FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
Washington, D. C.

In the Matter of the Claim of	
AMERICAN AND EUROPEAN AGENCIES INC. c/o Coudert Brothers 488 Madison Avenue New York, New York	Docket No. Y-647 Decision No. 1533
Under the Yugoslav Claims Agreement of 1948 and the International Claims Settlement Act of 1949	

Counsel for Claimant:

COUDERT BROTHERS
777 - 14th Street, N. W.
Washington, D. C.

12-29-54

FINAL DECISION

On November 26, 1954, a Proposed Decision was issued in this claim, denying it for the grounds there set out. Subsequent to the issuance of the Proposed Decision the claimant, through its attorneys, filed objections with accompanying brief, and requested a hearing, which was duly held.

In view of this Final Decision, it is not necessary to go into all points raised in claimant's brief or to elaborate in any degree on the evidence submitted at the hearing.

In the Proposed Decision, we held that the transaction was speculative and involved an illegal payment and that any award of over $20,000 would be subject to the demand of foreign citizens.

The record in this claim does establish that the transaction was speculative. Nevertheless, we do not consider that such speculation has been a reason for refusing diplomatic intervention. Claimant's point

that it is, instead, the speculative or exaggerated amount of claim which has inhibited diplomatic espousal is correct.

While claimant attempted to show at the hearing that the payment in dollars was not illegal, since Italian law in this respect applied only to Italian citizens, such evidence instead established that the payment was illegal, since Mr. Yaselli was a dual national of Italy and the United States. Nevertheless, since the transaction itself was legal, we do not consider the fact that an incident to that transaction was illegal under Italian law as sufficient to have excluded American diplomatic intervention.

Although an award of over $20,000 would be subject to the demand of foreign creditors, we do not consider the record as affirmatively establishing an actual assignment to aliens of the proceeds of the award. The fact that a particular claimant has foreign creditors would not of itself be sufficient to deny this claim.

Furthermore, while certain aspects of the transaction appear to have been extremely imprudent for an asserted "arm's length" transaction under the circumstances then prevailing, nevertheless these peculiarities are not deemed sufficient on the record before us to establish a question as to the bona fides of that transaction or of this claim.

The significant issue to us is whether the transaction was motivated solely by a design to put the property under American protection, in the face of emminent seizure by the Government of Yugoslavia. Certainly, the benefits to be derived from the sale of the stock to American interests were in the minds of the parties. However, at the time of the sale and negotiations leading up to the sale the factory was located in Zone "B" on Italian territory. While Yugoslavia had manifested its intentions toward acquisition of

the territory, Italy had not ceded its position that it should retain the territory, and certain Western Powers, including the United States, had expressed their view that the determination of the ultimate disposition of the territory was an open question. (See Statement of Acting Secretary of State Grew concerning the "Italy - Yugoslavia Boundary", of May 12, 1945, Dept. of State Pub. #2669, European Series (1946), p. 153) The acquisition of the territory by Yugoslavia could not, then, at such time have been considered imminent. Futhermore, the evidence shows that the Yugoslav authorities persuaded the owner of the plant to get it back in production, and co-operated in the work of its restoration. It was not until April of 1946 that this attitude changed, and Fallersa officers were prohibited access to the premises. We conclude, therefore, that the transaction was not motivated solely by a desire to place majority ownership of Fallersa in American hands for the purpose of invoking diplomatic protection. Accordingly, we find that American and European Agencies is an eligible claimant under the Agreement.

As to the date on which the property of Fallersa was taken by the Government of Yugoslavia, we hold it to have been taken on September 15, 1947, when the Peace Treaty with Italy became effective in the territory of Ilirska Bistrica. The remaining question is one of valuation.

It is the claimant's position that it is the value of the property taken and not the value of the stock which it owned in Fallersa which should be the measure of its compensation. Claimant has filed a report dated March 2, 1948, signed by Battistella, Fallersa's Vice-President, giving the results of an appraisal said to have been made by one Alesandro Bolis, an expert registered in the records of Engineers in Trieste. It is to be noted that this document

is not itself an appraisal but is a "Report of Survey", although the entries are sworn to as being correct. The report shows that the acquisition costs of the physical assets between March 3, 1941, to December 31, 1945 were as follows:

Lands	205,915.60 lire
Buildings	9,934,654.20 "
Machinery	10,995,673.50 "
Implements, furniture, merchandise, etc.	8,240,558.85 "
Total	29,376,802.15 lire

The report uses the date January 1, 1943, as the average date of reference and arrives at the value of the properties as of March 22, 1946, which it judges to be the date of taking, by multiplying the above figures by 11.60. The report then converts the lire into dollars at the official rate of 225 lire to 1 dollar, as follows:

Lands	2,388,621 lire	$10,616.00
Buildings	115,241,988 "	512,186.50
Machinery	127,549,812 "	566,888.00
Merchandise, etc.	95,590,483	424,846.50
Total	340,770,905 lire	$1,514,537.00

To determine the amount of the claim for its interest in Fallersa, claimant multiplies the total by 61.6%, its proportionate stock interest, and arrives at $932,954.79.

But claimant ignores the fact that its interest is based on the ownership of shares of stock and it is the value of such stock at the time of taking which is the proper measure of its compensation, as we have consistently held. The means utilized by claimant would be tenable only if Fallersa had no liabilities.

The Government of Yugoslavia has filed an appraisal of physical assets made by local authorities, on the basis of 1938 values, which finds their value as follows:

Land	159,132 lire
Buildings	1,808,801 "
Machinery	3,679,840 "
Movables	351,345 "
Total	5,999,118 lire

At the rate of 19.01 lire to the dollar (See Board of Governors of the Federal Reserve System, Banking and Monetary Statistics (1943), physical assets would be worth $315,576.96 at 1938 values. On the basis of an estimate made by our Field Branch the value of the physical assets would be approximately 32,000,000 dinars, as of 1938, or $727,272.72 converted at the rate of 44 dinars to 1 dollar.*

While the Commission ordinarily bases its findings as to the value of stock on 1938 values, the special circumstances here inhibit this practice. Neither the factory nor Fallersa was in existence in 1938 and consequently there are no financial records of that year, which can be of assistance in determining the net worth of the company. For this reason, we have decided to base our finding as to the value of the stock on its book value on the date of taking, September 15, 1947, and convert such lire values into dollars at the official rate of exchange. Some precedent for this procedure is found In the Matter of the Claim of Stefan and Anna Johsz (Decision No. 1420), where we converted a bank account, established in 1942, from dinars into dollars at the official rate of exchange at the date of taking.

The book value may be determined from two sets of records filed by claimant, certified copies of Fallersa's balance sheets and certified copies of summary balance sheets published in the Official Gazette of the Allied Military Government. Based on these documents, the book value of one share of Fallersa stock was as follows:

	1945	1946	1947	1948
Balance sheets	415.9 lire	403.68 lire	346.9 lire	350.4 lire
Summary	426.7 "	364 "	357.28 "	351.6 "

We conclude from all the evidence that the value of 1 share of stock of Fallersa on September 15, 1946, was 350 lire. Converting that figure into dollars at the rate of 350 lire to the dollar, the legal rate at such time (See Lutz, F. A. and V. C., Monetary and Foreign Exchange Policy in Italy (1950), Appendix, Table XI),* we arrive at $1.00 as the value of a share of Fallersa stock on the date of taking. Since claimant owned 12,320 shares of stock of Fallersa, the value of such stock was $12,320.

Claimant takes the position that debts of Fallersa owed to it should not be taken into consideration in computing net worth. Claimant is apparently relying on Article 4(c) of the Agreement (see Hearing Transcript, p. 11) and expressly is relying on the letter of July 19, 1948 from the Secretary of State to the Yugoslav Ambassador (Transcript, pp. 147-8), which obviously was referring to the Article 4(c) provisions concerning debts owed to the owner of an enterprise.

There is no need to consider the validity of claimant's argument with respect to the effect on such debts of Article 4(c) or the letter of July 19, 1948, for that Article and letter have no application to the situation at hand. Article 4(c) applies expressly and exclusively to debts of enterprises nationalized or otherwise taken by Yugoslavia. The debt here runs from Fallersa, an Italian corporation which has never been nationalized or taken by Yugoslavia. It is also manifest that the letter of July 19, 1948, can be referring only to enterprises nationalized or taken by Yugoslavia, when speaking of the discharge of debts, for the Governments of the United States and Yugoslavia would, of course, have no competence to agree on the discharge of a debt of an Italian corporation still in existence on July 19, 1948, and never nationalized or taken by Yugoslavia. We do not consider, therefore, that there is merit to claimant's argument in this respect, and it was proper to consider debts owed by Fallersa to claimant in computing net worth,

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* It is noted that the "Legal Free Rate" was 667 lire, the "Middle Rate" 508 lire, and the "Black Market Rate" 665 lire to the dollar in September 1947.

for they were outstanding obligations on the day of taking and, indeed, are currently outstanding obligations.

Claimant also asks compensation for its proportionate interest in the reasonable value of the possession and enjoyment of the properties from March 31, 1946, the date on which the Government of Yugoslavia seized possession of them, until the date of nationalization. To support this item of the claim, an"Estimate of Operation" is included in the report of Battistella previously referred to. This estimate would appear to be utterly refuted, except as a projection of speculation, however, in view of Fallersa's balance sheets from 1945 which show continuing losses.

The Commission, in its determination of claims against Yugoslavia, is directed by the International Claims Settlement Act of 1949 to apply (1) the terms of the Agreement with that country and (2) the applicable principles of international law, justice and equity, in that order. The Agreement between the Governments of the United States and Yugoslavia contains no specific provision regarding loss of use of property, loss of profits, and the like. Generally, international and domestic arbitral tribunals in the determination of international claims allow compensation for indirect damages such as loss of use of property, loss of profits and the like, if such losses are reasonably certain and are ascertainable with a fair degree of accuracy. They do not allow compensation for indirect damages if they are conjectural or speculative or not reasonably certain or susceptible of accurate determination. See Borchard, Diplomatic Protection of Citizens Abroad, Sections 172, 173 and cases cited therein.

We are of the opinion that it has not been proven that it was reasonably certain that the profits expected or any profits would have been realized by claimants. The claim for such profits must therefore be denied. However, claimant may be compensated in terms of interest

for the loss of the use of the compensation it was entitled to receive on the date the property was taken, from the date of taking to the date of payment by the Government of Yugoslavia. Both the Agreement with Yugoslavia and the International Claims Settlement Act contemplate the allowance of interest by the Commission for the delay in payment of compensation by the Government of Yugoslavia.

Accordingly, in full and final disposition of this claim, an award is hereby made to American and European Agencies, Inc., in the amount of $12,320 with interest on that amount at 6% per annum from September 15, 1947, the date of taking, until August 21, 1948, the date of payment by the Government of Yugoslavia, in the amount of $688.56.

Dated at Washington, D. C.

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PROPOSED DECISION OF THE COMMISSION

This is a claim for $1,538,753.52 by the American and European Agencies, Inc., a corporation organized under the laws of the State of New York on January 20, 1945, and is for the taking by the Government of Yugoslavia of a plant for the manufacture of plastic wood slabs located at Villa del Nevoso (Ilinska Bistrica), Yugoslavia, and owned by the Fallersa, S. A., an Italian corporation with its siege social in Trieste, in which claimant alleges it owns 12,320 shares of the 20,000 shares issued and outstanding.

The claimant has submitted evidence that all of its outstanding stock has been owned since the first issue on January 25, 1945, by E. Paul Yaselli, Joseph Yaselli and Diana Yaselli, who have been citizens of the United States since October 2, 1888, March 24, 1893, and June 22, 1926, respectively.

As evidence of its acquisition of the shares of Fallersa, claimant has filed a copy of a notice published in the Official Legal Gazette of Rome on April 27, 1945, showing that E. Paul Yaselli, claimant's President, was authorized to sign contracts in the claimant corporation's name and that said authorization was registered with the Clerk of the Tribunal in Rome. Claimant has also filed a photocopy of a "Bill of Sale", dated September 27, 1945, and acknowledged before the United States Consul in Rome on the following day. This document recites:

> "The undersigned Federico Carlo Prince Windisch-Graetz acting for himself and on behalf of the following named persons, Amedeo Prince di Windisch-Greatz, Countess Luigia Ceschi a S.Croce, Elisabetta Princess di Windisch Graetz, Leontina Princess di Windisch-Graetz, Ugo Prince di Windisch-Graetz, Prince Massimiliano Antonio di Windisch Graetz and Baron Leo Ecconomo, through a duly authorized power of attorney executed on September 21st. 1945, before Notary Public Sandrin Bruno fu Antonio, in the city of Trieste, Italy, sells and assigns on behalf of the above named persons and for himself, in consideration of $1.00. (one dollar) and other valuable considerations, their respective shares of stock of the Fallersa company, an Italian stock company, with its head-quarter in the city of Trieste, Italy, to the American and European Agencies, Inc. 12,320, (twelve thousand three hundred and twenty shares) shares of the said Fallersa company.
>
> "In addition, the above named persons including the undersigned sell and assign, in consideration of $1.00. (one dollar) and other valuable considerations, their respective credits that they have against the said Fallersa company, amounting in all to the sum of lires 13,012.000. (Thirteen million and twelve thousand lires) to the said American and European Agencies, Inc. an American corporation, incorporated under the laws of the State of New York and duly authorized to do business in Italy and duly registered with the Italian Chamber of Commerce of Rome, its number being 128747.
>
> /s/Federico Carlo Prince di Windisch-Graetz
> Federico Carlo, Prince di Windisch-Graetz.
>
> "The American and European Agencies, Inc., as above stated, through its President E. Paul Yaselli, in

consideration of one dollar ($1.00) and other valuable considerations, purchases the said shares of stock (12,320. shares) of the said Fallersa company and the said credits against the said company, (Fallersa) amounting to lires 13,012,000.

/s/ American and European
Agencies Inc. E. Paul Yaselli Pres.
American and European Agencies,
Inc., by E.Paul Yaselli, President"

Claimant has also filed an original letter dated September 28, 1945, addressed to E. Paul Yaselli and signed by "Federico of Windisch-Graetz". The contents of the letter are as follows:

"With this I come to confirm that today you have paid me:

"U.S.A. $20,000 (twenty thousand dollars U.S.A.) on account of the total sum of U.S.A. $300,000 (three hundred thousand dollars U.S.A.) agreed upon as the purchase price on the part of the American and European Agencies, Inc., of 12,320 (twelve thousand three hundred twenty) shares of the corporation FALLERSA (Plastic panel factory, incorporated of Trieste) belonging to the members of my family.

"In addition, the Fallersa owes us for a credit amounting to Lire 13,012,000 (thirteen million twelve thousand lire) which, computed on the basis of an exchange rate of one dollar being equal to twenty lire amount to U.S.A. $650,600.00 (six hundred fifty thousand six hundred dollars U.S.A.).

"It is understood that the remaining sum of $280,000.00 (two hundred eighty thousand dollars U.S.A.) in addition to the countervalue of the sum representing our credit of Lire 13,012,000.00, computed at the exchange rate of one dollar being equal to twenty lire, amounting to $650,600.00 (six hundred fifty thousand six hundred dollars U.S.A.) shall be paid by you to me or to a person representing my family, six months after the American and European Agencies, Inc. shall have taken possession of the factory.

"I inform you that it will be my duty as agreed upon to have our shares of stock transferred immediately upon the books of the corporation to the name of the American and European Agencies, Inc., and that Dr. Ugo Prince of Windisch-Graetz will resign as President of the corporation so that you, Mr. E. Paul Yaselli, can be elected in his place.

"In faith, in my own name and as attorney for members of my family."

As additional evidence with respect to the purchase of the stock, claimant has filed a certified copy of a letter dated in Rome on

November 14, 1945, from the Italian Ministry of Treasury authorizing the purchase of the 12,320 shares by claimant and the cession of the credit of 13,012,000 lire to claimant. The letter adds:

> "It is understood that the corporation can settle the operation in Italian lire and it is further understood owing to this mode of payment and observing the currency laws, the entire block of shares so sold must be deposited in a special account to be opened with a local branch of the Bank of Rome and subject for each operation to the preliminary authorization of this Ministry.
>
> "It is also understood that the entire amount of dividends that may become due on the said shares of stock as well as the possible interest maturing on aforesaid credit, cannot be transferred to a foreign country and can be used in Italy in accordance with the currency laws in force."

It is observed that while it was "understood" by the Ministry that the shares would be deposited with the Bank of Rome, this disposition was never carried out. In an affidavit of E. Paul Yaselli, dated February 9, 1954, he swore that the certificates were "endorsed in blank and deposited with the Banco di Roma at Rome, Italy, as custodian for AMERICAN AND EUROPEAN AGENCIES, INC., the owner, and the sellers, as pledgees". However, in an affidavit of August 20, 1954, he corrected his previous affidavit, and swore that "The delivery of the certificates representing these shares of the Fallersa Corporation for registration of the transfer took place on March 18, 1946, and the completion of the registration occurred on April 1, 1946, whereupon they were delivered into the custody of Alberto Fontana, of Rome, Italy, who was to deposit them with Banco di Roma." However, as appears from the affidavit of Fontana and a letter from Silvio Battistela, Fallersa's Vice-President, Fontana never deposited the certificates with the Bank of Rome, in accordance with the Ministry's instructions, but retained possession of them "in order to avoid the heavy expense of having them kept in the custody of the

Banco di Roma". Fontana did, however, eventually deposit the certificates with the Banca Triestina on December 22, 1953, and permission was subsequently secured for such deposit from the Ministry of Treasury on July 19, 1954.

As evidence of the registration of the shares of Fallersa in claimant's name, claimant has filed a certified copy of an extract from the Stockholders Register of Fallersa, showing the cancellation of old and the issuance of new stock certificates to claimant, one certificate for 4,700 shares remaining as security and guaranty in favor of certain persons, including E. Paul Yaselli. Claimant has also filed evidence that on March 25, 1946, E. Paul Yaselli was elected President of Fallersa.

In order to show that the parties to the transaction were dealing at "arms length", claimant has filed a letter dated August 29, 1945, addressed to Mr. Yaselli. Since claimant strongly relies on this document as showing the bona fides of the transaction and the fact that it is both legal and beneficial owner of the stock, we shall quote freely from the letter:

> "My sons Maximilian and Frederic have been telling me by telephone last night that Baron Sachs, who for many years has been assisting me as my attorney in all legal affairs regarding our family estate in Jugoslavia, was kind enough to introduce my sons to you and that all four of you had very interesting talks about my Fallersa stock. They tell me that they believe to have aroused your interest in this factory and ask me to give you some more authentic details about its present situation, which for a foreigner might be difficult to understand.
>
> "First of all let me tell you that to me the idea brought forth by Baron Sachs, that is the payment in cash of a minor sum of dollars and the major dollar sum after your having taken up work in the factory, would suit me in general. Of course the minor sum of 10 to 15 thousand dollars in cash suggested by you is far too small and we will have some difficulty in agreeing on the major amount as well. But all in all I am convinced we

shall be able to find an agreement somehow and I will be pleased to hear some new proposals or perhaps to meet you personally for further talks here in Trieste.

"Let me now give you some details about our situation and point out to you what seems to me to be of essential importance.

"The reason why I wish to sell my majority stock of the factory to some foreigner, like yourself, is practically the following one:

"My family belonging to the Central-European Nobility, is greatly endagered by the new communist influence arising in Jugoslavia. The Jugoslav occupying forces have immediately after the armistice laid hands on all our large forests, castles, houses, factories etc. Fortunately up to now nothing has happened to the Fallersa, as this factory is a separate corporation and our name does not appear in it, but I am not at all sure about the future. You as foreigner will certainly have no difficulty whatever to possess the factory and to stay there as often and as long as you wish, whereas every single member of my family risk to be arrested and joint my youngest brother who was already kidnapped here on May 13th and seems to be in a Lubiana prison since then.

"My boys have been telling you something about the extra-ordinarily favourable prospects for producing re-integrated wood panels with all the vast magnificent forests just in fron of the factory doorsteps. I would not hesitate to say, that the brand-new factory should be able to rent some 50%. Under normal circumstances the price of the factory should not be less than 1½ million dollars. My stock being something more than 60% (about 38% belong to some other Italian citizens) is worth about 1 million dollars. You can well imagine that only reluctantly I am thinking of selling my stock of the Fallersa, but who knows when and whether I will be able to have my forests back again. If I should get something about half the value my stock is worth, I will at least have something for my very large family to start a new life with. The minor amount in cash would serve me for an immediate emergency case. In fact not even your President may know exactly what is going to happen to our blessed town and its surroundings, and yet I hope your Government may urge the Jugoslavs to go back to their old frontier-line.

"There is one thing more, I wish to tell you: We must not forget that we Italians by fascist law are forbidden to own foreign currency, therefore we must take care not to have anything written down regarding the dollar cash. It will have to be a gentlemen-agreement on a simple given word until this beastly fascist law will be abolished, let us hope soon.

"In view of the coming Peace Treaty, there is not much time to be lost. Fortunately the telephone-line to Rome is allright again, so you may ring me up any time. My number is 58-09.

"Not knowing your address yet, I am sending this letter to my friend Baron Sachs. Let me thank you for the kind words you had for my boys as well as for the interest you take in our Country. Hoping to meet you soon here, I am

yours very sincerely

/s/ Dott. Ugo Principe di Windisch-Graetz"

In addition, claimant has filed the affidavit, dated November 5, 1954, of Federico Windisch-Graetz, who swears:

"Prince Federico Windisch-Graetz, being duly sworn deposes and says; that I reside in Trieste, Italy, 281 Viale Miramare, that as representative of several owners of stock of the Fallersa corporation, duly authorized by each stockholder, agreed with the American and European Agencies, Inc., a New York corporation, in the month of September 1945 after negotiations had been carried on for several months with its President E. Paul Yaselli, to sell to the American an European Agencies, Inc., 12,320 shares of the Fallersa stock, that our group owned, for the sum of Dollars 300.000.-- and the credit of lires 13,012.000.--, which calculating the lire at the rate of 20.-- lires to the dollar, would amount to Dollars 650,600.-- was to be paid in addition to the Dollars 300,000.-- for the value of the 12,320 shares of stock, in other words the whole transaction was for Dollars 950,600.--

"That the agreement was made in dollars, because of the instability of the Italian lire at the time.

"I executed an agreement before the American Consul in Rome, Italy, on the 28th. day of September 1945 and delivered it to Mr. Yaselli, at his home on the same day, Via Lovanio 6, Rome, Italy, after Mr. Yaselli handed me Dollars 20,000.-- in U.S. Currency, I handed him the signed contract of sale and purchase. The reason for accepting from Mr. Yaselli the U.S. Currency from him personally, instead through a bank, was because at the time an Italian national was not allowed to possess foreign Currency of any kind and Italian banks could not pay to an Italian National Currency in any other Currency than Italian lire."

And in an affidavit dated November 5, 1945, Massimiliano Windisch-Graetz swears:

"Prince Massimiliano Windisch-Graetz being duly sworn deposes and says; that I reside at Viale Miramare Number 281 city of Trieste Italy; that on or about the month of July, 1945, I was introduced to E. Paul Yaselli, Esq., as President of the American European Agencies, Inc., by Baron Niels Sachs di Gric, an old friend of the family, residing at Trinita dei Monati, 17, Rome, Italy. Baron Sachs introduced Mr. Yaselli to me at the Grand Hotel, Rome, for the purpose of discussing the purchase of our interest in the Fallersa corporation.

"This introduction was followed with several other meetings, which culminated in Mr. Yaselli accompanying me to Trieste, where he could investigate the corporation's affairs, talk to my father, my uncle Baron Economo, a stockholder in the Fallersa and other stockholders of the corporation, examine the books of the corporation and talk to Directors and officers of the corporation; this visit was made some time in late summer 1945.

"After this visit Mr. Yaselli was satisfied with the representations I and Baron Sachs made to him and agreed to purchase all of our stock, amounting to 12,320 Shares, for the sum of Dollars 300,000.-- and the full value of the credit of lire 13,012,000.-- amounting in Dollars to 650,600.-- at the rate of 20.-- lires to the dollar. This was an agreement which was to be perfected in Rome, as soon as we could get the authority of all the stockholders to agree to the tentative agreement; it was further agreed upon, that may father was resign as Director and President of the corporation and Mr. Yaselli was to be elected in his place.

"All this matter of getting all the stockholder's consent to the said agreement took some time and finally at the end of September, 1945, my brother Prince Federico had secured a power of attorney from all other stockholders to act for them in the transaction, and both went to Rome, to consumate the tentative agreement as above stated. We went with Mr. Yaselli on the 28th. day of September before the U.S. Consul in Rome, Italy and signed the agreement of sale and purchase before the U.S. Consul Byron B. Snyder under oath. My brother Prince Federico having the power of attorney from the stockholders signed the agreement and Mr. Yaselli signed the agreement on behalf of the American and European Agencies, Inc. After this, myself, my brother Federico and Mr. Yaselli went to Mr. Yaselli's home at 6 Via Lovanio, Rome, Italy and there in my presence Mr. Yaselli, handed my brother Federico Dollars 20,000.-- in U.S. currency, which represented a part payment for 12,320 shares of stock certificates and the credit of lires 13,012,000.-- and in turn my brother Federico in my presence handed Mr. Yaselli the said agreement signed before

the U. S. Consul. It was understood that the stock certificates would be turned into the corporation for cancellation and new ones issued to the American and European Agencies, Inc. in due course, which was done according to the agreement.

"The reason why the transaction was entered into in dollars, was because of the uncertainty of the Italian lire and the further reason why the money was not paid through a bank, was because a bank could not pay an Italian national except in Italian lire, an Italian nationals was not allowed to possess foreign currency."

Several unusual features of the transaction by which claimant acquired the stock are immediately apparent. In the first place, at the time of the sale the Fallersa plant was located in territory controlled and occupied by Yugoslavia and the plant itself was in Yugoslav hands. Yugoslav intentions toward that territory were well known and communist influence in Yugoslav economic and political affairs had already become manifest. In the face of impending seizure of the territory and the imminent expropriation or confiscation of the property of Italian persons and corporations, the claimant purchased the majority of the stock in Fallersa and a credit in the amount of 13,012,000 lire. What is more surprising, however, is that claimant agreed to pay the entire purchase price in dollars, $300,000 for the stock and $650,600 for the credit. Another singular feature of this transaction is that the lire credit was converted to dollars at the rate of 20 lire to 1 dollar. Mr. Yaselli has explained this conversion rate as being the "legal rate" at the time. But the legal rate in 1945 was 100 lire to 1 dollar and went to 225 lire to 1 dollar in 1946, (See Statistical Yearbook of the United Nations, 1948, p. 374). The result, therefore, was that in exchange for becoming a creditor of Fallersa in the amount of 13,012,000 lire, claimant became a debtor to the Windisch-Graetz group in the amount

of $650,600, when this lire credit at the legal rate was equivalent to only $130,120 and doubtless much less at a "free" rate. The questionable nature of the whole transaction as a bona fide and prudent business venture is compounded when the evidence shows that the transfer to a foreign country of dividends on the stock and interest on the credit was prohibited.

We note also that only $20,000 out of a total purchase price of $950,600 was paid by claimant, and that the remainder "shall be paid . . . six months after the American and European Agencies, Inc. shall have taken possession of the factory". There is evidently no time limit within which possession must be had, and this ommission is not consonant with an "arm's length" transaction of such proportions. In addition, we do not find that the record shows that claimant ever got possession of the plant. On the contrary, in a letter of June 6, 1946, from Yaselli to A.F.H.Q., Caserta, he stated "We were allowed to visit the factory from A to Z". A permissive visit accorded by the Yugoslavs on the premises of the plant can hardly be construed as possession.

As to the $20,000 payment, Yaselli has stated that he carried it in the form of currency from Germany to Italy in a brief case in early 1945, passing across the border and through the German and Allied lines without being searched. Even if we give credit to an apparently remarkable immunity to the ordinary interferences of nations and armies in such matters, the possession and payment of dollars was itself a violation of the domestic law of Italy and that of the Allied Military Government at such time. Aside from these considerations, the claimant itself used none of its own money in the transaction, as the money belonged to Yaselli, acting on behalf

of a family corporation formed in New York a brief nine months before while he was in Italy.

Under these facts, the claimant corporation asks this Commission to award it the amount of $1,538,753.52 for the taking of Fallersa, which the Government of Yugoslavia concedes it took pursuant to the Nationalization Law of December 5, 1946 (Official Gazette No. 98 of December 6, 1946) "which with respect to the provisions of the Peace Treaty with Italy, entered into force on the territory of Ilinska Bistrica on September 15, 1947."

The Yugoslav Claims Agreement of 1948, by virtue of which this claim was filed, was the result of diplomatic negotiations between the Governments of the United States and Yugoslavia. It is proper, therefore, to inquire into certain principles pertaining to the diplomatic espousal of claims by this Government.

In the exercise of its discretion as to whether a claim will be espoused, the Department of State has been guided by principles which are never circumscribed by a mere inquiry as to whether ownership of the property which is the subject matter of the claim is in United States nationals. The maxim ex dolo malo non oritur actio is especially applicable to limitations on diplomatic protection (See Borchard, Diplomatic Protection of Citizens Abroad, pp. 714 et seq.). Other considerations inhibiting protection are speculation and exaggeration in claims and collusion, misrepresentation or illegal transaction (Hackworth, Digest of International Law, Vol. V, p. 710; Moore, International Law Digest, Vol. VI). In the case of corporations, the Department has required that there be a "substantial" American interest in such corporation to authorize diplomatic espousal of a claim. See Borchard, supra, pp. 621-2. This principle has been

written into Article 2(B) of the Agreement requiring that 20% or more of the outstanding securities of an American juridical person be owned by United States nationals. The Commission has previously held that this ownership must be beneficial as well as legal. Decision No. 54, In the Matter of the Claim of Westhold Corporation, Docket No. Y-1235.

Arbitral tribunals, likewise, have not been satisfied with ostensible American ownership, but have even inquired into the disposition of the proceeds of an award. Thus, Sir Edward Thornton, Umpire of the Mexican Claims Commission, declared:

> "In the case of Herman F. Wulff v. Mexico, No. 232, with regard to which the umpire is asked to amend his award of June 18, 1875, by making it absolute in favor of the administrator instead of conditional upon proof that the recipient shall be a citizen of the United States, the umpire cannot acquiesce in the arguments put forward by the counsel for the claimant, whoever that claimant may be. He is of the opinion that not only must it be proved that the person to whom the injury was done was a citizen of the United States, but also that the direct recipients of the award are citizens of the United States, whether these beneficiaries be heirs or, in failure of them, creditors. The heirs are certainly benefited by being able to pay the debts of their deceased relative, even though the whole of the award may be swallowed up by the creditors. If there be no heirs and only creditors, the umpire is of the opinion that even those creditors who are the immediate recipients of the award must prove that they are citizens of the United States. The umpire thinks that the Commission can make no award except to corporations, companies, or private individuals who are citizens either of the United States or of the Mexican Republic, respectively." (Moore's Arbitrations, Note #6 at p. 353)

Recently, the American Mexican Claims Commission adjudicating claims under the Settlement of Mexican Claims Act of 1942 (Public Law 814, 77th Congress, 2d Session, 56 Stat. 1058) passed on a question similar to that with which we are confronted here in Decision No. 37-B (Report to the Secretary of State, Department of State Publication 2859, Arbitration Series 9, p. 191). The decision is of particular

significance, because that Commission, like this Commission, adjudicated claims in which compensation was to be paid from a limited fund provided by an en bloc settlement.

In that case one element of the claim was for wrongful deprivation of property in 1914. Claimant corporation was organized in New York on May 28, 1914, and on June 1, 1914, acquired the land, which was the subject matter of the claim, by deed from two Mexican citizens, who had requested the incorporation of the claimant. Stock was issued to persons claiming United States citizenship, and the fact that only a small amount was paid on account therefor, the balance being owed to Mexican citizens, was a vital factor in testing the bona fides of the transaction. In holding that the transaction lacked bona fides and that the claim of error had no merit, the Commission quoted Commissioner Lawson:

"The original definite consideration involved in the acquisition of the shares, which admittedly in large part was never paid, is now attempted to be substituted by something of a very indefinite and uncertain nature. As the record stands at present, there is no satisfactory basis for concluding that the consideration involved in the acquisition by Lorenza R. de Braniff of stock of the Monte Blanco Real Estate Corporation of a par value of $499,000 was in excess of $46,500, if indeed that evidence can be regarded as satisfactorily establishing the transfer of consideration even to that extent. The question of the existence of a bona fide interest in the Monte Blanco Real Estate Corporation, therefore, on the part of Lorenza R. de Braniff, cannot at best, be regarded as free from serious doubt.

* * * * * *

"The conclusion seems inescapable in the instant claim that an effort is made, through the instrumentality of the Monte Blanco Real Estate Corporation, which, if successful, would, in substance amount to the espousal by the Government of the Government of the United States of the claim on behalf of other than American interest." (idem. p. 193)

The Commission also found that the position taken by claimant in the petition for review instead of showing error fortified the view that: "The only thing that can be suggested, is that the transfer of Hacienda to an American Company, the Monte Blanco Company, was concocted to protect the Hacienda from seizure by the Mexican Government - a fact stated openly in the record." (idem. p. 195)

This Commission is charged with adjudicating claims which are to be paid from a limited fund which in all likelihood will prove inadequate to meet the full amount of the principal of the awards. The weight of its responsibility toward all claimants is, accordingly, heavier than that ordinarily borne by arbitral tribunals, where the granting of an award in a particular claim does not in any way affect other claimants. Under these circumstances, considerations ex aequo et bono command more attention than isusually the case. Most of the claimants before the Commission were the owners of small farms, and the property of many was heavily damaged during the war for which we can allow no compensation here. The great majority of the claims over which we have jurisdiction represent the last evidence the owners possess of what was once a means of livelihood, or a home or the final legacy of a deceased relative. From equitable considerations, therefore, the instant claim has no standing whatsoever.

But this claim need not be decided on equitable grounds. The transaction on which this claim is grounded was motivated by a desire to put the property under American protection in the face of its imminent seizure by the Government of Yugoslavia. The prestige of the United States will not lend itself to becoming a party to international trafficking for the favor of its protection. In August 1946, the Department of State specifically approved the

position of the Embassy in Rome in withholding action on Yaselli's request for American protection and stated that the United States Government would not in the circumstances be justified in extending such protection. The transaction was speculative and involved an illegal payment and unless an award in this claim would exceed $950,600, all the proceeds thereof, except for the $20,000 payment, would be subject to the demand of foreign citizens. Finally, as we have previously pointed out, certain aspects of the transaction raise serious doubts as to the bona fides of the transaction and of this claim.

For the foregoing reasons the claim is denied.

Dated at Washington, D. C.

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