the corporation's *bona fide* creditors operates *ex nunc*, and the simulated acts must be considered as real and proper acts with regard to the individual who has acquired certain rights on the basis thereof". (Rivista del diritto commerciale, vol. XXIII, 1945, 2nd part, p. 63.) It also refers to the opinion of another especially authoritative Italian writer and states that: "A nullity in the true sense of the word is not envisaged in this case. Between nullity and the possibility of nullity a *tertium genus* is inserted which consists in *relative inefficacy*." (Brunetti, Trattato del diritto delle società', vol. II Società per azioni, 1948, No. 545, p. 276.)

21. We must now investigate whether the corporation contracts made by Arthur De Leon, either directly, or on his behalf through the intermediary of his general agent, Giorgio De Leon, can be considered as simulated contracts which, under the terms of Article 1414, paragraph 1 of the Italian Civil Code, are unproductive of effects between the parties.

In principle, a corporation is simulated when the parties never intended to consider themselves as co-associates (J. Rousseau, op. cit. p. 27). In this connection the Commission cannot refrain from noting that the purpose the contracting parties had in mind was not that of creating a commercial corporation, but of screening Arthur De Leon's real property from the serious threats of confiscation which loomed ahead in view of the antisemitic policy followed by the Italian authorities. The only decisions rendered in Italy in similar matters are those of the Court of Appeals of Turin dated July 8, 1948 and March 29, 1949, already mentioned above, which have accepted the

theory of simulation where corporations are involved, and have stressed that contracts made for the purpose of escaping racial persecution have been distinctly described by Italian legislation itself as simulated contracts and made subject by it, in an unequivocal manner, to the provisions of the Civil Code on simulated contracts. In fact, in Article 4 of Law Decree No. 222 of April 12, 1945, entitled: "Supplementary rules implementing decree No. 26 dated January 20, 1944 of Lieutenant of the Realm, for restoring the rights of Italian and alien nationals whose property rights were affected by the racial provisions", it is stated that "The provisions of the civil code are applicable to simulated contracts regarding acts of transfer, whether for a valuable consideration or gratuitously, of real property, personal property, shares of stock, leases or any other act fictitiously brought into being for the purpose of escaping racial persecutions by persons specified in Article 8 of Royal Law Decree no. 1728 of November 17, 1938, converted into law No. 274 of February 5, 1939. Testimonial proof is admitted without any limit as to value." (Official Gazette No. 61, May 22, 1945, p. 741.)

In examining the various changes undergone by Arthur De Leon's industrial enterprise, this Commission must believe that beginning with the dissolution of the "Fratelli De Leon" partnership of unlimited liability and the substitution therefor of a company on June 14, 1929, claimant became the sole and full owner of the corporation's assets.

The establishment of a *de facto* corporation, on October 20, 1940, did not fulfil the essential elements of a corporation contract and already had a fictitious character. Claimant's brothers, Emilio and Attilio De Leon, brought no assets to the corporation; the purpose of the corporation is thus also lacking the intent of jointly running an enterprise, the claimant preserving the free disposal of all the corporation's property and continuing to direct the enterprise from the United States through his general agent; finally, also the *affectio societatis*, namely the intent to co-operate which must appear in all stages of the corporation's life, is also lacking. Matters, in actual fact, remained in the state they were previously which means that Arthur De Leon continued to be sole owner of the enterprise. The *de facto* corporation was only an outward show, intended to make possible two months later on December 20, 1940, the establishment of a joint stock corporation.

The latter, also established for the purpose of avoiding the rigors of the anti-semitic laws in force in Italy, has certain peculiarities because it must establish, to the full satisfaction of law, the indisputable existance of the corporation. It was created between the same three brothers each one of whom was holder of a certain number of registered shares of stock, subsequently converted into non-registered shares and held as such up to the time of the enactment of Italian Royal Decree No. 1148, dated October 25, 1941 making the registration of all shares of stock obligatory. But Emilio and Attilio De Leon made no financial contribution whatever to the corporation; they took no interest in its management; the *affectio societatis* was also lacking; Arthur De Leon continued to manage the enterprise through the intermediary of his general agent who acted as President of the Board of Directors and as Managing Director.

These precautions no longer sufficed when it became obligatory in Italy to register all shares of stock. In order to conceal the Jewish ownership of the enterprise, the registered shares were distributed by Giorgio De Leon, on October 15, 1942, among eight new shareholders of the Aryan race, and De Leon's brothers ceased to appear as shareholders.

The witnesses have given concordant testimony before the Commission in this connection. They all declared that they had signed documents stating

that they were the owners of the shares assigned to them, but that they never had material possession of these shares; they asserted that they were fully aware that a fictitious operation was involved. They denied that they had ever signed a statement binding themselves to return these shares to the claimant's general agent, but they admitted that they had handed Giorgio De Leon a power of attorney authorizing him to use these shares in the manner he deemed best (testimony of Dr. Alessandro de Giorgis, pp. 47 and 54-55). It is quite clear that they never had any real interest in the joint stock corporation, that they never paid anything to have the shares assigned to them, nor did they ever attend any general meeting; they all asserted that no benefit whatever was received by them from the corporation's activities; and that the claimant withdrew all and any such sums as he needed from the corporation's assets; the corporation's profits, whenever they materialized, were not distributed as dividends among the shareholders but were invested in the enterprise itself (Boffa testimony pp. 86-87 and 115).

When some of these interposed third parties had, later, in 1952, certain difficulties with the Italian fiscal authorities, as the result of not having declared their registered shares, Arthur De Leon undertook himself to pay all arrears of taxes, as is revealed by the correspondence exchanged between himself and Dr. Pietro Comparini, who attended the Commission's hearing (Comparini testimony; p. 27, and Boffa, p. 119), thus acknowledging that the subject shares were part of his personal property and that the assignment thereof to these interposed persons was merely a fiction, and that it was incumbent upon him to shoulder the fiscal consequences.

The conditions existing prior to the establishment of the joint stock company are therefore unaltered and the *affectio societatis* has also been completely lacking in both the new and the old shareholders. They took no interest whatever in the enterprise, to the point that they promptly endorsed their registered shares over to Giorgio De Leon, claimant's general agent. These endorsements, which were part of the recording of the Aryan race shareholders in the stockholders' register, clearly establishes the intent of the parties to the contract to bring a sham corporation into being, concealing Arthur De Leon's ownership title to the enterprise in order to avoid confiscation.

The corporation's activities were constantly carried out in accordance with the claimant's determination, expressed by his general agent in resolutions apparently adopted in the name of the fictitious associates.

22. The Commission cannot avoid noting the evidence of these findings of fact and reaches the conclusion, in conformity with Article 1414, subparagraph 1 of the Italian Civil Code, that the corporation's contract is simulated and produces no effect between the parties.

But this does not lead to the result that the corporation is *ipso jure* null and non-existent. Under the Italian system of municipal law, the articles of incorporation of the company received by a notary must be recorded with the "Register of Enterprises", and, by virtue of Article 2331 of the Italian Civil Code, "by the recording in the register, the corporation becomes a legal person". As Brunetti writes (op. cit., No. 545, p. 276-277) "in the first place the corporation — a legal person — is a third party vis-à-vis the simulating stock-holders who have participated in its establishment so that the defect is not opposable to it (Art. 1415); in the second place, simulation does not produce the complete nullity referred to in Article 2332, but merely a condition of relative inefficacy wherefore the act continues to exist with respect to third parties and creditors. . . A conflict between the intent and the declaration of the parties is not possible in cases where, having been made public the declaration is decisive and the intent irrelevant."

This point of view is confirmed by a decision of the Italian Supreme Court ("Corte di Cassazione") wherein it is ruled that "the fact that a joint stock corporation is established with the determination to pursue a given purpose, whatever this may be, necessarily implies the knowing and deliberate intent to create the corporation in order to reach the desired purpose. As soon as the corporation is established in accordance with the rules of law in force, it exists *ope legis* irrespective of the intent of the stockholders, as a subject of law and distinct from the person of these stockholders. With respect to some of them, in the event that they acted as straw-men in someone else's behalf, there would be a relative simulation involved which would exert its influence exclusively in the relationship between the straw-man and his principal but would have no influence whatever on the existence of the corporation which has a life of its own" (cited by Brunetti, loc. cit. p. 277).

In the instant case, it is certain that Arthur De Leon and his brothers intended to create a joint stock corporation for the purpose of avoiding the provisions of the Italian anti-semitic laws, considered as iniquitous and generative of damages for which compensation is provided by the Treaty of Peace in Article 78, paragraph 9 (a), sub-paragraph 2, so that the purpose which the stockholders had intended to pursue, although contrary to the law in force in Italy at the date the corporation was established, lost its illicit character immediately after the downfall of the Fascist regime. Arthur de Leon was thus enabled to successfully safeguard his real property in Italy, and it must be admitted that if he wanted to pursue this purpose he also intended to resort to the means to achieve his aims; the joint stock corporation which he created was therefore validly established and its existence cannot be placed in doubt merely because the corporation contract was simulated.

Furthermore, it should be noted that simulation is invoked against a third party by the very person who was the instigator thereof, for the purpose of establishing that he had retained ownership title to the corporation's property, while the Defendant Party denies this statement and reaches the opposite conclusion. The Plaintiff Party's point of view opposes the customary rule of law followed in judicial practice, whereby who, while enjoying his complete civil capacity, makes, in the form that is customary in commercial relationship, a declaration intended for the public in general, must suffer all the consequences thereof (Wieland, Handelsrecht, 1931, vol. I, p. 125), a principle which corresponds to the Roman maxim of "*nemo contra factum suum venire potest*". The Italian Supreme Court, in its decision of July 28, 1943, came to the following conclusion: "By virtue of an apparent right whoever has reasonably relied on a legal manifestation and comported himself in harmony therewith, is entitled to rely on this manifestation even if it does not correspond to the truth." (Rep. Foro Italiano 1943, col. 1082, No. 30.)

On the above grounds, this Commission is of the opinion that the evidence regarding the simulation of the corporation contract cannot entail the disappearance of the corporation's ownership title to certain industrial installations, and so much the less can the restitution of the shares of stock to the claimant by the sundry stockholders entail a modification of the corporate ownership title, because the shares are merely proof of association with the corporation, an association which includes several rights (such as the right to attend meetings, the right to vote, the right to share in the benefits and in the settlement of an eventual liquidation), but not a right to the corporation's property. (Brunetti, op. cit., No. 454, p. 155.)

23. As in Italian law simulation merely entails a relative inefficacy of the contract, which continues to have effect with respect to *bona fide* third parties,

it is necessary to specify what consequences are entailed for the Italian Government, the Defendant in this dispute.

The Agent of this Government contends that *bona fide* persons must be considered all these persons, both physical and legal, who did not partake in the elaboration of the simulated contract or who were not aware of its existence, and that, therefore, the Italian State is a third party with respect to the agreements that resulted in the establishment of the "Fratelli De Leon S.A." joint stock corporation. He denies that the Plaintiff Party can oppose to the Italian Government the simulation of the corporation and that the latter cannot be considered as the true owner of the damaged buildings.

In order to judge the relevancy of this argument one must refer to the text of Article 1415 of the Italian Civil Code, which reads as follows (in translation):

> Simulation cannot be opposed either by the contracting parties, or by the successors or creditors of the simulated transferor, to third parties who have *bona fide* acquired rights from the apparent owner, except for the effects of the registration of the simulated act. (Sub-paragraph 1.)
>
> Third parties can assert simulation with respect to the parties in interest, in cases where it injures their rights. (Sub-paragraph 2.)

This provision was instituted primarily for private law relationships. But it cannot be denied that it is applicable to a State in cases where the State acts as a fiscal agency and is exposed to damage by a simulated act between private persons. Examples thereof can be found in Italy and in France where jurisprudence permits the government administration to collect fees on the apparent act, without taking into consideration any proved simulation" (Planiol-Riport, "Traité pratique de droit civil français, Vol. VI, 1930, paragraph 337, p. 464, note 7, wherein several decisions are cited: Req. October 20, 1926, S. 1927 1. 73; cassaz. civ., July 25, 1923, S. 1926 1. 328 and June 27, 1899, S. 1899, 1. 527). In Italian jurisprudence noteworthy is the decision of July 4, 1950 rendered by the Supreme Court, which asserted: "In matters of simulation, the concept of third parties is very broad and comprises all those who have no connection with the contract" (Giurisprudenza completa della Corte di Cassazione, 1950, p. 605, No. 1679); likewise, in its decision of July 31, 1950, the Court held that: "Third parties are all those who never had any connection with the contract, who never, in any way, partook therein, and who are not sole successors of the holders of the contractual relationship." (*Ibid.*, 1950, p. 750, No. 2044.) It is obvious that, on the basis of this jurisprudence, the Italian Government finds itself in the position of a third party who, having had no connection with a simulated contract stipulated between other subjects of law, can ignore a simulation which was intended to have the effect of preserving Arthur De Leon's ownership title to the corporation's property, and which would obligate it to pay the claimant, by virtue of Article 78 of the Treaty of Peace, a higher compensation than that which the corporation has already received and could, possibly, still receive, under Italian municipal law.

It is of no avail for the Plaintiff Party to argue that claimant did not resort to simulation in order to benefit by the indemnities provided for by the Treaty of Peace which he could not foresee at the time the joint stock corporation was established, but to escape the application of the Fascist laws which were of an oppressive nature; this Party contends that the Italian Government, which is responsible for the resulting situation, cannot invoke the benefits of *bona fide*. In point of fact, the *bona fide* that is required from a third party, under Italian law, is that connected with the simulated act itself, and not

with the motives that led the contracting parties to stipulate the aforesaid act. The third party who in no way participated in this act, who was not aware of its existence, who derived no benefit therefrom, either directly or indirectly, is protected, and he is doubly so under Italian law, in the sense that he can, on the one hand, declare that simulation is not opposable to him, and on the other hand, himself invoke the simulated act in the event that it is prejudicial to his rights (Article 1415, sub-paragraph 20, Italian Civil Code). With respect to the simulated corporation contract which was concluded, the Italian State has been requested to pay war damage compensation by and in favor of a stockholder who invokes the corporation's simulation for the purpose of asserting his right; the corporation which is neither null nor non-existent, has itself invoked its quality of an Italian legal person for the purpose of claiming from the Italian Government, already during the war, indemnities running into several million lire which the Italian Government awarded, unaware as it was of the simulation of the corporation contract, therefore in *bona fide*.

The Commission attaches a particular importance to this circumstance. In soliciting and accepting from the Italian Government, in its quality of Italian legal person, an amount of 3,500,000 lire as partial compensation for war damages sustained in 1943-1945, the corporation asserted, in a manner which binds its stockholders, the regularity and validity of its establishment; and since the Italian Government then acted on the basis of these declarations, neither the legal person nor the associated members can repudiate the attitude which they adopted and which was determinant in fixing the position of the Italian Government. They are unable now to contest the sincerity and truth of their declarations because they cannot appeal from the situation they created — created either to maintain the undoubted existence of the corporation for the purpose of obtaining an indemnity, or to entrench themselves behind the simulated character of this corporation in order to give the stockholder a higher indemnity.

The Roman maxim "*nemo contra factum proprium venire potest*" forbids the existence of such contradictory attitudes particularly because it is clear that the Italian Government was entirely ignorant of all the simulation proceedings used by the interested parties.

Therefore the Commission must consider the Defendant Party as a *bona fide* third party, protected by Article 1415 of the Italian Civil Code in so far as it concerns the simulated acts which the Plaintiff Party now asserts against him.

24. The question as to whether or not the conclusions of the Defendant Party, namely that the fiduciary contract between the claimant and his co-contractors leads to the result that only the duly established joint stock corporation would be entitled to act and claim war damage compensation, is to be considered as valid can be left open.

It is undeniable that a distinction between a simulated contract and a fiduciary contract is often a delicate matter, as both categories have certain features in common and the difference between them must be searched for in each individual case, by analyzing the declarations of intent of the contracting parties.

The Commission fails to find in the changes which were made by the De Leon brothers in their property relationships any such elements as could pertain to a fiduciary contract; it can see in those which resulted in the creation of what in appearance was a joint stock corporation merely multiple processes of simulation.

Furthermore, it can but recognize that the existence of the category of

fiduciary contract in the Italian legal system is very uncertain and that an important part of Italian authoritative legal writings rejects this theory, either on the ground that rules of positive law referring thereto are lacking or on the ground of incompatibility between the reason for a fiduciary contract and that for every other contract (Cariota-Ferrara, "I negezi fiduciary 1933, p. 128; Grassetti, "Rivista di diritto commerciale", 1936, I, pp. 345 et seq.: De Martini, "Giurisprudenza italiana" 1945, I, 1, p. 221; Santoro Passarelli, "Istituzioni di diritto civile", 1946, No. 39, p. 161; Carraro, "Il mandato di alienare", 1947, pp. 139 et seq.; Stolfi, "Negozio Giuridico", 1946, p. 121). This consideration supports the opinion of the Commission when it refuses to consider whether the corporation contracts, which are at the basis of this dispute, are fiduciary contracts. Italian rules of law relating to simulation suffice to protect any *bona fide* third party.

25. One should nevertheless also examine whether the claimant, Arthur De Leon, as a result of the endorsement over to him of the shares of stock on the part of the stockholders at the conclusion of the war has absorbed all the rights of the joint stock corporation and whether his position as sole owner and proprietor of all the shares of the "Fratelli De Leon" joint stock corporation, confers on him the right to receive compensation for the war damages sustained by the corporation.

The fact that all the shares of stock are possessed by one shareholder alone, does not have the effect of entailing an *ipso jure* dissolution of the joint stock corporation, although statutory laws have adopted different solutions in this connection; corporations which have one shareholder (*Einmangesellschaft*) only are not unknown either in qualified legal writings or in jurisprudence.

In Italian law, if the establishment of a single shareholder joint stock corporation is inconceivable, a corporation which is reduced during the course of its existence to a single shareholder continues and preserves its legal personality. (Brunetti op. cit., 400, p. 60, note 4.)

Article 2362 of the Italian Civil Code is not unaware of the existence of single shareholder joint stock corporations, because it assigns to them certain legal effects when this condition materializes during the life of the corporation, in providing that: "(Sole shareholder). In case of insolvency of a corporation, as the result of liabilities which arose during the period in which the shares were possessed by one person only, this person's responsibility is unlimited."

It appears from the foregoing text that a single shareholder corporation is not impossible and Article 2448 of the Italian Civil Code does not list this fact as one of the causes for dissolution; the Italian legislation has, however, regulated only one of the consequences of this legal condition, namely that of the corporation's insolvency. The other problems which this condition can give rise to must, however, equally be solved by applying the same concept, implicitly contained in this article, that the sole shareholder concentrates in his person all the corporation's rights and obligations, and that a strict separation between the personality of the shareholder and that of the corporation cannot be brought to its extreme limits, because the two sets of property are dependent on the same and sole will, that of the shareholder who alone manages the corporation's property and his personal property and disposes of it freely. It is therefore inevitable that in all procedural questions, especially in those concerning the necessary quality entitling one to take legal action, the formal point of view which lays all stress on the legal separation between the shareholder's personal property and the corporation's property is blotted out by the real coincidence of interests of which they are composed. (Wieland, op. cit., vol. II, 1931, paragraph 124, p. 385 et seq., especially p. 396.)

In the instant case it is not denied that, beginning from 1952, and particularly the date on which the Petition was filed, Arthur De Leon became the sole owner of all the shares of stock and that his personal property was merged completely with the joint stock corporation's property; in his capacity as shareholder he was thus entitled to manage the enterprise according to his own choice, and, in the event of liquidation, he could claim the whole of the corporation's assets net.

It therefore follows that it is unavailing to make a separation between the two sets of property, and that, in the instant case, the claimant should be considered as entitled to claim, personally, with respect to the corporate rights accruing to him in their entirety. But can the legal action begun in his behalf before the Commission be pursued if only the corporation itself is entitled to receive compensation? This is a point which must still be gone into.

26. Article 78, paragraph 4 (b) of the Treaty of Peace specifically invoked by the Plaintiff Party, provides that compensation shall be paid to United Nations nationals for losses or damages sustained in Italy by corporations or associations in which they had ownership interests, even in the event that these corporations or associations are not themselves United Nations nationals, that is, that they do not fulfil the conditions required by Article 78, paragraph 9 (a), sub-paragraphs 1 and 2.

Under the terms of this latter provision, associations or corporations established under the laws in force in one of the United Nations on the date of the coming into force of the Treaty of Peace, namely September 15, 1947, and who already fulfilled this legal condition on September 3, 1943, the date of the Armistice with Italy, have the status of "United Nations nationals"; the same thing can be said for those corporations or associations which, though not having been established under the laws in force in one of the United Nations, or not possessing this status on the dates specified in the Treaty of Peace, were treated as enemy in application of the laws in force in Italy during the war.

The joint stock corporation established by the claimant under the laws in force in Italy is an Italian corporation which, as such, cannot invoke the protective provisions of the Treaty of Peace for the purpose of obtaining compensation for the damages it sustained during the war. On the other hand the aforesaid corporation was never treated as enemy by the Italian authorities who never adopted any discriminatory measure against it during the War; it does not, therefore, fulfil the conditions required by Article 78, paragraph 9 (a), sub-paragraph 2 and cannot be considered as vested with the nationality of the United Nations. On no grounds whatever is this corporation entitled to receive compensation from Italy on the basis of the Treaty of Peace. The question hence arises as to whether or not its sole shareholder, in whom the quality of United Nations national must be acknowledged, can have more rights than the corporation itself.

The French-Italian Conciliation Commission has held that the Treaty of Peace affords protection to the shareholder as such. It has held that the principal shareholder is entitled to act in order that the joint stock corporation in which his ownership interests are dominant may benefit by any such restoration or compensation as may be provided for by the Treaty; the first claim submitted to the Italian authorities can emanate either from the claimant himself or, in his behalf, from the Government of the United Nations of which he is a national, and this is in contrast with the Italian Government's viewpoint which contended that only the owner corporation is entitled to act. (Decision no. 82 of December 1, 1950, "Tessitura Serica Piemontese"

Case,[1] "Recueil des décisions", 3e fascicule p. 13.)

The foregoing decision was rendered in a case where the corporation involved was subjected to discriminatory measures during the war on the part of the Italian Government; although the aforesaid Commission left open the question in cases where "the capital stock entirely, or almost entirely, belongs directly or through interposed persons to one individual alone who *de facto* controls the joint stock corporation," this Commission holds that this solution should be extended, by analogy to cases of war damages sustained by a single shareholder corporation, because the motive and the purpose of Article 78, paragraph 9 (a), sub-paragraph 2 of the Treaty of Peace, in the final analysis, is not the protection of the corporation established under Italian laws, but of the associates, who are United Nations nationals within the meaning of the aforesaid sub-paragraphs 1 and 2 of paragraph 9 (a). That which is valid for the United Nations national who is the principal shareholder of a corporation which does not have the status of a United Nations national, is also valid for the single stockholder who is a United Nations national within the meaning of Article 78 paragraph 9 (a) sub-paragraph 2 of the Treaty, of a corporation that is solely Italian.

The Commission could not reject the Petition of the United States Government merely on the grounds that the corporation is not entitled to receive war damage compensation; in order for the claimant to recover it would also be necessary that the claimant have been indirectly affected in his ownership interest in the joint stock corporation as a stockholder thereof, because, if the stockholder sustained no loss as a United Nations national, the Commission does not find in the Treaty, and especially in the principles set forth in Chapter VII, any positive legal basis on which to order payment of compensation.

The single stockholder who became such by the transfer of all the corporation's shares of stock over to him only after the war damages had been sustained by the corporation's property, cannot, in the opinion of the Commission, invoke his personal status of United Nations national, on the grounds of the treatment as enemy that was meted out to him in Italy during the war, for the purpose of obtaining benefits in favor of an Italian corporation which did not fulfil this condition.

27. It will therefore serve the Plaintiff Party no purpose to contend that the claimant is entitled to receive compensation for the damages caused by air bombardments which partly destroyed certain buildings owned by a corporation of which he has held all the shares of stock since 1952, by invoking Article 78, paragraph 4 (b), of the Treaty of Peace which reads as follows:

> United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9 (a) of this Article, but which have suffered a loss by reason of injury or damage to property in Italy, shall receive compensation in accordance with sub-paragraph (a) above.

Broad as the field of application of Chapter VII of the Treaty of Peace may be, it must be limited to the cases contemplated by its text, and it is still further less admissible to extend, by interpretation, the burden of reparation imposed on the Defendant Party. The contracting States were careful to prevent abuse and therefore did not confine themselves to requiring that all claimants be vested with the nationality of the United Nations at the date of the coming

[1] Volume XIII of these *Reports*, p. 78.

into force of the Treaty, but also required that they possess this nationality on the date of the Armistice with Italy: this was done to prevent third parties, by transfer of rights or through convenient naturalizations, from being permitted to benefit by indemnities for damages which occurred during the war but at a time when they did not fulfil the other requirements of the Treaty of Peace.

The claimant does not fulfil any of these conditions. In fact, because he has an ownership interest in an Italian joint stock company which does not have the status of a United Nations national, he could claim compensation only in the event that he had sustained damage in the corporation "by reason of injury or damage to property in Italy".

The exact meaning of these terms was carefully determined in decision no. 95 of March 8, 1951 rendered by the French-Italian Conciliation Commission, in the Società Minoraria o Metallurgica di Pertusola case [1] (Recueil 3e fascicule pp. 67 et seq., particularly p. 75 to p. 91). The result of the thorough grammatical and exegetic research work in the aforementioned decision, and which this Commission espouses, reveals that the expression "loss by reason of injury" implies discriminatory measures adopted by the Government of Italy against property, rights and interests of a United Nations national within the meaning of Article 78, paragraph 9 (a) of the Treaty of Peace and that the expression "loss by reason of damage" implies damages sustained as a result of acts of war, and that these be performed by the armed forces of Italy, of the Allied and Associated Powers or those of Germany during the partial occupation of Italian territory.

Undoubtedly ownership interests of United Nations nationals, or those deemed to be such, in Italian or neutral corporations are protected in cases where they sustained war damages in Italy; the Treaty of Peace limits their right to receive compensation to the extent of these ownership interests such as they existed on June 10, 1940 (Article 78, paragraph 1). The Treaty does not provide for cases in which these interests have changed owners and which no longer existed on the date on which the damage occurred. Arthur De Leon was no longer either in December 1942 or in February 1943 a shareholder of the joint stock corporation which sustained property injury; in point of fact, on October 15, 1942 and June 5, 1946, all the shares of stock had been transferred to eight stockholders of the Aryan race, as specified in the statement of facts (see above, no. 6, letter b), and he regained possession of them only after the cessation of hostilities in Italy. It therefore follows that the damages were sustained by a corporation which was completely Italian and none of whose stockholders was either vested with the nationality of the United Nations or could be considered to be vested therewith as the result of treatment as enemy under the laws in force in Italy during the war, the claimant himself, furthermore, not having yet suffered, at the dates under consideration, the slight hostile treatment making him a United Nations national, inflicted on him only as late as September 4, 1944.

The Commission cannot extend the scope of Article 78, paragraph 4 (b) of the Treaty of Peace beyond its terms, in view of the fact that there is here involved a provision of an exceptional nature the principle of which is extremely rigorous. Under the circumstances it holds it must apply the principle of "*in obscuris quod minimum sequimur*".

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[1] Volume XIII of these *Reports*, p. 179.

On the above grounds

DECIDES

(1) The claimant, Arthur De Leon, was treated as enemy during the war and he is therefore vested with the status of "United Nations national" within the meaning of Article 78, paragraph 9 (a), second sub-paragraph of the Treaty of Peace with Italy of February 10, 1947.

(2) Consequently, he, or his successors, are entitled to receive in lire from the Italian Government, under Article 78, paragraph 4 (a) of the Treaty of Peace, two thirds of the sum necessary, at the date of payment, to make good the losses resulting from war damages sustained by the building he owned in Turin, Corso Savoia no. 179.

(3) The Agent of the Italian Government shall submit to this Commission, within a time limit of thirty days, beginning from the date on which this decision is notified to him, his observations on the amount to be awarded to the claimant, or his successors, as compensation for the damages specified in paragraph (2) above, as well as on the amount of the reasonable expenses sustained by party in interest, Arthur De Leon, reimbursement for which is also being requested.

(4) The remainder of the Petition submitted by the Plaintiff Party in behalf of Arthur De Leon is rejected.

(5) This decision is definitive and binding.

(6) It shall be notified to the Agents of the interested Governments.

Signed at Rome, at the seat of the Conciliation Commission, Via Palestro 68, on May 15, 1962.

The Third Member

(G. SAUSER-HALL)

The Representative of the United States of America

(Leslie L. ROOD)

The Representative of the Italian Republic

(Antonio SORRENTINO)

DECISION NO. 227 OF 8 APRIL 1963

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy, pursuant to Article 83 of the Treaty of Peace with Italy of February 10, 1947, composed of Messrs. Leslie L. Rood, Representative of the Government of the United States, Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Italian Government, and Georges Sauser-Hall, Honorary President of International Law at the Universities of Geneva and Neuchatel, Switzerland, Third Member chosen by mutual agreement between the United States and Italian Governments,

Having seen the Commission's Decision No. 218 dated May 15, 1962 in the case of Arthur De Leon (No. 274), allowing thirty days' time from the date of notice thereof, or May 22, 1962, for the Italian Government to submit to the Commission its comments concerning the amount to be allocated to the claimant or to his heirs or assignees in compensation for the war damages

suffered by the building located at 179 Corso Savoia, Turin, Italy, as well as the amount of reasonable expenses incurred in preparing the said claim;

Having seen the letter No. 401927 (no date) of the Italian Ministry of the Treasury, estimating the amount of the said war damages at 10,871,700 lire, plus an additional amount not to exceed 30 per cent;

Having seen the Assessment Report of the Turin Ufficio Tecnico Erariale dated March 29, 1954 and its Annex A, filed with the Joint Secretariat of the Commission on December 12, 1962;

WHEREAS the Agent of the claimant Government has requested for the damages suffered by the building in Turin an amount estimated in February 1957 to be 24,774,000 lire, in round figures, subject to any necessary adjustment for variation of values at the date of final payment;

WHEREAS this amount should at first be reduced by 2,952,000 lire for depreciation because of the old age of the property, then the amount of 21,822,000 lire remaining after such deduction should be increased by 30 per cent to allow for the increase in prices at the date of the actual payment, so that, on the basis of these computations, the amount of the claimed loss should be established at 28,368,000 lire;

WHEREAS, on the other hand, it appears from the latest documents submitted by the defendant Government that the damages suffered by the above building, taking into consideration the same depreciation for old age above indicated, were estimated, according to expert advice, in January 1954 to be 11,809,000 lire, but such figure should be also increased by 30 per cent to allow for the increase in prices at the date on which actual payment is to be made, so that the compensation estimated on the basis of the data of the Italian Government should be estimated at 15,351,000 lire, in round figures;

WHEREAS, in consideration of the difference between the evaluation resulting from the elements submitted by the two Parties, the Commission deems it equitable to establish at *21,900,000 lire*, in round figures, the damage to real property suffered by the claimant, two thirds of which sum is to be paid by the defendant Government, i.e. *14,600,000 lire*;

WHEREAS only a portion of the claimant's demands was allowed by the Commission, the latter deems it equitable to establish at *500,000 lire* the amount of the expenses which the said claimant has reasonably incurred in Italy in determining the amount of compensation to which he is entitled, payable by the Italian Government,

For these reasons

DECIDES

1. Within two months from the notification of this Decision, the Italian Government shall pay, pursuant to Article 78, paragraph 4 (a) of the Treaty of Peace, to the claimant Arthur De Leon or to his heirs or assignees, the sum of *14,600,000 lire*, representing two thirds of the sum necessary, at the date

of payment, to compensate for the damages suffered by the building located at 179 Corso Savoia, Turin, Italy.

2. The payment of the said sum shall be made to the claimant Arthur De Leon or to his heirs or assignees or to their duly authorized representatives, pursuant to Article 78, paragraph 4 (c) of the Treaty of Peace, free of all levies, from all taxes or other charges.

3. The Government of Italy shall pay within the same period of two months (to the claimant or to his heirs or assignees), or to their duly authorized representatives, the sum of *500,000 lire*, representing the expenses reasonably incurred in Italy for the preparation of the claim.

4. This decision is definitive and binding. Its execution is incumbent upon the Italian Government.

Done at Geneva, at the home of the Third Member, Avenue de Champel 29, this day eight of April 1963.

The Third Member

(Georges SAUSER-HALL)

The Representative of the United States of America

(Leslie L. ROOD)

The Representative of the Italian Republic

(Antonio SORRENTINO)