AVVOCATURA GENERALE DELLO STATO

ATTI DEL GIUDIZIO STATI UNITI D'AMERICA CONTRO REPUBBLICA ITALIANA

dinanzi alla Corte internazionale di giustizia dell'Aja Sentenza 20 luglio 1989

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SOMMARIO

MEMORIAL

SUBMITTED BY THE

UNITED STATES OF AMERICA

(CASE CONCERNING ELETTRONICA SICULA S.P.A. – ELSI)

15 MAY 1987

PART I

INTRODUCTION

This case concerns the failure of the Government of Italy to afford to United States investors in Italy the protections and guarantees established by the 1948 Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic (the « Treaty ») and its 1951 Supplement.

Beginning in 1956, Raytheon Company and, subsequently, Machlett Laboratories, Inc., two United States corporations, invested in and gradually acquired complete ownership of an Italian electronics company, Elettronica–Sicula, S.p.A. (« ELSI »). By 1967, ELSI had become an established and reputable producer of highly sophisticated electronics components. However, despite large investments of capital and other assistance from its United States owners, ELSI never became financially self–sufficient. In March 1968, therefore, Raytheon and Machlett reluctantly decided to close and liquidate ELSI and to settle all outstanding debts from the proceeds of the sale of its assets.

On 1 April 1968, however, the Government of Italy requisitioned ELSI's plant and related assets, in order to prevent the liquidation and to facilitate the acquisition of ELSI's assets by Italy's commercial conglomerate Istituto per la Ricostruzione Industriale (« IRI »). As a result, Raytheon and Machlett were unable to sell the plant and other assets and were forced to put ELSI into bankruptcy. Italian officials then publicly announced that ELSI would be taken over by IRI. Instead of buying ELSI's assets at the scheduled bankruptcy auctions, however, IRI negotiated a piecemeal take–over with bankruptcy authorities, selectively acquiring the assets it wanted at a price substantially below fair market value. The bankruptcy authorities similarly failed to recover the fair market value of ELSI's other assets. Bankruptcy proceeds accordingly were not sufficient to pay ELSI's debts. While ELSI had immediately appealed the requisition order to the appropriate Italian authority, who found it unlawful, this decision was not rendered until after Italy had purchased ELSI's plant and other assets.

As a result, Raytheon and Machlett suffered financial losses which they would not have suffered, had they been allowed to proceed with the planned liquidation of ELSI, or even had Italy formally expropriated ELSI and paid just compensation. Most significantly, Raytheon did not recover any of the amounts it was owed by ELSI, and was required in addition to satisfy Italian bank loans to ELSI which it had guaranteed. Five banks which were owned and controlled by the Government of Italy also brought suit against Raytheon in Italian courts for payment of loans to ELSI which Raytheon had not guaranteed. This litigation, which continued for 16 years at great expense to Raytheon, ended with the dismissal of all suits as unfounded.

The United States contends that these actions constitute a violation of the Treaty and Supplement. As explained below, the requisition and subsequent conduct were both arbitrary and discriminatory, prevented Raytheon and Machlett from managing and controlling an Italian corporation whose shares they had lawfully acquired, and resulted in the impairment of their legally acquired rights and interests — in violation of Articles III and VII of the Treaty and Article I of the Supplement. In addition, the requisition constituted a taking of Raytheon's and Machlett's interests in property without due process and without adequate compensation,

in violation of Article V of the Treaty. Italian authorities also failed to comply with the obligation under Article V to afford the protection and security, by the unwarranted delay in ruling on the challenge to the requisition order and by failing to afford protection to ELSI's plant and premises.

After 18 years of unsuccessful attempts to resolve this matter through diplomatic channels, the United States appeals to the Court to find that the requisition and other actions and omissions of Italy constituted violations of the Treaty and Supplement and to order that full compensation be made to the United States for the damages suffered by Raytheon and Machlett as a result of Italy's failure to accord them the protections guaranteed by the Treaty and Supplement.

PART II

STATEMENT OF FACTS

CHAPTER I

BACKGROUND

From 1955 through 1967, Raytheon Company and Machlett Laboratories, Inc., two United States corporations, acquired 100 % of the shares of Elettronica Sicula S.p.A. (« ELSI »), an Italian electronics company operating in Palermo, Sicily. Although they developed ELSI into a manufacturer of sophisticated electronics equipment and a major employer in the Sicilian Region, ELSI never became a profitable enterprise. In 1967–1968, Raytheon and Machlett made a last major effort to make ELSI profitable.

SECTION 1. – *The Treaty of Friendship, Commerce and Navigation.*

On 2 February 1948, the United States and Italy signed a Treaty of Friendship, Commerce and Navigation (the « Treaty »). The Treaty entered into force on 26 July 1949 (1). The Treaty was subsequently strengthened by an Agreement of 26 September 1951 (the « Supplement »), which entered into force on 2 March 1961 (2). One of the major purposes of these agreements was to encourage American investment in the Italian postwar economy by establishing a mutually agreed framework of legal protection for commercial activities and investments of United States nationals in Italy (3).

As reflected in Article V of the Supplement, the Government of Italy was particularly interested in promoting new investment in its Southern Region, the Mezzogiorno, an historically underdeveloped area which includes the island of Sicily (4). Toward that end, the Government of Italy enacted incentives to encourage foreign investment in that Region and created a specific ministry within the national government to administer these programs and otherwise to encourage development in the Mezzogiorno (5).

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(1) Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, signed at Rome, 2 Feb. 1948, entered into force, 26 July 1949. T.I.A.S. 1965; 79 UNTS 171 (Annex 1).

(2) Agreement Supplementing the Treaty of Friendship, Commerce and Navigation of 2 Feb. 1948, signed at Washington, 26 Sep. 1951, entered into force, 2 Mar. 1961. T.I.A.S. 4685; 404 UNTS 326 (Annex 2).

(3) The importance of the Treaty to the Government of Italy as one means of encouraging United States investment in Italy is highlighted in the attached Reports from the Italian Parliament. Chamber of Deputies, Parliamentary Proceedings, Documents – Bills and Reports, N. 246–A, p. 4, presented to the Office of the President on 2 Mar. 1949 (Annex 3); Senate of the Republic, Legislature III, 291st Session, Assembly, p. 13758, 19 July 1960 (Annex 4). *See also*, discussion, *infra*, pp. 27–28 on Italian parliamentary consideration.

(4) Map of Italy, highlighting the Mezzogiorno Region (Annex 5).

(5) *The Foreign Investor's Digest of Italian Corporate Law*, pp. 245–254 (1963) (Annex 6).

SECTION 2. – *Raytheon's and Machlett's Investment in ELSI.*

Raytheon Company (« Raytheon »), a United States electronics manufacturer incorporated in Delaware ([6]), was a participant in this postwar investment activity ([7]). In 1952, Raytheon entered into a licensing and technical assistance agreement with an Italian company based in Genoa, Fabbrica Italiana Raddrizzatori Apparecchi Radiologici (FIRAR) ([8]). Subsequently, the owners of FIRAR decided to transfer its business to a relatively new company located in Palermo, Sicily — Elettronica Sicula, S.p.A. (« ELSI ») — and proposed that Raytheon become a shareholder in ELSI. In Raytheon's view, ELSI had very good prospects of success, notwithstanding its location in a remote and underdeveloped area. ELSI was supported by an experienced and successful Italian partner, the Moro Group, as well as by the strong government policy of support for business development in the *Mezzogiorno* ([9]). Moreover, the Italian Government offered and publicized investment incentives to companies investing in the Mezzogiorno ([10]). Raytheon acquired a 14 % shareholder interest in ELSI in 1956 ([11]).

From 1956 through 1967, Raytheon invested some 7.421 billion ([12]) lire (US$11,899,300) ([13]) in ELSI, ultimately acquiring 99.16 % of its shares ([14]). Raytheon also guaranteed over 5 billion lire (US$8,000,000) of loans to ELSI by various Italian banks ([15]). Machlett Laboratories, Inc., a United States corporation incorporated in Connecticut specializing in the manufacture of X–Ray tubes ([16]), acquired the remainder of ELSI's shares in April 1967, investing 34 million lire (US$54,100) in ELSI ([17]).

In addition to their direct investment, Raytheon and Machlett supported ELSI by providing patents, licenses and other technical assistance, providing management, marketing, and other expertise, and developing profitable business opportunities for ELSI, including a lucrative contract to produce electronic tubes for the North Atlantic Treaty Organization (NATO) HAWK missile system ([18]).

SECTION 3. – *The Development of ELSI to 1967.*

By 1967, ELSI had become a significant manufacturer of sophisticated electronic components and equipment and a major employer in Sicily, with a skilled work force of slightly under 900

([6]) Raytheon Company Certificate of Good Standing, State of Delaware, 22 Dec. 1986 (Annex 7); Introductory Pages from 1985 Raytheon Company Annual Report (Annex 8); Affidavit of Charles F. Adams, Finance Committee Chairman and Director, Raytheon Company, para. 9, 17 Apr. 1987 (Annex 9).

([7]) Annex 9, paras. 10–12.

([8]) Manufacturing and Sales Agreement between Raytheon Manufacturing Company and Fabbrica Italiana Raddrizzatori Apparecchi Radiologici, 18 July 1952 (Annex 10).

([9]) Annex 9, paras. 10 and 15.

([10]) Annex 6; *see also*, Annex 9, paras. 15–16.

([11]) Letter of Participation from Raytheon Manufacturing Company to Elettronica Sicula, S.p.A., dated 21 Oct. 1955, revised 15 Mar. 1956 (Annex 11).

([12]) Throughout this document, the term « billion » refers to 1,000 million.

([13]) These are the actual United States dollar and Italian lire amounts of this investment. In the following discussion, where it has been necessary to determine a dollar amount based on an actual lire figure, or vice versa, this Memorial uses an exchange rate of United States $1.00 to Italian L. 625, the generally prevailing exchange rate from 1967 through 1971. Selected United States Dollar–Italian Lire Conversion Rates from *The Wall Street Journal* (for dates 29 March 1968, 19 April 1968, 29 April 1968, 30 June 1971) and *The Washington Post* (for dates 1 April 1968, 11 July 1969, 24 January 1974) (Annex 12). The Affidavit of Arthur Schene, former Raytheon Vice President–Controller (Annex 13) provides complete details of relevant investment and statistical information about ELSI's financial history and other matters relevant to the claims of the United States.

([14]) Annex 9, paras. 12–13; Annex 13, para. 7 and Schedule A; Affidavit of Herbert Deitcher, Vice President and Treasurer, Raytheon Company, para. 2 and Exhibit A, 6 Jan. 1987 (Annex 14); *see also*, Affidavit of John D. Clare, former Chairman, Raytheon Europe International Company, para. 9 and Exhibit A, 10 Jan. 1987 (Annex 15). ELSI was renamed « Raytheon–ELSI » in 1963 to reflect Raytheon's ownership of a majority of ELSI's shares. This Memorial will refer to the corporation as « ELSI » throughout.

([15]) Annex 13, Schedule 12.

([16]) The Machlett Laboratories, Inc., Certificate of Good Standing, State of Connecticut, 26 Dec. 1986 (Annex 16).

([17]) Annex 9, para. 14; Annex 13, paras. 7 and 21 and Schedule A; Annex 14, para. 2 and Exhibit A.

([18]) Annex 9, para. 17.

employees, a large, modern, fully–equipped plant in Palermo, a reputation for quality products, and a significant volume of sales and export earnings (19).

ELSI had five major product lines: microwave tubes, cathode–ray tubes, semiconductor rectifiers, X–ray tubes, and surge arresters (20). Using Raytheon technology, ELSI produced microwave tubes, which generate high–frequency electromagnetic waves, for NATO Hawk Missile system and other uses, including telecommunications, radar, and industrial heating. ELSI's cathode–ray tubes were TV picture tubes, the most complex component in televisions. Its semiconductor rectifiers, which convert alternating current to direct current, were used in X–ray equipment, radio and television stations, electrostatic filters, and domestic appliances. Using Machlett technology, ELSI produced X–ray tubes, primarily for medical use, and surge arresters, which protect against overvoltage surges in telephone lines, cables and terminal lines (21).

ELSI sold these products throughout Europe, the United States, Japan, and other international markets. For each of the fiscal years ending 30 September 1965 and 30 September 1966, ELSI's sales totalled over 8 billion lire (US$12,800,000) (22). In addition to goods sold to NATO, just under 30 % of the sales during this two–year period represented exports from Italy (23).

ELSI thus became an established business. It did not, however, become self–sufficient. During fiscal years 1964 through 1966, ELSI made an operating profit, but this profit was insufficient to offset its debt expense or accumulated losses, and no dividends were ever paid to its shareholders (24). As of 30 September 1966, the accumulated accounting losses, as shown on the balance sheet, were some 2 billion lire (US$3,200,000) (25).

SECTION 4. – *Final Efforts at Self–Sufficiency.*

In February 1967, Raytheon embarked upon a major effort to make ELSI self–sufficient. It designated Mr. John D. Clare, Raytheon Vice President and General Manager of its European management subsidiary Raytheon Europe International Company, to be ELSI's Chairman and directed him to determine and implement appropriate steps to improve ELSI's financial performance (26). Raytheon and Machlett also designated other highly qualified individuals to assist ELSI (27). Some of these individuals worked full–time and others on a consultant basis to provide ELSI their specialized financial, managerial, and technical expertise. Raytheon also provided over 4,000 million lire (US$6,400,000) to ELSI in recapitalization and guaranteed credit (28).

This 1967 effort focused in part on improving the efficiency of administration and operations at the ELSI plant in Palermo. By December 1967, major steps had successfully been taken to upgrade plant facilities and operations, including a comprehensive inventory, implementation

(19) Annex 13, paras. 8, 9 and 12; « A New Industry in an Ancient Land », Raytheon–ELSI, S.p.A., Brochure Oct. 1963 (Annex 18); Sales brochure, Raytheon–ELSI, S.p.A. (Annex 19); Aerial photograph of Elettronica Sicula, S.p.A. plant in Palermo, Sicily, 1962 (Annex 20). Affidavit of Rico A. Merluzzo, former Director of Planning Raytheon–ELSI, S.p.A., para. 8, 17 Apr. 1987 (Annex 21). « Project for the Financing and Reorganisation [sic] of the Company », 1967 Report prepared by Raytheon–ELSI, S.p.A., pp. 20–21 (Annex 22); Affidavit of Dominic A. Nett, former Controller, Raytheon–ELSI, S.p.A., 17 April 1987 (Annex 30).

(20) Annex 21, para. 8. These product lines are pictured and described in Annexes 18 and 19.

(21) Annex 15, para. 11; Annex 21, para. 8.

(22) Annex 13, Schedule B3; Annex 22, pp. 10–21. ELSI's fiscal year was 1 October – 30 September. Unless otherwise noted, fiscal year data will be given based on the accounting methods used in preparing ELSI's accounting records.

(23) Annex 22, pages 20–21.

(24) Annex 13, Schedule B3; Annex 15, para. 12.

(25) Annex 13, Schedule B1.

(26) Annex 9, paras. 20–22; Annex 15, paras. 14–15; Affidavit of Joseph A. Scopelliti, former Chief Financial Officer and Controller, Raytheon Company, para. 2, 1 Apr. 1987 (Annex 17).

(27) Annex 9, para. 21; Annex 15, paras. 33–35; Annex 17, para. 2; Annex 21, paras. 5–8.

(28) Annex 9, para. 28; Annex 14, para. 2 and Exhibit A; Annex 15, para. 21.

of improved quality production, and scrap control systems, establishment of a major worker training program, and the restructuring of production facilities (29).

In Raytheon's view, however, it was most critical to ELSI's self–sufficiency and hence survival to develop further its product base, personnel, and place in the Italian economy. Raytheon management had concluded that, as an American–owned firm, ELSI was at a competitive disadvantage in seeking to develop Italian markets (30). This goal therefore entailed several interrelated objectives: to develop new products and markets in order to expand and diversify its business and make full use of its operating capacity; to secure an Italian partner with economic power and influence; and to be assured of the critical interest and support of the national and regional governments (31). The latter was particularly important because of the Italian Government's dominant role as a customer and supplier in numerous markets crucial to ELSI's operations and success, including the electronics, telecommunications, health care, military supplies, information and transportation systems, and the Italian banking system (32).

ELSI sought to benefit from Italy's *Mezzogiorno* incentive laws, especially (1) the so–called « 30 % law » which required 30 % of government agency supply and job contracts to be made from companies located in the *Mezzogiorno*; and (2) from transportation subsidies for businesses in the *Mezzogiorno* (33). The 30 % law was especially important to ELSI's X–ray tube business, since government–controlled hospitals were purchasing X–ray tubes from outside Italy which could have been purchased within Italy from ELSI in the Mezzogiorno (34). The transportation subsidies were especially important to the cathode–ray tube business, because the large size and weight of ELSI's products made transportation costs particularly expensive (35).

Many important potential new markets for ELSI products and many of ELSI's suppliers were government–controlled, primarily by the *Istituto per la Ricostruzione Industriale* (« IRI ») (36). IRI, which had been created in 1933 to take emergency control of banks during Italy's banking crisis, had developed into a permanent holding company with extensive and wide–ranging commercial interests, dominating, among other things, the telecommunications, electronics and engineering markets (37). IRI has been described as:

> « Europe's largest market–disciplined public enterprise group. ... It owns three of the largest national banks, and accounted for one fifth of the total of Italian bank deposits. In service companies it owns Alitalia, the main shipping companies, runs Italian radio and television (RAI), the larger part of the Italian telephone system, and has built over half the renowned national motorway network. In manufacturing it produces some three–fifths of Italian steel, over three quarters of ships built, owns the Alfa–Romeo motor car company, and has an important stake in other national engineering sectors (38) ».

By the end of 1967, IRI had a majority shareholder interest valued at over 1,206 billion lire (US$1,929,600,000) in some 139 companies, which employed some 290,000 persons and had combined sales of 2,230 billion lire (US$3,568,000,000) (39).

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(29) Annex 15, para. 36; Annex 21, paras. 9–15.

(30) Annex 17, paras. 3–4.

(31) Annex 9, paras. 24–25; Annex 15, para. 18; Annex 17, paras 4–5.

(32) Annex 9, paras. 24–25; Annex 17, para. 3. Moreover, the policies set by the Government of Italy in any of these areas directly affected ELSI's operations. For example, in March 1967, the Chamber of Deputies approved the first five–year plan for the Italian economy, which included detailed plans for the development of Italian industry. *Quarterly Economic Review Annual Supplement*, The Economist Intelligence Unit (1967) (Annex 23).

(33) Annex 6; Annex 15, paras. 28–31; Annex 17, para. 4.

(34) Annex 15, paras. 28–31.

(35) Annex 15, para. 19.

(36) Annex 17, paras. 3–4.

(37) Annex 17, para. 3. Raytheon had previously established a successful partnership with IRI and the private firm FIAT through their joint ownership of Selenia, an electronics company on the Italian mainland. Raytheon supplied Selenia managerial and technical expertise; IRI furnished Selenia access to markets controlled by IRI–affiliated companies and the Italian Government. Annex 9, para. 25. Raytheon therefore had reason to believe that a similar cooperative relationship could be established with the Italian industrial community, and with IRI in particular. *Ibid.*, paras. 24–25.

(38) Annex 25, p. 47.

(39) Annex 23; IRI, Istituto per la Ricostruzione Industriale, 1967 *Annual Report*, pp. 38–39, 65 (Annex 24); *The State As Entrepreneur*, pp. 45–49, 56–60 (S. Holland ed. 1972) (Annex 25).

Because of IRI's importance and the importance of a strong commercial relationship with the government, Mr. Clare and other senior Raytheon officials held some 70 meetings with Italian leaders between February 1967 and March 1968 (40). In these meetings — with cabinet-level officials of the national government and the Sicilian Region, as well as representatives of IRI, the *Ente Siciliano per la Produzione Industriale* « ESPI » (the Sicilian Government industrial organization responsible for the promotion of local development), and the private sector — ELSI's management and shareholders attempted to find ELSI a strategic Italian partner and explore the possibilities of other governmental support (41). In particular, Raytheon and ELSI developed and presented to Italian and Sicilian officials numerous specific proposals of ways for the Italian Government to meet its goals of industrial development in the Mezzogiorno through a partnership with ELSI and support for ELSI's development of new products and markets (42).

At first, Italy's response was encouraging. ESPI's President and the President of the Sicilian Region were enthusiastic about a partnership with ELSI (43). Similarly, other Italian officials, including senior officials at the Ministries of the Treasury and of Industry, Commerce, and Crafts, expressed their continuing support for the official policy of *Mezzogiorno* development and their specific interest in helping ELSI (44).

Notwithstanding this support for ELSI from representatives of the regional and national governments, IRI was not prepared to invest in or consider other commercial relationships with ELSI (45). On 4 January 1968, a senior IRI official confirmed that IRI was interested in furthering its own activities in the electronics field (46). IRI's specific plans at that time were apparently still being developed; the official said that IRI would not enter into a relationship with ELSI at that time, but might be willing to reconsider the decision later, perhaps in a year (47). ELSI would require additional capital contributions from its shareholders, a commitment they could not make unless there were good prospects that ELSI would become financially self-sufficient (48).

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(40) Annex 9, paras. 29–31; Annex 15, paras. 22–46; Annex 17, para. 5.

(41) Annex 9, paras. 29–30; Annex 15, paras. 23–32 and 37–44; Annex 17, paras. 3–5.

(42) Annex 9, paras. 22–23; Annex 13, para. 13; Annex 15, para. 20. ELSI's detailed proposals for its future development are contained in Annex 22. As explained by Charles F. Adams:

« If ELSI was going to be successful, it had no choice but to obtain a major Italian partner. After La Centrale decreased its ownership of ELSI in the early 1960's, ELSI was viewed as an ' American ' Company. We had learned by 1967 that, in order for a company to be successful in Italy, it had to be viewed as ' Italian ' and have an ' Italian link ' or ' contact ', which would provide access to important Italian markets and the contacts necessary to obtain vital support from the Italian government. The only way for ELSI to be viewed as an Italian company and have that necessary link was to acquire a major Italian partner, such as IRI and Ente Siciliano per la Produzione Industriale (' ESPI '), the Sicilian governmental entity responsible for funding and promoting local development ».

Annex 9, para. 24.

(43) Annex 15, paras. 24, 26 and 44, and Exhibits A and B. Because ELSI was a large employer, and because Sicily hoped to develop its electronics industry, the Sicilian Region had a strong interest in keeping ELSI operating. Annex 15, paras. 24, 26 and 27.

(44) Annex 15, paras. 25–30.

(45) Annex 9, para. 30; Annex 15, paras. 31–38.

(46) Annex 9, para. 30; Annex 15, paras. 38–40 and Exhibit C.

(47) *Ibid.* Sicilian officials were not prepared to enter a financial relationship with ELSI without IRI's support. Annex 9, para. 31; Annex 15, paras. 37–38.

(48) Annex 15, para. 21. They made this business judgment well known to the Government of Italy. Annex 9, para. 28; Annex 15, para. 21.

CHAPTER II

INTERVENTION BY THE GOVERNMENT OF ITALY TO PREVENT THE ORDERLY LIQUIDATION OF ELSI

Raytheon and Machlett decided in March 1968 to close ELSI and take it through an orderly liquidation. However, the Mayor of Palermo, acting as an official of the Italian government, requisitioned ELSI's assets to prevent the liquidation. The President of Sicily threatened that the requisition would be maintained indefinitely unless Raytheon contributed additional capital, kept the plant open and unilaterally absorbed ELSI's losses. With its assets being held by the Italian Government, and debts coming due, ELSI had no choice but to declare bankruptcy.

SECTION 1. – *The Decision to Liquidate ELSI.*

Because their discussions with leaders of the Italian Government and others in Italy did not appear to be leading to a successful conclusion, ELSI's shareholders began seriously to plan to close and liquidate ELSI to minimize their losses (1). They had made a business judgment not to infuse additional capital into ELSI if ELSI could not be made self–sufficient, since it appeared that further investments, like earlier investments, would be lost (2). Without an additional capital contribution, the shareholders would eventually have no alternative under Italian law but to liquidate (3).

Raytheon's management and shareholders continued to meet with Italian officials through the first quarter of 1968, stressing that ELSI's shareholders were considering closing the plant (4). Despite periodic mention of possible cooperation at some future time (5), Italian agencies were unwilling to finalize any plan to keep ELSI in business (6).

To prepare for ELSI's liquidation, therefore, Raytheon sent its Vice President, Joseph Oppenheim, to Palermo to be ELSI's Chairman. Mr. Oppenheim had the strong financial and market expertise needed to conduct the liquidation, and was assisted by similarly experienced senior management officials (7).

Under a comprehensive liquidation plan prepared by Raytheon Europe's Controller Joseph Scopelliti along with Mr. Oppenheim and others, ELSI would maintain a limited operation to complete work–in–progress and fill existing purchase orders, thereby preserving it as a going concern and making it more attractive to potential purchasers. All possible steps were to be taken to maintain good relationships with ELSI's customers and suppliers so that potential purchasers could be offered ELSI's businesses as a going concern, including its established name and reputation, customer and supplier relationships, and the necessary patent and trademark licenses and technical assistance from Raytheon and Machlett, in addition to the equipment

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(1) Annex 9, paras. 32–35; Annex 13, para. 13; Annex 14, para. 3; Annex 17, paras. 5–14.
(2) Annex 9, para. 20; Annex 15, para. 21; Annex 26, para. 4.
(3) Annex 15, para. 42–43; Affidavit of Avv. Giuseppe Bisconti, Studio Legale Bisconti, Rome, para. 4, 11 Dec. 1986 (Annex 26).
(4) Annex 13, para. 13; Annex 15, para. 43.
(5) E.g., Annex 15, para. 44 and Exhibit B.
(6) Annex 9, para. 30; Annex 15, para. 42.
(7) Annex 9, paras. 32–35; Annex 15, paras. 49–53; Annex 26, para. 5.

and other tangible assets ([8]). ELSI's business would be offered for sale both as a total package and as individual product lines to maximize the price realized under the liquidation ([9]).

As of 31 March 1968, the book value of ELSI's assets was 17.05 billion lire (US$ 27,200,000) ([10]). ELSI's financial condition would, of course, have been stronger had it received the benefits of the widely-publicized Mezzogiorno incentive laws and had it been able to expand its position in the Italian market ([11]). This book value represented a fair measure of the value of ELSI's assets on a going concern basis ([12]). On the other hand, for internal planning purposes, Raytheon estimated that a guaranteed minimum of 10.84 billion lire (US$17,280,000) could be realized on a « quick sale » basis ([13]).

ELSI's liabilities, on the other hand, totalled some 16.66 billion lire (US$26,656,000) ([14]). Thus, from the sale of ELSI's assets on a going concern basis, enough money would have been realized to pay off ELSI's liabilities in full, including the amounts owed by ELSI to Raytheon, with a 391 million lire (US$625,600) surplus to Raytheon and Machlett as a small return on their investment ([15]).

At worst, if only 10.84 billion lire were realized, Raytheon intended to use the proceeds from the sale of ELSI's assets to pay in full ELSI's preferred and secured creditors and all of ELSI's smaller unsecured creditors ([16]). Raytheon reasonably anticipated, however, that the bank creditors with large unsecured, unguaranteed loans would quickly settle their claims at no more than 50 % of this value as part of the orderly liquidation, as such a settlement would guarantee prompt and substantial payment, as compared with receiving little or nothing in bankruptcy ([17]). In this event, the liquidation would cost Raytheon some 3.79 billion lire (US$6,082,600), for partial recovery of amounts owed to it on open account and to pay off the remainder of ELSI's guaranteed loans ([18]).

Raytheon's Italian counsel, Avv. Giuseppe Bisconti, advised ELSI and its shareholders in March 1968 that an orderly liquidation was both legally possible and prudent in view of

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([8]) Annex 9; Annex 15, paras. 49–53.

([9]) Annex 15, para. 51; Annex 17, para. 12; Annex 26, para. 5. ELSI's product lines are pictured and described in Annex 18 and Annex 19. An extensive exposition of the liquidation plan is contained in Annex 17, paras. 6–14.

([10]) Annex 13, Schedule B1.

([11]) Annex 17, paras. 3–4.

([12]) *Ibid.*, para. 15.

([13]) Annex 17, para. 16 and Schedules C1, C2, C3 and C4; Annex 17, paras. 7–10 and Exhibit A. This conservative valuation, personally prepared by Raytheon Europe's Chief Financial Officer and Controller, deliberately omitted the significant intangible value of ELSI's businesses, including:

> « [I]ts excellent reputation as a producer of reliable electronic products, and its experience and know-how in the electronics industry, its supplier and customer lists and market reputation, patent licenses and other rights to technology supplied by Raytheon and Machlett, and other contracts. Moreover, in ELSI's case, its products were backed by the strong names, technology and reputations of Raytheon and Machlett Laboratories, Inc., and it had established products with a reputation for quality. In our judgment, these items were of significant value and interest to potential buyers ».

Annex 17, para. 8. The plan was conservative to reflect « the minimum prospects of recovery of values which we could be sure of, in order to ensure an orderly liquidation process ». *Ibid.*

([14]) Annex 13, Schedule E (« Total Adjusted Claims »). This included some 5.71 billion lire (US$9,100,000) in principal and interest on loans guaranteed by Raytheon; some 1.14 billion lire (US$1,830,000) in amounts owed to Raytheon by ELSI; and some 9.81 billion lire (US$15,696,000) in other liabilities and expenses, including amounts required for severance pay, taxes, and other expenses of the liquidation. *Ibid.*

([15]) *Ibid.*, Schedule E; *see also*, Table at p. 60, *infra*.

([16]) Annex 13, Schedule F; Annex 17, para. 14.

([17]) Annex 17. As described *infra*, at p. 16, these banks were willing to settle at 50 % or less as part of an overall voluntary settlement. *See* Annex 26, para. 16; Affidavit of Joseph Oppenheim, former Chairman of the Board, Raytheon-ELSI, S.p.A., 22 Sep. 1971 (Annex 27); Affidavit of Charles H. Resnick, General Counsel, Raytheon Company, 8 Sep. 1971 (Annex 28); Affidavit of Avv. Giuseppe Bisconti, Studio Legale Bisconti, Rome, 20 Aug. 1971 (Annex 29). In fact, most unsecured creditors waited seventeen years until the bankruptcy closed and then received less than 1 % of their claims because ELSI was forced to declare bankruptcy. *See* Annex 26, Attachment. Raytheon and its subsidiaries with claims against ELSI were willing to accept settlements of 50 % or less from ELSI as part of the orderly liquidation. Annex 13, Schedule D; Annex 17, para. 14.

([18]) Annex 13, para. 16 and Schedule F, and detail at Schedules H4, 12 and J. As detailed *ibid.*, Schedule J, Raytheon and its wholly-owned subsidiary were owed 1.14 billion lire (US$1,830,000) for goods and services rendered on open account. *See also*, Annex 14, para. 3; Table at p. 60, *infra*.

ELSI's financial situation (19). With preparations for liquidation completed, and no apparent prospect of developing a cooperative business relationship with Italian authorities, ELSI's Board of Directors voted on 16 March 1968 to cease full-scale production on 29 March 1968 and liquidate the company (20). On 28 March 1968 ELSI's shareholders voted to affirm this decision (21).

SECTION 2. – *The Requisition of ELSI's Assets.*

On 27 March 1968, the President of the Sicilian Region threatened four officers of Raytheon Europe and ELSI that the Government of Italy would seize ELSI's plant and related assets if its shareholders proceeded with their plan for an orderly liquidation (22). On 29 March 1968, ELSI's management, acting pursuant to the decisions of ELSI's Board and shareholders, nonetheless determined that it had no alternative but to proceed with the liquidation plan (23). That night, the General Manager of the Ministry of Industry Commerce and Crafts, speaking for the Prime Minister of Italy, asked Mr. Clare to delay closing ELSI, stating that Raytheon would incur the Prime Minister's severe displeasure if the plant were closed (24). After consulting with Raytheon's President, Mr. Clare and his staff sent dismissal letters late the night of 29 March 1968 (25).

On 31 March 1968, at 6:45 a.m., the President of the Sicilian Region met with ELSI's Managing Director to inform him of the Italian Government's plan for ELSI. According to the President, the Italian Prime Minister had said that the Government of Italy would requisition ELSI's plant in order to prevent the liquidation (26). He stated that an ESPI-affiliated company would be formed to run ELSI until IRI could acquire ELSI's assets (27). In addition to their plan ultimately to acquire the assets, Italian officials did not want to allow ELSI to close on the schedule determined by ELSI's directors and shareholders. National elections were scheduled for May 1968, and government officials told Raytheon repeatedly that they did not want the plant to close, with resulting large-scale unemployment shortly before an election (28).

Accordingly, on 1 April 1968 the Mayor of Palermo issued an order, effective immediately, requisitioning ELSI's plant and related tangible assets for a period of six months (29). The

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(19) Annex 26, para. 4. Avv. Bisconti explains:
« I advised Raytheon about the Italian legal requirements for an orderly liquidation of an Italian company. Under Italian law, in particular under Articles 2447 of the Italian Civil Code, when a company's capital is depleted below a statutory minimum amount (at the relevant time, the statutory minimum was 1,000,000 Italian Lire), the directors are required to call a shareholders meeting in order that the shareholders bring the capital back at least up to the required statutory minimum. If the shareholders fail to take the required action, the company is dissolved as a matter of law under Article 2448 of the Italian Civil Code. ELSI's capital, after taking into account losses to date at that time, was well in excess of the minimum statutory requirement. It was therefore possible under Italian law for ELSI's shareholders to plan an orderly liquidation of the company ».
Ibid. ELSI would not at this point have been considered bankrupt under Italian law, as it was still able to pay its debts as they became due. Only later, when Italy had seized ELSI's assets to prevent the liquidation, were ELSI's directors forced to file a petition in bankruptcy under Italian law. Annex 26, para. 12, and discussion *infra*, pp. 14-15.

(20) Minutes of Raytheon-ELSI, S.p.A., Board of Directors Meeting, 16 Mar. 1968 (Annex 31).

(21) Minutes of Raytheon-ELSI, S.p.A., Shareholders Meeting, 28 Mar. 1968 (Annex 32).

(22) On 27 Mar. 1968, he stated that « the plant would almost certainly be requisitioned » if ELSI sent out letters of dismissal pursuant to the decisions of its Board of Directors. Annex 15, paras. 56-57 and Exhibit F.

(23) Annex 15, para. 58.

(24) Annex 15, paras. 58-59 and Exhibit G.

(25) Annex 15, para. 60.

(26) *Ibid.*, paras. 61-62 and Exhibit H.

(27) *Ibid.* According to the President, IRI preferred to acquire ELSI's assets for its own use rather than to work with Raytheon to keep ELSI open because IRI did not want to enter a partnership with Raytheon.

(28) Annex 15, paras. 46 and 58; Annex 26, para. 6.

(29) Requisition Decree, Mayor of the Municipality of Palermo, 1 Apr. 1968 (Annex 33).

order was based on a 1865 law that bestowed extraordinary power on Italian administrative authorities to « dispose of private property » for reasons of « grave public necessity [30] ». Among the stated reasons for the requisition were that « the local press is taking a great interest in the situation and ... is being very critical toward the authorities and is accusing them of indifference to this serious civic problem » and that « there is a grave public necessity and urgency to protect the general economic public interest (already seriously compromised) and public order [31] ».

On 2 April 1968, ELSI's management relinquished control of ELSI's plant and assets to the Mayor on the advice of local counsel [32]. As a result of the requisition, ELSI's owners and management were, as a matter of law, deprived of control over and the right to dispose of ELSI's assets, and could not proceed with the liquidation [33]. ELSI's relationships with its suppliers and customers were cut off abruptly, in-process inventories could not be converted to finished products, and neither ELSI's goods nor its other assets could be sold [34].

Although he had legal control of the plant, the Mayor did not attempt to reopen and operate it. Rather, Italian authorities allowed ELSI's former workers to occupy the plant [35]. ELSI representatives immediately sent cables asking the Mayor and other Italian authorities to revoke the requisition, but received no response [36]. On 9 April ELSI formally petitioned the Mayor to lift his order, arguing that the requisition was illegal and would only delay the solution of the problem and create false hopes among ELSI workers. The Mayor did not respond [37]. On 19 April, ELSI appealed the Mayor's order to the Prefect of Palermo, an official of the Italian Government empowered to hear appeals of decisions by local governmental officials [38]. ELSI argued that the requisition was illegal and arbitrary, and that the Mayor acted outside his authority in requisitioning the plant [39]. Although the Prefect ultimately held that the Mayor had acted unlawfully, he delayed issuing this decision for sixteen months, until after IRI had completed its acquisition of ELSI's plant and assets [40].

After having requisitioned ELSI's plant and other tangible assets, Italian authorities pressured Raytheon to reopen ELSI at Raytheon's own additional expense. On 19 April 1968, the President of the Sicilian Region told Raytheon representatives that the regional and national governments had agreed to form a management company to operate ELSI. He proposed that Raytheon participate as a minority or equal partner with the government, contributing substantial new capital to the venture and assuming complete responsibility for ELSI's past debts. He proposed that the new management company pay only a token rental (one Italian lira) for ELSI's facilities. He indicated that this arrangement would keep ELSI workers temporarily

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[30] Annex 26, para. 7; Article 7 of Law of 20 Mar. 1865, N. 2248, Attachment E (Annex 34). The requisition was based indirectly on a 1955 law establishing the Mayor's authority to issue « emergency and urgent orders » of this character. Presidential Decree of 29 Oct. 1955, N. 6 (Annex 35).

[31] Annex 33.

[32] Annex 21, paras. 18–19; Annex 26, para. 8.

[33] Annex 26, para. 7.

[34] Annex 26, para. 7. The devastating effect of the requisition is described by former Raytheon Controller Joseph Scopelliti in Annex 17, para. 17:

> « On April 1, however, the Mayor of Palermo requisitioned ELSI's plant and equipment. With the requisition of ELSI's assets, it was impossible to invite potential buyers to view ELSI's facilities and discuss the sale of the businesses. Moreover, in-process inventories could not be converted to finished products. Suppliers and customers were thus suddenly and abruptly suspended. ELSI's hard-earned market position was quickly taken away by competitors. Not only were the bulk of ELSI's assets suddenly not disposable, but it did not appear likely that Raytheon would ever regain control of them. The requisition action ended our chances of completing an orderly liquidation and obtaining a fair price for ELSI's businesses and assets ».

[35] Annex 21, paras. 19–21. So far as Raytheon can determine, the workers continued to have actual custody of the plant during the requisition and consequent bankruptcy until the plant was finally reopened. *Ibid.*, paras. 20–21; Annex 26, paras. 16–17.

[36] Annex 26, para. 9.

[37] Annex 26, para. 9.

[38] Appeal by Raytheon-ELSI, S.p.A., to the Prefect of Palermo of Requisition Decree of the Mayor of Palermo, 19 Apr. 1968 (Annex 36); *See also*, Annex 26, para. 9.

[39] *Ibid.*; Annex 36.

[40] *See infra*, p. 21. This delay in ruling appears to have been unprecedented. Annex 26, para. 10.

employed until IRI set up its own plant in Palermo, emphasizing that Sicily had a « single goal, to keep the workers employed ([41]) ».

The following day, the President of the Sicilian Region delivered to Mr. Oppenheim a memorandum stating in part:

> « On the premise that the intent of [Raytheon] is that of liquidating ELSI, I shall herein explain the reasons why it is absolutely impossible that this can take place for the time being:
>
> 1) Nobody in Italy shall purchase, that is to say IRI shall not purchase neither for a low nor for a high price, the Region shall not purchase, private enterprise shall not purchase. Let me add that the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favor any sale while the plant is closed.
>
> 2) The banks which have outstanding credits for approximately 16 billion lire, cannot and will not accept any settlement even at the cost of dragging the Company into litigation on an international level. .....
> .....
>
> It is obvious that every attempt will be made (even at the cost of long litigation) to obtain from Raytheon what is owed by ELSI.
>
> 4) In the event that the plant shall be kept closed, waiting for Italian buyers who will never materialize, the requisition shall be maintained at least until the courts will have resolved the case. Months shall go by ([42]) ».

The memorandum set forth a plan for keeping ELSI open temporarily, aiming toward the liquidation of ELSI at a later time. After consulting with Raytheon officials, Mr. Oppenheim formally rejected the proposal on 26 April, writing to the President of the Sicilian Region:

> « Regrettably your proposal to form a management company was a temporary caretaker measure which would not solve the fundamental problem, namely keeping ELSI in Sicily and making it a viable and vital industry. For this reason, we find it impossible to accept it.
>
> It is sad to see that after all our investment over the years, and all our appeals during the last year to public agencies and private industry to join us in putting new blood into a Sicilian industry, the only responses were the requisitioning of our plant and a proposal which would only aggravate ELSI's critical financial condition.
>
> We are therefore forced to file a voluntary petition for bankruptcy, as required by Italian law... ([43]) ».

SECTION 3. – *The Resulting Bankruptcy.*

The President's memorandum made clear that the requisition of ELSI's assets would continue indefinitely. Deprived of the income which the sale of its assets would produce, ELSI was no longer able to meet its financial obligations when due. Its attorney advised the Board of Directors to file for bankruptcy or face possible personal liability for company debts ([44]).

([41]) Minutes of Meetings in Palermo between Messrs. Joseph Oppenheim, Howard Hensleigh, Stanley Hillyer and President Carollo of Sicily, 19–20 Apr. 1968 (Annex 37); Memorandum from the President of the Sicilian Region, 20 Apr. 1968 (Annex 38).

([42]) Annex 38.

([43]) Letter from Joseph Oppenheim, Chairman of the Board, Raytheon–ELSI, S.p.A., to Hon. Vincenzo Carollo, President of the Sicilian Region, 26 Apr. 1968 (Annex 39).

([44]) Annex 9, para. 36; Annex 17, para. 19; Annex 26, para. 12; Annex 39; Affidavit of Charles H. Resnick, General Counsel, Raytheon Company, paras. 4–5, 19 Jan. 1987 (Annex 40). Avv. Bisconti details in his affidavit why the requisition forced ELSI to declare bankruptcy:

> « On the day after we filed the appeal to the Prefect, President Carollo of Sicily delivered a written memorandum to Raytheon threatening that the requisition would be prolonged indefinitely unless Raytheon abandoned its plans to close ELSI. I was informed of this immediately by Mr. Oppenheim. The disposability of ELSI's assets was a fundamental prerequisite to ELSI's shareholders' ability to take ELSI through an

On 25 April 1968, the Board of Directors accepted this advice and voted to file a voluntary petition in bankruptcy (45). The bankruptcy petition, which was filed on 26 April 1968, with the Civil and Criminal Tribunal of Palermo, stated in part:

> « On April 1, 1968 the Mayor of Palermo, alleging reasons of serious necessity and urgency, ordered the requisition of the plant and of the equipment of the Company. Such measure, which is considered by the Company illegal and arbitrary and moreover unfit to resolve the the economic problem of the Company and of the Sicilian industry, has deprived the Company of the freedom to dispose of its assets for a long period, annihilating every possibility for the orderly disposition of the corporate assets; the negotiations then in course for the disposition of part or all of the assets were prejudiced without recourse. Furthermore, in the last few days there were clear and express indications of a line of behavior intended to put the Company in even more serious difficulties.
> Because of the order of requisition, against which the Company has timely filed an appeal, the Company has lost the control of the plant and cannot avail itself of an immediate source of liquid funds; in the meanwhile payments have become due (as for instance installments of long-term loans; an installment of Lit. 800,000,000 [US$1,280,000] to Banca Nazionale del Lavoro became due on April 18, 1968 ...); it is acknowledged that it is impossible for the Company to pay such sums with the funds existing or available and such impossibility is due to the events of these last weeks (46) ».

The Civil and Criminal Tribunal of Palermo found ELSI bankrupt on 16 May 1968, and named Avv. Giuseppe Siracusa, a Palermo attorney, as Curator (hereinafter, « Trustee ») for the bankruptcy (47).

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orderly liquidation; they were relying on the proceeds of these sales in large part to pay ELSI's creditors in an orderly manner. Without the ability to dispose of its assets, ELSI would not have the liquidity needed to pay its debts as they came due and therefore would soon become technically insolvent under Italian law. All indications from the Italian Government were that the requisition would not be quashed in the near term. Because ELSI's illiquidity and its consequent inability to meet its obligations when due were caused by the requisition, and would continue, I advised ELSI's directors that they had an obligation to file a petition for a declaration of bankruptcy, failing which they could be held personally liable pursuant to Article 217 of the Bankruptcy Law, Royal Decree of March 16, 1942, N. 267. I had not previously contemplated such a step, since I saw no possibility of its being required by ELSI's financial situation prior to the requisition. Given the requisition, however, and the consequent inability to dispose of ELSI's plant and equipment, it was evident that ELSI would no longer be in a position to satisfy regularly its obligations and pay its debts as they came due ».

(Annex 26, paras. 11 and 12). The text of Article 217 of the Bankruptcy Law of Italy, Royal Decree of 16 Mar. 1942, N. 267, is attached as Annex 41.

(45) Minutes of Meeting of Raytheon-ELSI, S.p.A., Board of Directors, 25 Apr. 1968 (Annex 42). *See also*, Annex 40, paras. 4-5.

(46) Raytheon-ELSI, S.p.A., Petition for Bankruptcy to the Civil and Criminal Tribunal of Palermo, p. 6 26 Apr. 1968 (Annex 43).

(47) Raytheon-ELSI, S.p.A., Judgment of Bankruptcy, Civil and Criminal Tribunal of Palermo, decided 7 May 1968, deposited 16 May 1968, registered 17 May 1968 (Annex 44). The Tribunal then appointed a five-member creditors committee including two representatives of ELSI's labor force, two representatives of ELSI's bank creditors, and a representative of Raytheon Europe. Documents filed in the Civil and Criminal Tribunal of Palermo designating Giuseppe Siracusa Trustee in Bankruptcy and selecting the creditors committee in the bankruptcy of Raytheon-ELSI, S.p.A., 4 June 1968 (Annex 45).

CHAPTER III

THE ACQUISITION OF ELSI'S ASSETS BY IRI

The Government of Italy publicly announced that it would take over ELSI's plant and related assets through one of IRI's subsidiaries. Raytheon and Italian officials discussed a possible agreement, but Italy broke off talks in November 1968. Notwithstanding its decision to acquire ELSI's assets, IRI then boycotted the series of three auctions held by the bankruptcy judge, while communicating directly with the trustee and the bankruptcy judge to obtain different purchase terms than had been set for the auctions. Arguing that the plant has been idle for a long period, an IRI subsidiary leased and soon thereafter purchased ELSI's plant and most of its assets at a fraction of their original worth.

SECTION 1. – *Public Announcement of the Decision to Acquire ELSI's Assets.*

On 25 July 1968, the Minister of Industry, Commerce and Crafts announced to the Parliament that the Government of Italy intended to take over ELSI's plant through one of IRI's subsidiaries (1). Until IRI's subsidiary was ready, ELSI's assets would be taken over by a new company formed by the Sicilian Region and some government agencies (2). He also indicated that Italy was still considering a general creditors' settlement outside the bankruptcy proceeding (3).)

Italian officials in fact met with Raytheon officers repeatedly from July to November 1968 to discuss a possible plan for a government take–over that might include a creditor settlement (4). The parties tentatively agreed on a plan which by early November 1968 was close to being finalized. In the course of these negotiations, all but one of the seven creditor banks agreed to accept 30 %–40 % of their unsecured claims. One bank decided that it would accept 50 % in a settlement (5).

On 13 November 1968, however, the Government of Italy announced its decision that an IRI subsidiary, IRI–STET, would « intervene » and take over ELSI's plant in Palermo (6). A senior Italian official confirmed five days later that Italy broke off nearly successful settlement negotiations because it had decided to allow IRI to take over ELSI's assets without a creditor settlement (7). On 30 November, former ELSI workers who had been occupying the plant

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(1) Address by Minister of Industry, Commerce and Crafts, Andreotti, to the Italian Parliament, 25 July 1968 (Annex 46). He explained that this subsidiary would acquire « a suitable site » and make other preparations to commence operations in Palermo, adding that « those familiar with situation in Palermo know that this is not difficult ». *Ibid.*, at p. 3.

(2) *Ibid.*, at p. 4. The plan announced by the Industry and Commerce Minister for Sicily to take over and operate ELSI's facilities corresponds directly to the plan outlined by the President of the Sicilian Region, speaking on behalf of the Italian Prime Minister, the day before the requisition. *Supra*, p. 12.

(3) Annex 46, at p. 4.

(4) Annex 26, para. 16; Annexes 27, 28 and 29.

(5) Annex 26, para. 16; Annex 29. The United States is not claiming for damages based on this settlement that fell through. The present claim is based on the assumption that Raytheon would have paid 50 % to *all* of the large creditor banks. *Ibid.*

(6) Press Release by the Government of Italy, 13 Nov. 1968 (Annex 47); Annex 26, para. 16.

(7) Annex 29.

took down the plant's entrance sign that said « ELSI » and replaced it with a new sign that said « STET ([8]) ». In December, IRI formed a new subsidiary in Palermo — Industria Elettronica Telecomunicazioni, S.p.A. (« ELTEL ») — to take over ELSI's plant and assets ([9]).

SECTION 2. – *The Acquisition of ELSI's Assets.*

A) – *IRI leases and re-opens ELSI.*

The bankruptcy court ordered an auction of ELSI's plant and equipment for 18 January 1969, over eight months after ELSI was declared bankrupt, and set a minimum bid of 5 billion lire (US$8,000,000) ([10]). The Government of Italy had announced its decision to take over ELSI's assets for its own use and no private parties bid at the auction ([11]).

By this time, ELSI's plant had been idle and occupied by former employees for over nine months, and they were bringing pressure on the regional and national governments to reopen the plant ([12]). As early as November 1968, government officials, as well as IRI, had promised that an IRI subsidiary would take over ELSI's plant and rehire most of the former employees ([13]). In attempting to reach an agreement on such reemployment, however, disputes arose between employee representatives and IRI about timing ([14]). Four hundred of ELSI's workers marched on Rome in early 1969 to protest the government's delay ([15]). IRI representatives and the Trustee in bankruptcy reportedly agreed on 18 March 1969 that IRI would acquire ELSI's assets, beginning with a lease of the plant for 150 million lire (US$240,000), followed by a negotiated purchase of the assets. This agreement, which was publicly reported, was reached in a meeting with the Prefect of Palermo ([16]).

While these negotiations were taking place, the bankruptcy court held a second auction on 22 March 1969, offering ELSI's assets for 6,223,293,258 lire (US$9,957,000) ([17]). As with the first, IRI boycotted this auction, and no other potential purchasers appeared ([18]). The

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([8]) Photograph of entrance to Elettronica Sicula, S.p.A. plant in Palermo, Sicily, 1962 (Annex 48); Photograph of entrance to Raytheon–ELSI S.p.A. plant in Palermo, Sicily, Nov. 1968 (Annex 49).

([9]) Annex 26, para. 20; « I.R.I. Breaks Its Promise – 200 Workers Remain Jobless », *L'Ora*, 5/6 Dec. 1968 (Annex 50).

([10]) Notice of Auction to be held 18 Jan. 1969, *Corriere Della Sera*, 11 Dec. 1968 (Annex 51).

([11]) Although several buyers expressed to the Trustee their interest in purchasing ELSI's assets, no buyers appeared at the first auction. Minutes of 18 Jan. 1969 Auction of ELSI's Assets (Annex 52); Annex 26, para. 18. As stated by Avv. Bisconti:

> « [S]ince the Italian Government had made clear its decision to have one of its agencies acquire ELSI's assets, potential purchasers had no incentive and received no encouragement to pursue their interest. Moreover, during the time ELSI's plant was occupied by its employees, it would have been difficult for the Curator to even show the assets ». *Ibid.*

([12]) Annex 50; « CGIL: The Undertakings for ELSI Are Not Being Fulfilled », *Giornale di Sicilia*, 8 Dec. 1968, p. 6 (Annex 53); « ELSI: Agreement Reached for Workers », *Giornale di Sicilia*, 30 Jan. 1969, p. 2 (Annex 54); « The ' EX ' [Employees] of ELSI Protest in Rome », *Giornale di Sicilia*, 30 Jan. 1969, p. 5 (Annex 55); « ELSI: Conclusive Meeting in the Prefecture », *Giornale di Sicilia*, 19 Mar. 1969, p. 14 (Annex 56). The workers' unions actively negotiated and lobbied the Government on their behalf. *See* Annex 50. As discussed in these news reports, IRI was represented in its negotiations for and acquisition of ELSI's plant and assets by SIEMENS, one of its industrial subsidiaries, and by ELTEL, which ultimately purchased the plant and related assets. *See*, e.g., Annexes 50, 54 and 56.

([13]) Annex 50.

([14]) Annexes 50, 53, 54, 55 and 56. IRI ultimately agreed to rehire the employees in phases over a one-year period. *See* Annex 56.

([15]) Annexes 55 and 56.

([16]) Annex 56. The Prefect, who had pending before him ELSI's April 1968 appeal of the requisition, actively participated in the March 1969 negotiations between IRI, Sicilian officials and the Trustee in Bankruptcy for the acquisition of ELSI's assets. *Ibid.* Despite his personal participation in IRI's acquisition of ELSI's assets, however, the Prefect delayed ruling that the requisition was illegal until August 1969, five months after the negotiations were concluded and sixteen months after Italy seized the plant but only forty days after IRI concluded its purchase of the assets. *See* discussion *infra*, p. 21.

([17]) Notice of Auction to be held 22 Mar. 1969, *The New York Times*, 5 Mar. 1969, p. 28 (Annex 57).

([18]) Minutes of 22 Mar. 1969 Auction of ELSI's Assets (Annex 58).

President of the Sicilian Region explained on 5 April 1969 that ELTEL's decision not to bid was part of a national government plan dating back to October 1968:

> « [President Carollo] said: ' There is an agreement: precise, written, and signed '. ... The agreement, as Carollo explained it last night, entailed the acquisition of the factory by IRI for the sum of four billion lire. It was even agreed that IRI would be absent from the first auction, participating instead in the second one, where the basic price was precisely four billion lire. ... ' What I am saying is so true — ' continued Carollo, ' that immediately after this conversation the directors of IRI came to Palermo in order to form ELTEL. ... The truth ... is that IRI (through ELTEL) has continued to speculate on a lower purchase price, no longer honoring its previous commitment; and it also happened that the consortium of creditors and the bankruptcy trustee backed out as well, bringing up the problem of the inventory to be acquired together with the plant ([19]) ».

A week after the second auction, ELTEL publicly proposed to the Trustee that it be allowed to lease and reopen the ELSI plant for an eighteen-month period at an annual rental charge of 150 million lire (US$240,000) ([20]).

The creditors committee met and expressed what the bankruptcy judge called an « essentially negative opinion » of the proposed lease ([21]), recommending that any such lease be limited to six to twelve months and be granted only if ELTEL agreed to purchase all of ELSI's inventoried raw materials for 1.8 billion lire (US$2,880,000) ([22]). Raytheon Europe's representative on the creditors committee vigorously opposed this lease, in part because of the nominal payment, but more fundamentally because it would discourage any potential competition for the purchase of ELSI's assets. As he elaborated in a petition to the bankruptcy judge:

> « IRI, notwithstanding the alleged commitments [to purchase ELSI's assets], has let two sales go unattended with the obvious purpose of causing in such way the price to become lower. The attitude of IRI leads one to suspect that this maneuver shall continue for several months until such time as the price of the plant, because of the reductions the law permits (but does not require), will go down to such a low value that the solution of the serious social problem represented by one thousand Elsi workers may also convert itself into an enormous bargain for IRI and into an enormous damage to ELSI creditors....
>
> .....
>
> It is impossible to see what benefit there may accrue to the creditors from the lease. On the contrary, it appears that the lease can only cause damage to the creditors because ELTEL, once it has obtained possession of the plant — notwithstanding the provision that may be included in the lease agreement that in the event of purchase of the plant or part thereof by third parties the same shall be terminated — shall have presumably no interest in purchasing the plant or, in any case, it shall have no urgency to purchase it and a consequence of all this shall be that, through successive auctions, the price shall be reduced to such a point as to depreciate completely the ELSI plant. On the other hand, a private group which might still think of purchasing the plant or part thereof, knowing of the aforementioned decision of the Italian Government and knowing that IRI is also in the possession of the plant, can only be absolutely discouraged even from taking into consideration such a possibility.
>
> [Moreover, the lease] shall make it impossible [for the liquidator] to sell the inventory at any reasonable price.
>
> .....

([19]) « ' There Was an Agreement ' Says Carollo », *Giornale di Sicilia*, 6 Apr. 1969 (Annex 59).

([20]) Minutes of Raytheon-ELSI, S.p.A., Creditors Committee Meeting, 29 Mar. 1969 (Annex 60); Submission by Trustee in Bankruptcy Giuseppe Siracusa to the Civil and Criminal Court of Palermo, 3 Apr. 1969 (Annex 61). As noted *supra*, p. 17, this lease arrangement was reportedly arranged in advance of the creditors committee meeting by IRI and the Trustee, in the presence of the Prefect. Annex 56.

([21]) Annex 61, p. 3.

([22]) Annex 60, p. 2.

> [I]nventory can be sold at a reasonable price only to whomever uses the plant; therefore, if the inventory is separated from the plant and if an attempt is made to sell the inventory separately, the only result shall be that the inventory will be sold as scrap or that it may be absolutely impossible to sell a substantial part thereof (23) ».

Notwithstanding the views of the creditors committee, the Trustee recommended and the bankruptcy judge agreed to grant ELTEL the lease on the terms it requested (24). Raytheon Europe's appeal of the lease to the Civil and Criminal Tribunal of Palermo was denied on 9 May 1969, primarily on the ground that the lease could preserve the already reduced value of ELSI's assets, which had remained unused because of the requisition (25).

B) *IRI acquires ELSI's work in process.*

In April 1969, ELTEL proposed to buy ELSI's work in process — material left on production lines when the plant was requisitioned — for 105 million lire (US$168,000). The creditors committee met on 2 May 1969 to consider this offer, which was for about 48 % of the 217 million lire (US$347,200) at which this material had been inventoried and appraised (26). Raytheon Europe's representative on the creditors committee opposed ELTEL's offer because of this low price and other grounds, arguing in part that the sale should not be considered prior to the auction proceedings scheduled for early May 1969 (27). The other members of the committee agreed to the sale despite ELTEL's low offer, in part because this inventory had already been sitting unused for over 12 months (28).

On 3 May 1969, IRI boycotted the third auction of ELSI's assets held by the bankruptcy judge (29). ELTEL had notified the bankruptcy court on 16 April that it wanted to buy the plant and equipment only and not the supplies, « since these are not indispensible for administration ». ELTEL indicated that it would bid at the third auction if it could make a bid of 3.2 billion lire for the plant and equipment only — rather than for the plant, equipment, inventory and supplies (30). The court, however, did not change the terms of the auction and ELTEL did not bid. No other bidders appeared either (31).

On the same day as the third auction, however, the Trustee petitioned the bankruptcy judge to approve the sale of ELSI's work in process to ELTEL for the exact price ELTEL had offered, reasoning that the reduced price was justified by the long period of plant inactivity

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(23) Brief to the Civil and Criminal Tribunal of Palermo from Avv. Giuseppe Bisconti, 8 Apr. 1969, pp. 4–7 (Annex 62).

(24) Submission to Civil and Criminal Tribunal of Palermo by Avv. Giuseppe Bisconti, 10 Apr. 1969, pp. 3–5 (Annex 63). In justifying his recommendation, the Trustee noted:

> « The rental of Lire 150,000,000 per year, considered abstractly, is neither adequate nor remunerating, however if it is related to the obligations which the lessee shall undertake to safeguard the integrity, and to maintain also for the future, of the value of the plant, it shall on the other hand result to be definitely convenient ». *Ibid.*, at p. 4.

(25) Decree of the Civil and Criminal Tribunal of Palermo, 9 May 1969 (Annex 64).

(26) Minutes of Creditors Committee Meeting, Raytheon–ELSI, S.p.A., 2 May 1969 (Annex 65).

(27) Annex 65. Raytheon Europe's representative stated that IRI was simply pursuing its « well thought–out plan which is, in essence, geared to a maximum devaluation of ELSI's business from which ELTEL alone would benefit ». *Ibid.*, at p. 3.

(28) *Ibid.*, at pp. 3–4; Annex 26, para. 22. To Raytheon's knowledge, this material was not offered to any other purchasers, since the plant and its assets were offered as a single package for everyone except IRI. *Ibid.*

(29) Notice of Auction to be held 3 May 1969, *The New York Times*, 8 Apr. 1969, p. 71 (Annex 66); Minutes of 3 May 1969 Auction of ELSI's Assets (Annex 67). The bankruptcy judge set a price of 5 billion lire (US$8,000,000) at this auction. The disparity in prices among the first three auctions arises in part because the bankruptcy judge slightly varied the particular assets that were offered at each auction in addition to ELSI's plant. *See* Annexes 51, 57 and 66.

(30) Submission to the Civil Court of Palermo by ELTEL, S.p.A., 16 April 1969 (Annex 68).

(31) Annex 67.

and by ELTEL's lease of the plant (32). The Court approved the sale at the price set by ELTEL (33).

C) – *IRI completes its acquisition of ELSI's assets.*

Having acquired control of ELSI's plant through the lease and ownership of its work in process, ELTEL quickly negotiated a price to its liking for ELSI's remaining assets.

On 27 May 1969, ELTEL submitted to the bankruptcy judge its offer to buy the remaining plant, equipment and supplies for 4 billion lire (US$6,400,000) (34). The Trustee proposed to the creditors committee that it accept this offer, subject to some minor changes (35). The committee considered the proposal, as modified, on 6 June and approved it by a split vote (36). On 7 June the bankruptcy judge scheduled an auction for 12 July 1969 on the agreed terms (37). After Raytheon Europe unsuccessfully appealed the judge's decision to sell ELSI's assets to ELTEL (38), ELTEL appeared at the fourth auction and purchased ELSI's plant and remaining assets (39). The Civil and Criminal Tribunal of Palermo approved this purchase and assigned ELSI's remaining assets to ELTEL the next day (40). Thus, on 12 July 1969, ELTEL finally completed its purchase of ELSI's assets for 4.006 billion lire (US$6,409,600), a price it had essentially determined eight months earlier (41).

The Government of Italy thus achieved its objective of acquiring ELSI's plant and other assets without paying or otherwise cooperating with ELSI's shareholders, Raytheon and Machlett, and without paying a freely market-determined price. IRI's subsidiary Italtel, S.p.A., now uses ELSI's plant to manufacture telephone equipment (42).

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(32) Submission to the Civil and Criminal Tribunal of Palermo by Trustee Giuseppe Siracusa, 3 May 1969, subsequent order by the Tribunal, 5 May 1969 (Annex 69). The Trustee stated:

« According to the lease agreement the undersigned [Trustee] is obligated to remove the material in question which removal costs a considerable amount of money and time and results in a substantial reduction in value of the material proper.... In view of the fact that the material is one year old and difficult to sell while its removal from the assembly line would only reduce its value, the undersigned is in favor of selling it for, L. 105,000,000 » (Annex 69).

(33) Annex 26, para. 22; *see also*, Transcript of Bankruptcy Hearing, Civil and Criminal Court of Palermo 13 July 1969 (Annex 74).

(34) Submission to the Civil Court of Palermo by ELTEL, S.p.A., 27 May 1969 (Annex 70). This offer, which was accepted, was the price reportedly negotiated by IRI and the Trustee eight months earlier, in October 1968 (Annex 59). Earlier in May 1969, ELTEL apparently attempted unsuccessfully to get an even lower price for the assets. Two days after the third auction, on 5 May 1969, ELTEL submitted to the bankruptcy judge its own appraisal of ELSI's plant and the other remaining assets at 2.381 billion lire (US$3,809,600). Annex 26, para. 23.

(35) Minutes of Creditors Committee Meeting, Raytheon–ELSI, S.p.A., 6 June 1969 (Annex 71).

(36) *Ibid.* The two ELSI employee representatives voted in favor, the representative of general creditors abstained, the bank representative was absent, and the Raytheon Europe representative voted against the proposal. *Ibid.*

(37) Notice of Auction to be held on 12 July 1969 (Annex 72).

(38) Annex 26, para. 24.

(39) *Ibid.* To encourage ELTEL not to prolong any further its efforts to secure ELSI's assets at an even lower price, Raytheon Company agreed in late June 1969 to extend to ELTEL a license for its existing Italian patents and certain proprietary information. Letter from Joseph Oppenheim, Vice President, Raytheon Company, to Industria Elettronica Telecomunicazioni, S.p.A., 26 June 1969 (Annex 73).

(40) Annex 74.

(41) Annex 59.

(42) *See* I.R.I., Istituto per la Ricostruzione Industriale, 1985 *Yearbook*, pp. 260–263 (Annex 75). Italy is thus using ELSI's plant to produce one of the new products proposed by ELSI in its 1967 Report to Italian officials. Annex 22, p. 28; Annex 15, para. 64.

CHAPTER IV

SUBSEQUENT ITALIAN COURT ACTION

After IRI had completed its purchase of ELSI's assets, the Prefect finally ruled that the requisition had been illegal. The Trustee then sued the Mayor and Italian Interior Minister for damages based on this ruling, but was awarded only damages for loss of possession during the requisition. Five government-controlled banks sued Raytheon in Italian courts to recover for the unsecured, unguaranteed loans they had made to ELSI. All of these suits resulted in judgments for Raytheon. Bankruptcy proceedings were completed in 1985, with secured and preferred creditors receiving payment in full and unsecured creditors receiving only a small fraction of the amounts they had claimed.

SECTION 1. – *The Illegality of the Requisition and Aftermath.*

As noted above (1), on 19 April 1968, ELSI appealed the Mayor's 1 April 1968 requisition of its assets to the Prefect of Palermo, an official of the Italian Government empowered to hear appeals of decisions by local governmental officials. The Prefect ruled on ELSI's appeal of the requisition order on 22 August 1969, over sixteen months after the appeal was filed, but only 40 days after ELTEL had completed its acquisition of ELSI's assets (2). The Prefect found the requisition to have been illegal, ruling that it could not possibly have achieved its stated purposes (3). Specifically, the Prefect ruled that « the order is destitute of any juridical cause which may justify it or make it enforceable (4) ».

The Mayor appealed the Prefect's Order to the Italian Council of State and the President of Italy (5). His appeal was dismissed on the ground that he lacked standing to appeal a decision of the Prefect, his administrative superior (6). The Prefect's ruling therefore stands as a final decision of Italian judicial authorities that the requisition was unlawful.

The Prefect's delay in ruling on ELSI's appeal of the requisition was apparently unprecedented. In other cases in which the 1865 law had been invoked as a basis for requisition of an industrial plant, the Prefect of the relevant jurisdiction quickly quashed the requisitions (7). In most of these cases, the requisitions were quashed in less than thirty days, sometimes in as little as one day (8).

Based on the Prefect's decision, the Trustee brought suit on behalf of ELSI's bankrupt estate on 16 June 1970 in the Court of Palermo against the Minister of the Interior of Italy and the Mayor of Palermo for damages to ELSI resulting from the illegal requisition (9). In

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(1) *Supra*, p. 13.
(2) Judgment of Prefect of Palermo, 22 Aug. 1969 (Annex 76).
(3) *Ibid.*, pp. 10–11.
(4) Annex 76, p. 11. The Prefect noted that the Mayor's actions were motivated in part by his desire to show the local press that he was « fac[ing] the problem in some way ». *Ibid.*, p. 12.
(5) Council of State Opinion Regarding Appeal by Mayor of Palermo, 19 Nov. 1971 (Annex 77); Ruling by President of Italy Dismissing Appeal by Mayor of Palermo, dated 22 Apr. 1972, registered 19 May 1972 (Annex 78).
(6) *Ibid.*
(7) Annex 26, para. 10.
(8) *Ibid.* In none of these cases did the Prefect delay his ruling for more than thirty days. *Ibid.*
(9) Annex 78.

his complaint, the Trustee stated that the requisition had not only caused ELSI's bankruptcy, but had also impeded its success:

> « In consideration of the heavy legal and economical situation created by the appealed order of requisition, Raytheon–Elsi S.p.A. was obliged to file for bankruptcy, which was declared by decision of this Tribunal on May 7–9, 1968.
> Even after the declaration of bankruptcy the Trustee in bankruptcy, Avv. Siracusa, could not take possession of the plant and relative equipment due to the order of requisition issued by the Mayor of the City of Palermo, which remained in effect until September 30, 1968, causing unimaginable damages for the bankrupt company and, therefore, for the creditors ([10]) ».

The Trustee sought damages of 2.395 billion lire (US$3,834,500) plus interest for the decrease in value of ELSI's plant and electronic equipment during the requisition, and for ELSI's inability to dispose of the plant and equipment during the requisition period ([11]).

On 2 February 1973, the Court of Palermo ruled that the Trustee was not entitled to compensation for the requisition ([12]). On appeal, the Court of Appeals of Palermo found on 24 January 1974 that the Trustee was entitled at least to compensation from the Minister of the Interior for loss of use and possession of ELSI's plant and assets during the six–month requisition period. It therefore awarded, in effect, a « rental » payment of some 114 million lire (US$171,000), computed as half the annual rate of five percent of the total value of the assets ([13]). This decision was upheld on appeal by the Supreme Court of Appeals on 26 April 1975 ([14]). The amount of the judgment was ultimately received by the Trustee and, less costs and expenses, distributed to ELSI's creditors ([15]).

SECTION 2. – *Italian Bank Suits Against Raytheon.*

Upon demand, Raytheon Company paid 5.7876 billion lire (US$9,283,600) as payment in full of those of ELSI's bank loans that it had guaranteed ([16]). Seven banks had made unguaranteed loans to ELSI that were outstanding on 1 April 1968, when Italy requisitioned ELSI's plant and assets ([17]).

Between 1969 and 1971, five of these banks that were owned or controlled by IRI or the Sicilian Region filed suits against Raytheon in Italian courts to recover the loans they had made to ELSI ([18]). All of these lawsuits resulted in judgments in favor of Raytheon after many years

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([10]) Lawsuit for damages filed by the Trustee against the Minister of the Interior and the Mayor of Palermo, 16 June 1970, p. 2 (Annex 79).

([11]) The suit was brought by the Trustee seeking compensation for the bankruptcy estate. It was not brought. nor could it have been brought under Italian law, on behalf of ELSI's shareholders, Raytheon and Machlett, Annex 26, para. 28.

([12]) Judgment of the Court of Palermo, decided 2 Feb. 1973, filed 29 Mar. 1973, registered 4 Apr. 1973 (Annex 80).

([13]) Judgment of the Court of Appeals of Palermo, registered 24 Jan. 1974, p. 24 (Annex 81). The United States dollar equivalent in the text is derived from the exchange rate on 24 Jan. 1974 of United States $1.00 to Italian L. 666.667 (Annex 12).

([14]) Judgment of the Supreme Court of Appeals, 26 Apr. 1975 (Annex 82). The Court determined that the Court of Appeals incorrectly computed the damages owed to the Trustee, but that the decision was nonetheless « equitable ». *Ibid.*, p. 6.

([15]) Annex 26, Attachment.

([16]) Annex 13, para. 29 and Schedule II; Annex 14, Exhibit B. This total includes principal and interest, as detailed in Annex 13, Schedule II.

([17]) Annex 13, Schedule D.

([18]) The following banks filed suit against Raytheon in Italian courts on the dates indicated in parentheses: Il Credito Italiano (7 May 1969), Banco di Roma (23 June 1969), Banca Commerciale Italiana (15 January 1969), Banco di Sicilia (13 March 1970), and Cassa Centrale di Risparmio V.E. (18 July 1970). IRI controls the first three of these banks. Banco di Sicilia and Cassa Centrale di Risparmio V.E. are government–controlled banks which have their headquarters and primary place of business in Sicily. Two of ELSI's unguaranteed creditors, IRFIS and First National City Bank of New York, did not sue Raytheon. President Carollo of the Sicilian Region had explicitly threatened that Raytheon would be subjected to this type of litigation if ELSI's shareholders decided to close ELSI and take it through an orderly liquidation (Annex 38).

of litigation (19). The courts dismissed the banks' claims that Raytheon had guaranteed the loans and, in keeping with well-established precedent, held that Raytheon's interest in ELSI did not make it a « sole shareholder » that could be held liable for loans to ELSI (20). All of the decisions totally cleared Raytheon of any explicit or implicit misconduct with respect to ELSI (21).

SECTION 3. – *The Conclusion of the Bankruptcy Proceedings.*

In the bankruptcy, creditors presented claims against ELSI totalling some 13 billion lire (US$20,000,000) (22). Raytheon and one of its subsidiaries, Raytheon Service Company (« RSC »), had unsecured claims against ELSI of some 1.14 billion lire (US$1,830,000) for goods and services they had advanced to ELSI on unsecured open accounts (23). On advice of Italian counsel, however, Raytheon and RSC did not file claims in the bankruptcy proceeding because it was clear that they would not receive enough in the bankruptcy to justify their filing costs (24).

The bankruptcy proceedings closed in November 1985.

According to the bankruptcy reports, the bankruptcy realized only some 6.37 billion lire (US$10,192,000) for ELSI's assets, as compared with the minimum liquidation value of 10.84 billion lire (US$17,344,000) (25). Of the amount realized, some 6.08 billion lire (US$9,728,000) went to pay banks, employees, and other creditors (26). The remainder went to pay bankruptcy administration, tax, registry, and customs charges. All of the secured and preferred creditors who filed claims in the bankruptcy were paid in full. The unsecured creditors received less than 1 % of their claims (27).

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(19) Annex 26, para. 26.
(20) *Ibid.*
(21) *Ibid.*
(22) *Ibid.*, Exhibit A; Annex 30, Schedule D.
(23) Annex 13, Schedule D; Annex 14, Exhibit C; Annex 26, para. 14. Raytheon Service Company is a United States corporation incorporated in Delaware and wholly owned by the Raytheon Company. Annex 13, para. 31. Certificate of Good Standing, State of Delaware, Raytheon Service Company, 22 Dec. 1986 (Annex 83); Proof of Raytheon Company's 100 % ownership of Raytheon Service Company, 8 Oct. 1986 (Annex 84).
(24) As Avv. Bisconti explains:
« Under Italian law, the filing of documents supporting a claim in bankruptcy may be subject to a registration tax, the amount of which is a percentage of the claim and varies depending on the nature of the claim. If Raytheon and RSC had filed in bankruptcy, they would have paid a substantial tax. Given ELSI's many secured creditors, the likelihood that the full value of ELSI's assets would not be realized in the bankruptcy proceeding, and the costs of the bankruptcy, I advised Raytheon and RSC not to file claims at the time. Under Italian law, it would have been possible for them to file such claims at a later stage in the proceedings and participate in distributions subsequent to their filing. As the bankruptcy proceeded to a conclusion, however, it became very apparent that Raytheon and RSC would not recover enough in the bankruptcy to justify the costs of filing. On my advice, therefore, these companies did not file in the bankruptcy ». Annex 26, para. 14.
(25) Annex 13, Schedules C1, C2, C3 and C4; Annex 26, Exhibit A; Annex 30, para. 6 and Attachment B.
(26) Annex 30, Attachment B, Schedule A.
(27) Annex 26, Attachment; Annex 30, Attachment B.

PART III

THE JURISDICTION OF THE COURT

Jurisdiction is based on Article 36(1) of the Statute of the Court, as read in conjunction with Article XXVI of the 1948 Treaty of Friendship, Commerce and Navigation (the « Treaty ») between the two countries (1). Article 36(1) expressly recognizes the ability of parties to the Statute — such as Italy and the United States — to provide by treaty for the Court to exercise jurisdiction over specified matters. In Article XXVI of the Treaty, Italy and the United States agreed that:

> « Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means ».

As a result of the requisition and subsequent bankruptcy of ELSI, and related actions as described in the Statement of Facts above, a dispute arose between Italy and the United States concerning the interpretation and application of the Treaty and its 1951 Supplement (2). The Government of the United States contends that Italy's actions have violated a number of provisions of the Treaty and Supplement, as detailed below. The Government of Italy, however, has denied this contention.

This dispute has not been « satisfactorily adjust[ed] by diplomacy ». As detailed in Attachment 2 of the Application submitted by the United States in this case, the Governments of the United States and Italy have attempted to resolve this dispute by diplomatic means for many years without reaching any mutually satisfactory agreement. Finally, in the fall of 1985, the two governments agreed in principle that a contentious proceeding under the Treaty would be an appropriate means of resolving the dispute (3). No efforts at settlement are pending.

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(1) Annex 1.

(2) Article IX of the Supplement provides that it shall « constitute an integral part of the said Treaty of Friendship, Commerce and Navigation ». Annex 2.

(3) Either party has, of course, a unilateral right to invoke the jurisdictional provisions of the Treaty. *See*, e.g., *United States Diplomatic and Consular Staff in Tehran, judgment, I.C.J. Reports* 1980, pp. 26–27, in which jurisdiction was premised, *inter alia*, on the unilateral invocation of Article XXI(2) of the 1955 Treaty of Amity. Economic Relations, and Consular Rights between the United States and Iran, 284 UNTS 93, which contained linguage virtually identical to that contained in Article XXVI of the Treaty between the United States and Italy,

PART IV

THE CLAIMS OF THE UNITED STATES

CHAPTER I

INTRODUCTION

Pursuant to the Treaty and its Supplement, Italy assumed a number of specific obligations to protect investments made by United States nationals in its territory. A major purpose of this Treaty was to encourage investment by nationals of one country in the economy of the other, by creating a code of fair treatment for the protection of foreign investors (1). Thus, the Treaty contains numerous specific and interrelated provisions for the protection of foreign investors, reflecting the parties' fundamental intention to provide a framework which would foster a favorable climate for investment (2).

As stated in the Majority Report to the Italian Senate on the Treaty:

« The underlying principles are simple and fundamental. Full respect for the respective sovereignty and full equality between the two parties, and consequently reciprocity of treatment; systematic application of the most-favored-nation principle and thus mutual granting of the most-favored treatment to the foreign citizens and foreign interests; a spirit of friendship in the implementation of the Treaty, goodwill when the precise provision cannot be satisfied, fair play [so in Italian] in all cases (3) ».

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(1) As noted in the Majority Report to the Italian Senate:

« there is nothing here that could create conditions of privilege, that is not justified under law and equity, and that does not correspond to the same interest on the part of the Italian economy. The latter has a need, indeed an urgent need, for foreign capital. Certainly these general dispositions are not sufficient in themselves to hasten the influx, but there remains the appropriateness of these precautionary measures against any possible creation of persecutory or discriminatory conditions ».

Senate of the Republic, Bills and Reports – 1948–1949, N. 344–A, Report of the Majority, p. 9, Sent to the Office of the President on 28 May 1949 (Annex 85).

(2) « [T]his is a general treaty, ... It is thus a framework that determines in a definitive, organic and lasting way the relations between the citizens of the two countries and the legal status that each country grants to citizens of the other country living on its territory ».

Ibid., p. 2.

As a leading commentator points out:

« In a real sense, therefore, the FCN treaty as a whole *is* an investment treaty; not a mosaic which merely contains discrete investment segments. It regards and treats investment as a process inextricably woven into the fabric of human affairs generally; and its premise is that investment is inadequately dealt with unless set in the total ' climate ' in which it is to exist .... These treaties focus, in fundamental terms of enduring value over the long range, upon the line between policy favorable and policy unfavorable to foreign investment: namely, hospitality to and equality for the foreigner under the law, and respect for his person and his property ».

H. Walker, « Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice », 5 *American Journal of Comparative Law*, p. 229, at pp. 244, 247 (1956).

(3) Annex 85, pp. 2–3. *See also, Commercial Treaties: Hearings Before the Special Subcommittee on Commercial Treaties and Consular Conventions, Committee on Foreign Relations, United States Senate*, 82d Cong., 2d

As described by the United States Department of State, the Treaty was « designed to assure to economic enterprises the ability to operate in a foreign country on a basis of true competitive equality with local concerns (4) ».

Sess., p. 15 (1952) (Annex 86). For the United States, this reflected a significant shift in emphasis after World War II:

« Perhaps the most important respect in which the current [post war] treaties differ from those of the twenties and thirties is the greatly increased emphasis on the encouragement of American private investment abroad, by the expansion and strengthening of provisions relating to the protection of the investor and his interests ». Annex 86, p. 4 (Remarks of Harold F. Linder, Deputy Assistant Secretary of State for Economic Affairs).

Materials from ratification proceedings in the United States Senate are cited herein, together with comparable materials from Italian internal ratification proceedings, to demonstrate that the two parties had a common understanding of the meaning and purpose of the Treaty. Standing alone, such internal ratification proceedings cannot, of course, bind another party.

(4) « Commercial Treaty Program of the United States », Department of State Publication 6565, Commercial Policy Series 163, p. 2 (Jan. 1958) (Annex 87).

CHAPTER II

INTERFERENCE WITH THE MANAGEMENT AND CONTROL OF ELSI

SECTION 1. – *Article III of the Treaty.*

Article III of the Treaty guarantees that nationals of either party may participate in corporate enterprises organized under the other's laws. Article III(1) provides most-favored nation treatment to United States nationals, including corporations, to organize and participate in Italian corporations (1). It also provides that Italian corporations controlled by United States nationals shall enjoy most-favored nation treatment with respect to exercising the functions for which they were created.

Article III(2) extends further guarantees of treatment in the case of corporations engaged in most activities (2):

> « The nationals, corporations and associations of either High Contracting Party *shall be permitted*, in conformity with the applicable laws and regulations within the territories of the other High Contracting Party, *to organize, control and manage corporations* and associations of such other High Contracting Party for *engaging in commercial, manufacturing*, processing, mining, educational, philanthropic, religious and scientific activities » (Emphasis added).

Like Article III(1), Article III(2) specifically addresses both the rights of United States persons seeking to invest in Italian corporations and of the Italian corporations which they control. Paragraph 2 provides in its first sentence that United States investors shall be permitted to « organize, control and manage » Italian corporations engaged in, *inter alia*, commerce and manufacturing, subject only to the requirements established by local law (3). This provision

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(1) Article III(1) provides that foreign corporations:

« shall enjoy, ... rights and privileges with respect to organization of and participation in corporations and associations of such other High Contracting Party, ... in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to nationals, corporations and associations of any third country ».

Italian corporations so organized:

« and controlled by such nationals, corporations and associations, shall be permitted to exercise the functions for which they are created or organized, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to corporations and associations that are similarly organized or participated in, and controlled, by nationals, corporations and associations of any third country ».

(2) Because each country had restrictions on the rights of aliens to establish and manage companies engaged in certain activities, Italy and the United States were not able to make the broader protection of Article III(2) universal. The activities enumerated reflected those in which neither country had any domestic legal impediments to conferring an unqualified right on the other's nationals to organize, manage and control corporations or associations. Article III(2) further provides that corporations so organized, which are:

« controlled by nationals, corporations and associations of either High Contracting Party ... *shall be permitted to engage in the aforementioned activities* therein, in conformity with the applicable laws and regulations, *upon terms no less favorable than those* now or hereafter *accorded* to corporations and associations of such other High Contracting Party controlled by its own *nationals*, corporations and associations» (Emphasis added)

(3) This qualification should be construed to permit regulation of the exercise of management and control. but not abrogation of that right. As noted by Walker, the phrase « in conformity with applicable laws and regulations », as it occurs in this Treaty, « is framed in such a manner as to imply that it does not constitute a reservation detracting from the Treaty right; and such phraseology has been omitted from subsequent treaties ». H. Walker, « Provisions on Companies in United States Commercial Treaties », 50 *American Journal of International Law*, p. 373 at p. 384, n. 53 (1956). In view of the possible ambiguity of this qualification, however, the Supplementary Agreement provided stronger protection by absolutely prohibiting arbitrary and discriminatory interference, whether or not in accordance with local law. *See* Section 2, *infra*.

recognizes the need for conformity with local law, but does not refer to treatment « no less favorable » than that accorded to corporations owned by local nationals. It is by its terms something other than a guarantee of national treatment. It is, rather, a guarantee of non–interference with management and control. United States nationals « shall be permitted » to organize, manage and control Italian corporations without impediment or interference, except for the requirements or constraints imposed by law. This guarantee encourages investment by assuring investors of their freedom to manage and protect their investment.

Italy thus has an obligation to the United States under Article III(2) to allow United States corporations to organize, manage, and control Italian corporations operating in certain specified areas without governmental intervention, except for such conditions and regulations as are established by law.

This obligation reflects a particular emphasis, in the Treaty as a whole, on the importance of assuring an investor that, once he invests in a company in the other country, he will receive fair treatment:

> « [T]here can be little in the way of effective promotion [of investment] unless there is effective protection, for new capital is unlikely to venture where existing capital is ill–treated. Hence the emphasis on the protective feature of the treaty provisions on investments is essentially a matter of placing first things first (4) ».

The first articles of the Treaty, the so–called « establishment » provisions, are particularly important in this regard (5). As stated in the Majority Report to the Italian Senate:

> « The first articles, which are the most important ones, guarantee to citizens of the other party, to juridical persons, commercial companies, enterprises and associations constituted by them, the exercise of commercial and non–commercial activities in the widest sense. Full rights, then, to any activity, to acquisition, possession, administration of movable and real property; to organize, direct, manage companies, ... etc. (6) ».

The United States submits that the requisition of ELSI's plant and related assets constituted an interference with Raytheon's and Machlett's management and control of ELSI which was not in accordance with applicable law, in violation of Article III(2) of the Treaty. Since Raytheon and Machlett are incorporated in the United States, they are United States corporations for purposes of the Treaty (7). ELSI was an Italian corporation engaged in manufacturing and commerce — two of the activities enumerated in Article III(2). The Government of Italy thus was obligated by Article III(2) not to interfere with Raytheon and Machlett's management and control of ELSI. While ELSI was subject under that provision to generally applicable Italian law, the Mayor of Palermo's requisition was contrary to that law (8).

This unlawful requisition had the purpose and effect of disrupting Raytheon's and Machlett's continued management and control of ELSI. In early 1968, following a year of serious but unsuccessful efforts to improve ELSI's profitability, Raytheon and Machlett — which had yet to receive any return on their capital — decided that further investment in the company was unwise. While they continued to seek Italian Government support for the plant in Sicily, they also began to plan for the possible voluntary liquidation of ELSI.

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(4) « Commercial Treaty Program of the United States », Department of State Publication 6565, Commercial Policy Series 163, p. 2 (Jan. 1958) (Annex 87, p. 5).

(5) As stated by Hawkins,

> « From the standpoint of economic relations, ... the significance of establishment provisions arises largely from their relationship to the flow of investment capital. Foreign capital will not enter a country unless it has some assurance that it will receive fair treatment... ».

H. HAWKINS, *Commercial Treaties and Agreements*, pp. 15–16 (1951).

(6) Annex 85, p. 6.

(7) Article II(2) specifies that:

> « Corporations and associations created or organized under the applicable laws and regulations within the territories of either High Contracting Party shall be deemed to be corporations and associations of such High Contracting Party... ».

(8) As discussed at p. 31, *infra*, the Mayor's action was attributable to the Government of Italy.

Despite assurances given by the President of the Sicilian Region as late as February 1968 that ESPI, a Sicilian Government entity, would provide funds to enable ELSI to stay in business if necessary, no support was forthcoming from Italy to justify a reversal of the impending decision to liquidate. Accordingly, Raytheon and Machlett decided to cease full-scale production and liquidate the company and to dismiss as of 29 March all employees but those personnel necessary to carry out the liquidation (9).

On 31 March however, the President of the Sicilian Region informed ELSI's Managing Director of an Italian Government plan whereby ELSI's plant would be requisitioned to prevent liquidation and to give the state conglomerate IRI the opportunity to acquire ELSI's assets. The following day, the Mayor of Palermo issued the requisition order (10).

In so doing, the Mayor of Palermo was acting in his capacity as an agent of the national government, and thus his actions were attributable to the Government of Italy. As the Court of Palermo ruled:

> « the Mayor in issuing the orders mentioned in Article 69 of Decree Law Pres. Reg. N. 6 of October 21, 1955, acts as a functionary of the civil administration of the [Ministry of the] Interior, of whose heirarchy he is a part, so that, as has been established for the responsibility of the organs which are part of the direct administration of the State, the responsibility for the acts of the Mayor in the execution of his functions as a government official must be placed at the summit of the above-mentioned State administration, i.e., the Minister of the Interior ... (11) ».

This conclusion is not affected by the determination that the requisition was unlawful. It has long been established, as stated in the *Estate of Jean-Baptiste Caire* (*France v. United Mexican States*), that « it does not matter whether the official or agency in question acted within the limits of its competence or exceeded them (12) ». Moreover, even if the Mayor had not been found to be acting as an official of the national government, the requisition would be attributable on other grounds to the Government of Italy since the action clearly was taken by the Mayor in his official capacity as a government officer — a position he maintained consistently before the courts of Italy (13).

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(9) *Supra*, pp. 11-12; Annex 15, para. 47.

(10) *Supra*, pp. 12-13; Annex 16, paras. 61-62 and Annex 33.

(11) Annex 80, at 6. Thus, the requisition is an action of the national government *per se*. *See*, e.g., R. Ago, « Le Délit International », 68 *Recueil des cours de l'Académie de droit international de La Haye* (« *Recueil des cours* »), p. 419 at pp. 462-469 (1939); D. ANZILOTTI, 1 *Cours de droit international*, p. 470 (1929); E. JIMENEZ DE ARECHAGA, « International Responsibility », *Manual of Public International Law*, p. 544 (M. Sorensen, ed. 1968); I. BROWNLIE, *System of Law of Nations, State Responsibility* (Part 1), pp. 132-141 (1983); G. A. CHRISTENSON, « The Doctrine of Attribution in State Responsibility », *International Law of State Responsibility for Injuries to Aliens*, pp. 330-332 (R. B. Lillich, ed. and contrib. 1983); C. DE VISSCHER, *Theory and Reality in Public International Law*, p. 289 (1968); C. EAGLETON, *The Responsibility of States in International Law*, p. 44 (1928); Articles 5, 6 and 7 of Part One of the International Law Commission's draft articles on State responsibility (« International Law Commission's draft articles on State responsibility »), II *Yearbook of the International Law Commission*, 1980 (Part Two), p. 31; F. V. GARCIA-AMADOR, « Draft Articles on the Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens » (« García-Amador's draft articles on State responsibility »), *reprinted in* F.V. GARCIA-AMADOR, L. SOHN and R. BAXTER, *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, pp. 21-23 (1974).

(12) Translation. 5 *Reports of International Arbitral Awards*, p. 516 at pp. 529-530. As more recently stated in Comment 1 to Article 10 of Part One of the International Law Commission's draft articles on State responsibility, the action is attributable

> « even in the case of manifest incompetence of the organ perpetrating the conduct complained of, and even if other organs of the State have disowned the conduct of the offending organ ».

II *Yearbook of the International Law Commission, 1975*, p. 61. *See also*, e.g., T. Meron, « International Responsibility of States for Unauthorized Acts of their Officials », 1957 *British Yearbook of International Law*, pp. 88, 93, and 113-114 (1958); P. Reuter, « La responsabilité internationale », *Droit international public*, pp. 149-150 (1958); BROWNLIE, *op. cit.*, at pp. 135-137; JIMENEZ DE ARECHAGA, *op. cit.*, at p. 548; Eagleton, *op. cit.*, at pp. 57-58; ANZILOTTI, *op. cit.*, at pp. 470-471; AGO, *op. cit.*, at p. 469.

(13) Annex 80, p. 3; Annex 81, p. 5. *See*, e.g., *Pieri Dominique & Company* (France v. Venezuela), 10 *Reports of International Arbitral Awards*, p. 139 at p. 156; BROWNLIE, *op. cit.*, at pp. 141-142; CHRISTENSON, *op. cit.*, at p. 333; REUTER, *op. cit.*, at pp. 152-153; ANZILOTTI, *op. cit.*, at pp. 475-478; JIMENEZ DE ARECHAGA, *op. cit.*, at pp. 557-558; EAGLETON, *op. cit.*, at p. 32; Article 7 of the International Law Commission's draft articles on State responsibility, *II Yearbook of the International Law Commission, 1980*, at p. 31.

The requisition was aimed specifically at preventing Raytheon and Machlett from taking steps to protect their interests as investors, namely, to liquidate ELSI and minimize their losses. It necessarily and intentionally blocked ELSI's plans to sell its assets. Having relinquished control of the plant on 2 April, ELSI management no longer had physical access to the assets. Nor could it have attempted to sell them with the legal cloud of the requisition over the plant. ELSI was prevented from carrying out a management decision reached by its controlling shareholders — to close an unprofitable plant and to liquidate its assets to satisfy outstanding debts. Moreover, this order was not in accordance with Italian law, as subsequently confirmed by the Prefect of Palermo (14).

The Government of Italy thus did not permit Raytheon and Machlett to organize, manage and control their investment, for their own protection as investors, but rather intervened with an illegal action to prevent such management and control. The United States accordingly submits that the Government of Italy violated Article III(2) of the Treaty.

SECTION 2. – *Article I of the Supplement.*

Less than two years after the Treaty entered into force, Italy and the United States signed the Supplement to the Treaty. The Supplement was seen by the parties as an important step in further encouraging investment by providing stronger guarantees to investors of freedom from harmful treatment. As stated in the Preamble, the purpose of the Supplement was to « giv[e] added encouragement to investments of one country in useful undertakings in the other country ... by amplification of the principles of equitable treatment ». The United States Secretary of State, in recommending that the Senate give its advice and consent to ratification, similarly stated that:

> « by rounding out the comprehensive rules governing general economic relations established by [the] Treaty, [the Supplement would] further encourage private capital investments (15) ».

The Italian Minister of Foreign Affairs, speaking before the Italian Senate, emphasized Italy's strong economic interest in ratification of the Supplement (16). As Senator Jannuzzi, who wrote the majority report approving Senate ratification, observed:

> « The ruling out of any discriminatory treatment or arbitrary measures to the prejudice of citizens, juridical persons or associations of Italy or of the United States that respectively work in the territory of the other State, the possibility of unobstructed control of enterprises, the most liberal possible treatment assured for the transferability of capital, [and] the fiscal concessions are all principles which, suitably supplementing those contained in [the Treaty], aid the Italian economy [in particular], insofar as they are aimed at favoring the investment of U.S. capital in Italy (17) ».

The « exclusion of any discriminatory treatment or arbitrary measures to the damage of ... juristic persons » to which Senator Jannuzzi refers is contained in Article I of the Supplement, which came into force on 2 March 1961. It provides that:

> « The nationals, corporations and associations of either High Contracting Party *shall not be subjected to arbitrary or discriminatory measures* within the territories of the other High Contracting Party resulting particularly in: (a) *preventing* their *effective control and management of enterprises* which they have been permitted to establish or acquire therein;

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(14) Annex 76, pp. 10–13.

(15) Letter of the Secretary of State dated 25 Jan. 1952, contained in the Message from the President of the United States transmitting the Supplementary Agreement, Senate Print Exec. H, 82nd Cong., 2nd Sess., p. 2 (Annex 88). *See* N. 3, Chapter I, *supra*.

(16) Senate of the Republic, Parliamentary Proceedings, Legislature III, Bills and Reports – Documents, 1958–1960, N. 931–A, p. 4, Sent to the Office of the President on 18 July 1960 (Annex 89).

(17) Annex 89, pp. 2–3.

or (b) impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise ... » (Emphasis added).

This provision complements and strengthens the guarantees of non–discriminatory treatment and freedom from interference with management and control which are contained in Article III of the Treaty ([18]). The terms of Article I, « shall not be subjected », are imperative and unqualified. Unlike Article III of the Treaty, Article I is not limited by any reference to national treatment or to domestic law. It thus establishes a standard of protection for United States nationals independent of the standards of treatment accorded to Italian or third country nationals or corporations. Article I prohibits, in absolute terms, governmental measures which are either « arbitrary or discriminatory », and which prevent United States investors from effectively controlling and managing companies which they have established or acquired in Italy.

As set forth above, the requisition clearly prevented Raytheon and Machlett from exercising their management and control of ELSI. In order to establish a violation of Article I, therefore, it remains to be shown that the requisition was an « arbitrary or discriminatory measure ».

In accordance with Article 31 of the Vienna Convention on the Law of Treaties, which in this respect codifies established customary international law, a Treaty should be interpreted in accordance with « the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose ([19]) ». The object and purpose of this Treaty in general, and of this Article and formula in particular, indicate that the prohibition of « arbitrary or discriminatory measures » should be construed broadly, to protect investors against governmental action which violated the basic principles of non–discrimination and « fair play » which underlie the Treaty. In hearings before the United States Senate, the Department of State witness stated that:

> « The basic aim of the [investment] provisions [is] to safeguard the investor against the nonbusiness hazards of foreign operations, ... [such as] [i]nequitable tax statutes, confiscatory expropriation laws, rigid employment controls, special favors to State–owned businesses, drastic exchange restrictions, and other discriminations against foreign capital ([20]) ».

As explained in the Report of the President to the Italian Chamber of Deputies:

> « The [Supplementary] Agreement proposes, above all, to eliminate any discriminatory measure that one of the two countries might adopt to the prejudice of citizens or juridical persons of the other contracting party, any measure aimed at impeding management or effective control of enterprises for which they have received the required license to purchase or establish, or any measure aimed at obstructing the exercise of their rights relative to such enterprises or to investments of any type ([21]) ».

As is indicated by the above statement, and by the use of the disjunctive « or » in the phrase « arbitrary or discriminatory », Article I prohibits « arbitrary » measures as distinct from, and in addition to, « discriminatory measures ». The prohibition of « arbitrary » measures conveys above all the commitment of the respective governments not to injure the investments and related interests of foreign investors by the unreasonable or unfair exercise of governmental authority. Following standard dictionary definitions, an « arbitrary » act may be one which is characterized by absolute power or an abuse of discretion. « Arbitrary actions » include those which are not based on fair and adequate reasons (including sufficient legal justification), but rather arise from

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([18]) The rights referred to in Article I(b) are addressed in Chapter III, *infra*.

([19]) Vienna Convention on the Law of Treaties, Art. 31(1), U.N. Doc. A/CONF. 39/27, p. 293 (1969).

([20]) Remarks of Harold F. Linder, Deputy Assistant Secretary of State for Economic Affairs (Annex 86, p. 4).

([21]) Chamber of Deputies, Parliamentary Proceedings, Legislature III, Documents – Bills and Reports, N. 537, pp. 1–2, presented to the Office of the President 8 Nov. 1958 (Annex 90).

the unreasonable or capricious exercise of authority (22). The terms « oppressive » and « unreasonable » are thus synonyms of « arbitrary (23) ».

As used in Italian and United States legal practice with reference to governmental action, « arbitrary » actions include those which are unreasonable, in the sense that they are not based on sufficient or legitimate reasons, or are unduly unjust or oppressive. The Italian Constitutional Court has interpreted the Italian constitutional guarantee of impartial public administration as prohibiting the promulgation of arbitrary or unreasonable regulations (24). Similarly, under Law N. 1034 of 6 December 1971 which governs regional administrative tribunals, one of the bases for review of Italian administrative acts is excess of authority (*eccesso di potere*). This concept includes both misuse of power (*sviamento di potere*) and inequality of treatment (*disparità di trattamento*), which in turn require that all administrative actions be free of arbitrariness and discrimination (25).

Similar standards in United States jurisprudence derive from the constitutional guarantees of equal protection of the law and due process and are found in the federal Administrative Procedure Act, among other statutes. The Act provides, in pertinent part, that « a reviewing court shall ... hold unlawful and set aside agency action ... found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (26) ». The provision has been interpreted as requiring the court to « consider whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment (27) ».

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(22) *See*, e.g., *Ballentine's Law Dictionary*, p. 88 (3d ed. 1969); *Black's Law Dictionary*, p. 96 (5th ed. 1979); *Shorter Oxford English Dictionary*, p. 91 (1944); *Webster's New International Dictionary of the English Language* p. 110 (3d ed. 1961). *See also*, G. Devoto and G. C. Oli, *Vocabolario Illustrato della Lingua Italiana*, p. 25 (1983) (« *arbitrario* » defined as « *irregolare, abusivo, ingiustificato, fatto o ditto ad arbitrio* » [irregular, illicit, unlawful unjustified, done or said in violation]).

(23) Roget's *International Thesaurus*, Secs. 627.5 and 737.15 (3d ed. 1962). A number of United States investment protection treaties prohibit, variously, « arbitrary and discriminatory » or « unreasonable and discriminatory » measures. *See*, e.g., Panama, Art. II(2), 21 *International Legal Materials*, p. 1227, at p. 1230 (1982) (ratification pending); Belgium, Art. 4(2), 14 *United States Treaties* 1284, at p. 1291. The United States regarded these terms (« arbitrary » and « unreasonable ») as equivalent. *See*, e.g., the United States interpretation of Art. IV(1) of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, *signed* 15 Aug. 1955, *entered into force*, 16 June 1957, 284 UNTS 93, 8 UST 899, forbidding application of « unreasonable or discriminatory measures »:

> « Government conduct which does not intrinsically violate international law is nevertheless unlawful if it is arbitrary or it discriminates against aliens. Thus, actions by the Government of Iran which otherwise might have been lawful were unlawful if the government engaged in these actions arbitrarily or directed them against U.S. nationals ».

« Memorandum of the Department of State Legal Adviser on the Application of the Treaty of Amity to Expropriations in Iran », 22 *International Legal Materials*, p. 1408 at p. 1411 (1983).

Similar clauses, prohibiting not only discriminatory but also unreasonable, unfair, or arbitrary treatment, are also found in investment protection treaties between other nations. For example, the agreement concerning the promotion and reciprocal protection of investments between the Republic of Cameroon and the United Kingdom stipulates in Article 2(2) that:

> « Neither party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party ».

The corresponding French text prohibits « mesures arbitraires ou discriminatoires ». ICSID, *Investment Promotion and Protection Treaties*, 1982 Booklet, p. 41 at pp. 42 and 49. *See also*, e.g., investment protection treaties between Panama and Switzerland (Art. 2(a): « mesures indues ou discriminatoires »), *ibid.*, 1983 Booklet, p. 63 at p. 64; the Belgium–Luxembourg Economic Union and Rwanda (Art. 3(2): « toute mesure injustifiée ou discriminatoire »), *ibid.*, p. 81 at p. 83. Still other treaties, rather than prohibiting unfair or unequal treatment affirmatively guarantee fair and equitable treatment. *See*, e.g., the Federal Republic of Germany and the People's Republic of China (Art. 2: assurance of « fair and equitable treatment »), *ibid.*, p. 43 at p. 44; Kuwait and Pakistan (Art. 2(2): assurance of « fair and equitable treatment »), *ibid.*, p. 17 at p. 18.

(24) Corte Costituzionale 30 Jan. 1980, N. 10, I *Giurisprudenza Costituzionale*, 1980, p. 67 at p. 91; Corte Costituzionale 15 Feb. 1980, N. 16, I *Giurisprudenza Costituzionale* 1980, p. 137 at p. 143.

(25) Rossano, *L'Eguaglianza giuridica nell'ordinamento costituzionale*, p. 450 (1966); Sandulli, I *Manuale di Diritto Amministrativo*, pp. 620–624, Sec. 141(e) (1982).

(26) United States Code, Title 5, Sec. 706(2)(A) (1982) (Annex 91).

(27) *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1970). *See also*, *Motor Vehicles Manufacturers Assoc. v. State Farm Insurance Co.*, 463 U.S. 29 (1983).

Other municipal legal systems as well prohibit arbitrary governmental action of this character. In France, for example, in accordance with decisions of the highest French administrative court, the Conseil d'Etat, administrative action will be considered « arbitrary » if taken without due regard for the factors and legal principles governing the legitimate exercise of discretion in a particular case (28). As stated by de Laubadère, a typical example of such improper use of authority is the use of police power for a goal other than public security, peace or well-being, « for example, a financial goal (29) ». The « classic model » which he cites is police orders limiting the use of a public pier in order to reduce the maintenance expense to the commune (30). Similar standards are in force in the Federal Republic of Germany under Section 40 of the Federal Law on Administrative Procedure of 1976 Verwaltungsverfahrensgesetz of 25 May 1976, BGBl. I 1749 (1976)), which provides:

> « If an administrative authority is authorized to act according to its discretion, it must exercise its discretion according to the purpose of the authorization and observe the legal limits of the discretion (31) ».

In international law as well, the term « arbitrary » is used to describe prohibited actions which constitute an unreasonable, improperly motivated, or unduly unjust or oppressive use of otherwise legitimate governmental authority. Thus, for example, a variety of otherwise lawful actions, such as expulsion of aliens, arrest, detention, deprivation of nationality, cancellation of contracts, and deprivation of property may be prohibited when « arbitrary (32) ». In this context, an « arbitrary » action is one which is unjust or unreasonable in light of the relevant international standards (33). More generally, the concept of « abuse of rights » illustrates the general usage

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(28) *Société Glace Service*, 26 July 1985, N. 51.083, *Recueil des décisions du Conseil d'Etat*, (« *Recueil Sirey* ») 1985, p. 236; *Caminade*, 13 Jan. 1983, N. 27.966. Under French administrative law, arbitrary administrative acts may be annulled through the procedure of the *recours pour excès de pouvoir*. *See*, e.g., Vedel and Delvolvé, *Droit administratif*, pp. 807–811 (9th ed. 1984).

(29) « The typical example [of *détournement de pouvoir*] is that of police powers, which, by their nature, can only be exercised for a goal of security, peace, or well-being, and not for some other objective of general interest, for example, a financial objective (the classic model of annulling police orders limiting the usage of a public pier in order to reduce the expense of upkeep to the commune: Decision of the Conseil d'Etat, 12 Nov. 1927, *Bellescrize*, p. 1048 ».
Translation. ANDRE DE LAUBADERE, 1 *Traité de droit administratif*, p. 599 (9th ed. by J. C. Venezia and Y. Gaudemet 1984).

(30) *Ibid. See also*, e.g., *Sieur Beaugé*, Conseil d'Etat, 4 July 1924, *Recueil Sirey*, p. 641 (mayor's order requiring ocean bathers to change clothes in local bath-houses motivated by financial interest of the village, annulled as *détournement de pouvoir*); *Caisse de Compensation pour la Décentralisation de l'Industrie Aéronautique*, Conseil d'Etat, 8 July, 1955, *Recueil Sirey*, p. 398 (refusal to approve the budget of establishment in order to provoke its liquidation annulled as *détournement de pouvoir*).

(31) Translation. This provision represents the concretization of the general prohibition against arbitrary action (*allgemeines Willkürverbot*) deduced from articles 3 and 20 of the Basic Law (*Grundgesetz*) of the Federal Republic of Germany. The German Federal Constitutional Court has reaffirmed this general prohibition on numerous occasions. *See generally*, G. LEIBHOLZ and H. J. RINCK, *Kommentar zum Grundgesetz* (6th ed. 1985), Art. 3, annotations 2–5; Art. 20, annotation 20; K. OBERMAYER, *Kommentar zum Verwaltungsverfahrensgesetz* (1983), para. 40, annotation 76(b) (1).

(32) *See*, e.g., C. F. Murphy, « Limitations upon the Power of a State to Determine the Amount of Compensation Payable to an Alien upon Nationalization », in 3 *The Valuation of Nationalized Property in International Law*, pp. 56–62 (R. Lillich, ed. 1975) (arbitrary expropriation); American Law Institute, *The Foreign Relati ns Law of the United States. (Second Restatement)* (1965) (« American Law Institute, *Second Restatement* »), sec. 193 (arbitrary breach of contract) (*see also*, Tent. Draft N. 7, 1986, sec. 712: arbitrary impairment of property or other economic interests); *International Covenant on Civil and Political Rights*, U.N. Doc. A/Res/2200 A (1960) Articles 6 (deprivation of life), 9 (arrest or detention), 12 (right to enter one's own country), 17 (interference with privacy, family, home or correspondence); *Universal Declaration of Human Rights*, U.N. Doc. A/Res/217(III) (1948), Articles 9 (arrest, detention or exile), 12 (interference with privacy, family, home or correspondence), 15 (deprivation of nationality), 17 (deprivation of property).

(33) As one commentator has stated with respect to the use of the term « arbitrary » in the Universal Dcc'aration of Human Rights, « the reason for the use of the words ' arbitrary ' or ' arbitrarily ' was to protect individuals from both ' illegal ' and ' unjust ' acts ». P. Hassan, « The Word ' Arbitrary ' As Used in the Universal Declaration of Human Rights: ' Illegal ' or ' Unjust ' ? », 10 *Harvard International Law Journal*, p. 225 at p. 254 (1969). *See also*, P. Hassan, « The International Covenant on Civil and Political Rights: Background and Perspective on Article 9(1) », 3 *Denver Journal of International Law and Policy*, p. 153 (1973); JIMENEZ DE ARECHAGA, « The

of the term « arbitrary » to refer to governmental actions which are unreasonable, improperly motivated, or unduly unjust or oppressive ([34]).

The requisition of ELSI's plant was precisely the sort of arbitrary action which was prohibited by Article I(a). Under both the Treaty and Italian law, the requisition was unreasonable and improperly motivated. The requisition was found to be illegal under Italian domestic law for precisely this reason: it was « destitute of any juridical cause which may justify it or make it enforceable ([35]) ».

Apart from considerations of Italian law, moreover, the requisition was « arbitrary » for purposes of the Supplement. Its object and effect were to prevent Raytheon and Machlett from protecting their investment, without any justification which can be viewed as legitimate in terms of the governing principles of the Treaty.

The declaration of a public emergency in this case was a mere device; if the closing of the plant was an « emergency », it was an emergency of Italy's own creation. Raytheon and Machlett had given the Italian authorities every opportunity to take legitimate steps to prevent ELSI from closing, but the Italian authorities declined to do so. Instead, they sought to force Raytheon and Machlett to keep ELSI open by the sheer exercise of power. The requisition was not used to prevent ELSI from closing; as the Prefect noted, Italy took no steps to keep the plant in operation, but merely seized it. In short, the planned closing was not a *bona fide* public emergency, nor was the requisition a *bona fide* response.

The purpose of the requisition appears to have been to create the appearance of action, while allowing time for IRI to step in to take over the plant. The Prefect noted the apparent intent to show the local press that governmental authorities were « fac[ing] the problem », notwithstanding that they did nothing concrete to resolve the problem ([36]). At the same time, IRI was developing plans to expand into this area, but was not yet ready to do so.

This motive is discriminatory. As noted above, Article I(a) prohibits « arbitrary or discriminatory » measures without qualification. To « discriminate » is « to make distinctions in treatment, show partiality (*in favor of*) or prejudice (*against*) ([37]) ». The term « discriminatory » thus embraces discrimination in favor of government-controlled enterprises. The Treaty explicitly recognizes the need to protect against discriminatory action in favor of publicly owned or controlled enterprises ([38]). The purpose of the Supplement was to strengthen these protections, and in particular to protect against « special favors to State-owned businesses ([39]) ». Here IRI's interests were directly contrary to Raytheon's and Machlett's, and the Government intervened to advance its own commercial interests at the latter's expense. This is a particularly

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Background to Article 17 of the Universal Declaration », 8 *Journal of the International Commissions of Jurists* N. 2, p. 34 (1968); F. V. GARCIA-AMADOR, Fourth Report on State Responsibility, *Yearbook of the International Law Commission 1959*, Part II, para. 24, p. 7 (UN Doc. ACN. 4119, para. 24).

([34]) In *Case Concerning the Barcelona Traction, Light, and Power Company, Limited*, for example, the Government of Belgium equated the concepts of « arbitrary » administrative action, *détournement de pouvoir*, and « abuse of rights ». *See*, e.g., oral argument (second phase) in 8 *Memorials, Pleadings and Documents*, pp. 35-43; submissions, *reproduced in* the *Judgment (Second Phase), ICJ Reports* 1970, pp. 12, 17. *See also*, e.g., 1 *Oppenheim's International Law*, p. 345, (8th ed. by H. Lauterpacht 1955):

> « [Abuse of right] occurs when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage »;

and G. SCHWARZENBERGER, *International Law and Order*, p. 100:

> « The hard core of situations, in relation to which the hypothesis of the abuse of rights remains potentially relevant, is the arbitrary or unreasonable exercise of absolute rights .... Thus, ultimately, the issue reduces itself to that of the arbitrary or unreasonable exercise of rights or powers within the exclusive jurisdiction of States ».

See also, MURPHY, *op. cit.*, at pp. 59-62; GARCIA-AMADOR, *op. cit.*, at paras. 22-29.

([35]) Annex 76, p. 11.

([36]) Annex 76, p. 12.

([37]) *Webster's New World Dictionary of the American Language*, p. 403 (1982) (emphasis in original). The Italian word « discriminazione » is defined « distinzione operata nel corso di un giudizio o di una classificazione » (« a distinction made in the course of a judgment or classification »), G. DEVOTO and G. C. OLI, *Vocabolario illustrato della lingua italiana*, p. 811 (1983).

([38]) *See*, e.g., Article XVIII of the Treaty and Paragraph 2 of the Protocol.

([39]) Annex 86, p. 4.

clear-cut departure from the Treaty principle of « fair play » and the specific guarantee of Article I(a) of the Supplement.

The requisition thus was an « arbitrary or discriminatory measure » for purposes of the Treaty. It was an unreasonable action which did not rest on legitimate grounds, neither under Italian law nor under the governing principles of the Treaty. It was precisely the sort of « refined technique », contrary to the fundamental principles of « equitable treatment », and « fair play », which Article I(a) was intended to prohibit. Accordingly, the United States submits that the requisition was an arbitrary and discriminatory measure which effectively prevented Raytheon and Machlett from exercising management and control of ELSI, in violation of Article I(a) of the Supplement.

SECTION 3. – *Article VII of the Treaty.*

The guarantees of management and control established by Article III of the Treaty and Article I of the Supplement are further buttressed by Article VII of the Treaty, which provides in part:

> « The nationals, corporations and associations of either High Contracting Party shall be permitted to ... dispose of immovable property or interests therein within the territories of the other High Contracting Party upon the following terms:
>
> . . . . . .
>
> (b) in the case of nationals, corporations, and associations of the United States of America, the right to acquire, own and dispose of such property upon terms no less favorable than those which are or may hereafter be accorded by the state, territory or possession of the United States of America ... under the laws of which such corporation or association is created or organized, to ... corporations ... of the Italian Republic ».

The Treaty thus guarantees that a United States corporation which has invested in Italy is entitled to dispose of immovable property or interests therein upon the same terms as would an Italian corporation investing in the United States investor's state of incorporation.

Raytheon is incorporated in the State of Delaware (40) and Machlett is incorporated in the State of Connecticut (41). Under Article VII of the Treaty the Government of Italy undertook to allow these United States corporations to dispose of immovable property and interests therein upon terms no less favorable than would be accorded by these states to Italian corporations.

Under the laws of both Delaware and Connecticut, corporations may be dissolved and their assets sold pursuant to determinations by their boards of directors and shareholders (42). For example, Delaware provides in Section 271 of Title 8 of its Code:

> « Every corporation may at any meeting of its board of directors or governing body sell, lease or exhange all or substantially all of its property and assets ... upon such terms and conditions and for such consideration ... as its board of directors or governing body deems expedient and for the best interests of the corporation, when and as authorized by a resolution adopted by the holders of a majority of the outstandind stock of the corporation entitled to vote thereon ... (43) ».

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(40) Annex 7.

(41) Annex 16.

(42) *See Delaware Code Annotated*, Title 8, Secs. 271, 275 (1983 and Supp. 1986) (Annex 92); *Connectictut General Statute*, Annotated, Secs. 33-372, 33-375 (West 1958 and Supp. 1986) (Annex 93). These constitutional guarantees may be enforced through procedures made available to property owners under state law. *See*, e.g., *Delaware Code Annotated*, Title 10, Secs. 6101-6115 (1975) (Annex 94).

(43) *See* Annex 92.

The courts of Delaware have emphasized that:

« there is no statutory limitation on the right of a Delaware corporation to sell its assets on such terms and conditions and for such consideration as its board of directors deems expedient and in the best interests of the corporation (44) ».

Thus, under the reciprocal guarantees of the Treaty, Raytheon and Machlett were entitled to liquidate ELSI's assets pursuant to the decision of its shareholders and board of directors. The requisition which foreclosed this planned action violated Article VII of the Treaty.

Carrying the reciprocity point further, if Delaware or Connecticut were to take the immovable property of a corporation for a lawful public use, they would be obligated to make compensation for that property under fundamental provisions of the United States Constitution (45) and the respective state constitutions (46). Constitutional rights affecting property interests are guaranteed to both natural persons and corporations (47). The right to compensation for a taking of interests in property is guaranteed to foreign as well as United States investors (48).

Under United States law, this duty to compensate owners of property for interference with their property rights arises not only from a formal expropriation decree but also from government actions, including interference with the use of the property, that amount to a taking of property (49). Thus, in *Benenson v. United States* (50), the United States Court of Claims ruled that where the United States Government effectively barred property owners from exercising their right to demolish improvements to their real property or otherwise use the property as they wished, the United States violated the constitutional rights of the property owners and was required to make appropriate compensation.

Most of the assets seized by the Mayor of Palermo and subsequently acquired by the Government of Italy consisted of ELSI's manufacturing plant and other immovable property (51). As discussed above, ELSI's owners had the right under the Treaty to dispose of this property as they saw fit. The United States submits that by denying the owners that right, the Government of Italy violated Article VII of the Treaty.

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(44) *Alcott v. Hyman*, 184 A. 2d 90, 94 (Delaware Court of Chancery 1962), *affirmed* 208 A.2d 501 (Delaware Supreme Court 1965).

(45) The Fifth Amendment of the United States Constitution provides:

« No person shall be ... deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation ».

(46) Section 8 of the Delaware Constitution provides:

« [N]or shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being made ».

Section 11 of the Connecticut Constitution provides:

« The property of no person shall be taken for public use, without just compensation therefor ».

(47) The general principle of equal treatment under the United States Constitution for corporations and natural persons was set forth by the Supreme Court of the United States in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (corporations are entitled to equal protection of the laws of the United States). *See*, e.g., *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071 (7th Cir. 1978), *cert. denied* 439 U.S. 1121 (1979) (corporate property owner can bring action against county and state taxing officials for wrongful assessments of property value); *Sterngrass v. Bowman*, 563 F. Supp. 456 (S.D.N.Y. 1983) (corporation may bring action against city for wrongful decisions affecting corporation's use of real property).

(48) *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (when the United States expropriates the property of an alien friend, the Fifth Amendment of the United States requires that it pay just compensation equivalent to the full value of the property). Thus, non-resident aliens owning property within the United States « as well as citizens are entitled to the protection of the Fifth Amendment ». *United States v. Pink*, 315 U.S. 203, 228 (1942). *Cf., Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 111 (2d Cir.), *cert. denied* 385 U.S. 898 (1966) (« This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing they were protected by constitutional guarantees »).

(49) *See*, e.g., *United States v. Clarke*, 445 U.S. 253, 257 (1980); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

(50) 548 F.2d 939 (Court of Claims 1977). *See also, Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983), *cert. denied* 465 U.S. 1101 (1984) (defendant city's course of conduct designed to force residents to sell property to city violated United States Constitution).

(51) *See*, e.g., Annexes 20, 51, 57, 67 and 72.

CHAPTER III

IMPAIRMENT OF INVESTMENT RIGHTS AND INTERESTS

SECTION 1. – *The Requisition.*

Article I(b) of the Supplement provides, in pertinent part, that:

« corporations ... of either High Contracting Party shall not be subjected to ... *arbitrary or discriminatory measures* within the territories of the other High Contracting Party resulting particularly in ... *impairing ... legally acquired rights and interests* in such enterprises [other than management and control] or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise » (Emphasis added).

As discussed in connection with Article I(a) above, Article I of the Supplement is intended to extend the safeguards for foreign investment contained in the Treaty to reach « the more refined techniques through which governments might effectively destroy investments made by foreigners ... » (1). As explained in the contemporaneous Department of State report to the United States Senate:

« [I]t is believed to serve a useful purpose in that it affords one more ground, in addition to all the other grounds set forth in the treaty, for contesting foreign actions which appear to be injurious to American interests. A given measure of a foreign government might, for example, be fully consistent with the national treatment or most-favored-nation treatment rules of the treaty, and also short of expropriation, but yet arbitrary and unreasonable as it affected some vested American interest in the country concerned. In that event, the only treaty ground for protest might be general language such as is found in [Article I(b) of the Supplement] (2) ».

Article I(b) thus extends the basic principles of fair play and non-discrimination to all forms of governmental action which are injurious to investors, prohibiting any « arbitrary or discriminatory measures » which impair not only the rights, but also the interests, of United States investors in Italian corporations.

As discussed above, the requisition of ELSI's assets was an arbitrary and discriminatory measure. It not only effectively blocked Raytheon's and Machlett's exercise of management and control over ELSI, but « result[ed] particularly in ... impairing [their] other legally acquired rights and interests » in ELSI. The requisition thus violated Article I(b), in addition to Article I(a) of the Supplement.

The impairment of Raytheon's and Machlett's rights and interests occurred because the requisition, as intended, prevented the voluntary liquidation of ELSI and caused it to file for

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(1) R. R. Wilson, describing the « new formulas on property protection » contained in United States investment-protection treaties developed in the late 1950's. R. R. WILSON, *United States Commercial Treaties and International Law*, p. 121 (1960).

(2) *See* State Department Comments in Annex 86, pp. 28-29.

bankruptcy. As the court-appointed Trustee in bankruptcy stated in his complaint against the Minister of the Interior and the Mayor of Palermo:

> « In consideration of the heavy legal and economical situation created by the appealed order of requisition, Raytheon-Elsi S.p.A. was obliged to file for bankruptcy, which was declared by decision of this Tribunal on May 7-16, 1968 ([3]) ».

Without control over ELSI's plant or assets, an orderly, voluntary liquidation was simply impossible. Moreover, since ELSI's assets could not be liquidated, the point would soon be reached where its debts could not be paid as they became due. Hence, there was therefore no alternative but for ELSI to file a petition in bankruptcy ([4]).

By frustrating the voluntary liquidation, the requisition made the closing of ELSI much more costly to Raytheon and Machlett than it would have been had this governmental intervention not occurred. Raytheon was required to pay some 5.8 billion lire (US$9,300,000) to those bank creditors of ELSI to whom Raytheon had made guarantees. As discussed in Part VI below, these payments were substantially more than Raytheon would have paid had it been allowed to proceed with the planned liquidation. In addition, Raytheon recovered nothing on its open accounts with ELSI, totalling over 1.3 billion lire (US$1,830,000). Finally, both Raytheon and Machlett lost the small return on their investment which the liquidation could have provided ([5]).

Further, the liquidation plan would have permitted payment of ELSI's unsecured loans. Under the bankruptcy, however, unsecured creditors received less than 1 % of the amounts claimed. As predicted by the President of the Sicilian Region ([6]), the government-controlled banks which held these loans brought suit against Raytheon to recover the amounts due. While the lawsuits all resulted in judgments for Raytheon, they caused Raytheon substantial additional and unnecessary expense ([7]).

In addition to Raytheon's and Machlett's direct capital contribution, Raytheon's guaranteed of loans made to ELSI and its open accounts for goods and services provided to ELSI are « investment rights and interests » which are protected by Article I(b). This Article expressly protects not only contributions to capital, but anything else provided by an investor to an Italian corporation in which it invests « whether in the form of funds (loans, shares, or otherwise), materials, equipment, services, processes, patents, techniques or otherwise ».

Both the open accounts and the guarantee payments are investments within this broad definition: « whether in the form of funds ... or otherwise ». The explicit inclusion of « loans » in particular demonstrates that credit arrangements between a United States investor and an Italian corporation are within the scope of protected investment rights and interests under Article I(b). The open accounts are amounts owed to Raytheon and thus constitute a « loan ». Raytheon's guarantees were originally in the nature of a contingent « loan » representing a commitment to provide a specified amount of funds for ELSI's benefit on demand. When the guarantees were paid, they become an actual loan of funds to ELSI. Thus, both the guarantees and open accounts are protected investment rights and interests within the scope of Article I(b).

Raytheon's financial loss in defending against the Italian bank lawsuits similarly constitutes an impairment of protected rights and interests. The banks were suing Raytheon for payment of ELSI's loans. If these suits had been successful, Raytheon would have been required to make further contributions of funds on ELSI's behalf.

The United States accordingly submits that the requisition was an arbitrary and discriminatory measure by the Government of Italy which impaired Raytheon's and Machlett's investment rights and interests in ELSI, in violation of Article I(b) of the Supplement.

([3]) Annex 79, p. 2.
([4]) *Supra*, pp. 14-15, and Annex 26, para. 12.
([5]) *See* discussion at pp. 60-61, *infra*, and Table at p. 60. *See also*, N. 13, Chapter VI, *infra*.
([6]) Annex 38, p. 1.
([7]) See discussion at pp. 61-62, *infra*; Annex 40, para. 7 and Exhibit C.

SECTION 2. – *The Subsequent Course of Conduct.*

The harmful effects of the requisition were confirmed and compounded by the subsequent conduct of Italian officials, which was in further violation of Article I(b) of the Supplement. The requisition, indeed, was only the first step in a series of concerted actions taken by the Italian government and IRI authorities to acquire ELSI's plant and related assets at less than fair market value, while leaving Raytheon with responsibility for paying ELSI's outstanding debts (8). Having requisitioned the plant and caused ELSI's bankruptcy, the Government of Italy discouraged private bidders, boycotted the auctions itself, and worked out special arrangements for a piecemeal take-over directly with the bankruptcy authorities.

The object of these actions was to secure ELSI's facilities for IRI, on the terms and at the below-market price which IRI desired, while also responding to the political pressure brought by ELSI's former workers. These actions were discriminatory measures prohibited by Article I of the Supplement, since they were taken with the clear object and effect of favoring a public Italian enterprise at Raytheon's expense. They resulted in the further impairment of Raytheon's investment rights and interests. Thus, not only did the Government of Italy wrongfully cause the bankruptcy, it also proceeded wrongfully to exploit the bankruptcy which it had caused (9).

Before the requisition was issued, the President of the Sicilian Region had informed Raytheon that IRI wanted to take over ELSI's facilities for its own use, but was not ready to do so immediately. He attempted to convince Raytheon that it should keep ELSI open at its own expense until IRI was ready to acquire it. He noted that, if Raytheon did not do so, the requisition would remain in effect and ELSI would have no alternative but to declare bankruptcy. Moreover, he predicted, in such event the government would make the result as costly as possible for Raytheon (10). Raytheon, nevertheless, declined to make any further investment in ELSI, seeing no prospect of recovering such funds (11). When ELSI accordingly did declare bankruptcy, the Government of Italy turned its attention to the bankruptcy process.

The Government of Italy's objective was to acquire ELSI's facilities for IRI at the lowest possible price. Toward that end, it incrementally consolidated both the appearance and the substance of a take-over of ELSI's facilities, which enabled it ultimately to dictate the sale price.

Even before any bankruptcy auctions were held, the public at large had been informed that the Government would take over ELSI's facilities. On 25 July 1968, the Minister of Industry announced to the Italian Parliament that the Government of Italy intended to take over ELSI's plant through an IRI subsidiary (12). On 13 November, after inconclusive negotiations with Raytheon for a comprehensive settlement, the Government issued a press release announcing

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(8) It is a settled rule of state responsibility that the State is responsible for the actions and omissions of the judicial and administrative authorities, including regional and local government officials. *See*, e.g., G. SCHWARZENBERGER, 1 *International Law*, pp. 625–627 (1957); ROUSSEAU, *Droit international public*, pp. 358, 374 (1953); I. BROWNLIE, *System of Law of Nations, State Responsibility* (Part 1), p. 144 (1983); C. EAGLETON, *The Responsibility of States in International Law*, pp. 70–73 (1928); and authorities cited at N. 15 and N. 17, Chapter II, pp. 74, 75; Moreover, irrespective of its general status for purposes of attribution, the actions of IRI in this case (and of its subsidiaries) are also attributable to the Government of Italy, since IRI was not only owned and controlled by the Government, but was also acting as an arm and agent of the Government. The decision to take over ELSI's assets through IRI was a central government decision, conceived even before the requisition and, subsequently publicly announced as such. As stated by Christenson, « The criteria for attributing conduct of [state-owned enterprises] to the State seem to be ... attribution if the entity serves State purposes, thus becoming part of the State's apparatus ». G. A. CHRISTENSON, « The Doctrine of Attribution in State Responsibility », *International Law of State Responsibility for Injuries to Aliens*, p. 333 (R. Lillich, ed. 1983); *see also*, on attribution of acts of agents generally, *Chiessa* case, 15 *Reports of International Arbitral Awards*, p. 399; 1 *Oppenheim's International Law*, p. 342 (8th ed. by H. Lauterpacht 1955); B. CHENG, *General Principles of International Law as Applied by International Courts and Tribunals*, pp. 192–193 (1953).

(9) For other examples of cases involving allegations of a wrongful course of conduct in connection with bankruptcy proceedings *see*, e.g., *Antoine Fabiani* (France v. Venezuela), *summarized in* M. Whiteman, 3 *Damages in International Law*, pp. 1785–1788; *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3; *Timberlane Lumber Co. v. Bank of America, N. T. & S. A.*, 549 F.2d 597, 605 (9th Cir. 1976); *Claims of « Salvador Commercial Company » et al.*, 15 *Reports of International Arbitral Awards*, p. 467.

(10) *Supra*, p. 14; Annex 38.

(11) *Supra*, p. 14; Annex 39.

(12) Annex 46.

that IRI–STET would take over ELSI at the Government's request (13). In response to this announcement, workers at the Raytheon plant took down the name–plate « ELSI » at the entrance to the plant and put up a new name–plate « STET » (14). The IRI subsidiary which was to run the plant, ELTEL, was formed in Palermo in December of 1968 (15). At the same time, IRI announced its plans for rehiring workers when it reopened the plant in 1969 (16). All of these developments were publicly reported (17). Thus, by the first scheduled bankruptcy auction on 18 January 1969, the Government's take–over of ELSI's plant and assets was to all appearances a certainty.

IRI, however, had not yet reached final agreement with the Trustee on its purchase of ELSI's assets. Nor did it bid at the first auction (18). The first auction was for all of ELSI's assets, with a minimum bid set at 5 billion lire (19). It appears that IRI was not interested in purchasing all of ELSI's assets at this price, but only in purchasing the plant and certain related equipment for some 4 billion lire (20). According to the President of the Sicilian Region, IRI had reached agreement with the bankruptcy Trustee on such a sale as early as October 1968, but the agreement had broken down over IRI's unwillingness to purchase any of ELSI's other assets (21).

While these terms were not to IRI's liking and it boycotted the auction, it nevertheless proceeded with its plans to take over ELSI. On 30 January it was publicly reported that IRI had reached agreement with ELSI's former workers on a plan for rehiring (22). It also was reported that, faced with pressure from the former employees, IRI had agreed with the Trustee and with the unions on an interim plan to reopen the plant under a lease arrangement, pending agreement on the final terms of sale (23).

In late March 1969, therefore, ELTEL officially proposed to the Trustee that it be permitted to lease ELSI's plant for a period of eighteen months at an entirely nominal rate, without any commitment whatsoever to purchase the plant or assets at any price (24). Raytheon's representative on the creditors' committee pointed out that, if such a lease were approved, ELTEL would be in a position to dictate the terms of final sale (25). The lease nevertheless was approved, on the ground that ELSI's plant needed to be operated and maintained (26).

Upon taking possession of the plant, ELTEL sought and received permission to purchase ELSI's work in process for less than one–half its appraised value (27). This first piecemeal sale without open public bidding was justified in large part by the lease (28). Finally, with ELTEL in possession of and operating ELSI's plant, the bankruptcy authorities agreed to sell the plant and related equipment to ELTEL for 4 billion lire (US$6,400,000) (29). Thus, for a little over

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(13) « Without prejudice to the undertaking of the STET Group to build in Palermo a new plant to manufacture in the field of telecommunications, the IRI–STET Group, solicited by the Government ..., has communicated its willingness to intervene in taking over the [ELSI] plant and in commencing also new production » (Annex 47).

(14) Annexes 48 and 49.

(15) Annex 26, para. 20; Annex 59, p. 2.

(16) Annex 53.

(17) Annexes 50, 53, and 54.

(18) Annex 52.

(19) Annex 51.

(20) *Supra*, p. 18; Annex 59, pp. 2–3.

(21) *Ibid.*

(22) Annex 54.

(23) *Supra*, p. 17; Annexes 54, 55 and 56.

(24) Annexes 60 and 61.

(25) *Supra*, p. 18; Annex 60, p. 2.

(26) Annex 64, pp. 2–3. The need for such operation and maintenance was, it may be noted, entirely the responsibility of Italian authorities. As is discussed at Chapter IV, *infra*, instead of reopening and maintaining the plant after the requisition, Sicilian authorities allowed the workers to occupy it. Thus, as a result of the requistiion and the subsequent failure to protect the requisitioned property, the plant had been left idle and not maintained for almost a year.

(27) Annex 65.

(28) *Supra*, pp. 19-20; Annex 69.

(29) *Supra*, p. 20; Annexes 72 and 74.

4 billion lire ELTEL acquired ELSI's plant, equipment, and inventory, including work in process — assets initially valued at over 12 billion lire (US$19,200,000) ([30]).

Thus, the Government of Italy skillfully took advantage of its own commanding position and its initial wrongful requisition to acquire ELSI's plant and assets at a reduced price for the use of their own commercial enterprise.

Their actions were discriminatory within the meaning of Article I(b) of the Supplement. As discussed at p. 33 above, the term « discriminatory », as used in the Treaty and Supplement, expressly encompasses favored treatment for government–controlled enterprises. The actions, moreover, contributed to the impairment of Raytheon's and Machlett's rights and interests as investors. Having caused the bankruptcy, the Government of Italy further shaped its results, to the detriment of Raytheon and Manchlett and the benefit of IRI.

This result was furthered, moreover, by yet another arbitrary and discriminatory action — the Prefect's failure to rule on the legality of the requisition until after ELTEL had acquired ELSI's assets ([31]). During this entire period, the Prefect of Palermo refrained from ruling on the lawfulness of the requisition. When the Prefect finally ruled on 22 August 1969, it was sixteen months after the appeal had been filed, but only 48 days after ELTEL finally purchased ELSI's assets. As discussed below, the Prefect's delay was exceptional. This delay was « arbitrary », in that it was unfair, unreasonable, and unsupported by any legitimate considerations. This delay was, moreover, « discriminatory », in that no comparable delay appears to have occurred in any previous similar appeal brought by an Italian–controlled corporation ([32]).

Thus, the United States submits that, beginning with the requisition and throughout the bankruptcy, Italian authorities engaged in a series of arbitrary and discriminatory measures resulting in the impairment of Raytheon's and Machlett's investment rights and interests, in violation of Article I(b) of the Supplement.

([30]) Annex 13, Schedule Cl. *See* N. 38, Chapter IV, *infra*.

([31]) As discussed further in Chapter IV, *infra*, this delay in ruling also constituted a failure to afford the protection due to Raytheon under Article V of the Treaty.

([32]) *See* further, discussion at pp. 52–53, *infra*.

CHAPTER IV

WRONGFUL TAKING OF INTERESTS IN PROPERTY

With the requisition, Italy embarked on a course of activity aimed at acquiring the bulk of ELSI's assets for a public enterprise at less than fair market value. In addition to the Treaty violations indicated above, the requisition constituted a taking of property without due process of law or just compensation, in violation of Article V (2) of the Treaty. The requisition definitively ended Raytheon and Machlett's ability to use and dispose of assets which they owned through ELSI. It led directly to a forced bankruptcy sale of the assets, primarily to an Italian State enterprise at a price substantially below their fair market price. The requisition, which later was found unlawful, thus constituted a taking of property giving rise to an right to « just » compensation. Because the taking was accomplished through means specifically proscribed by the Treaty — i.e., interfering with management and control and failing to accord the guarantees of due process — just compensation encompasses not only the actual market value of the property taken but also any additional amount necessary to ofjset consequential damages of the taking.

SECTION 1. – *The Taking of Interests in Property.*

Article V(2) of the Treaty provides that:

> « The *property* of nationals, corporations and associations of either High Contracting Party *shall not be taken* within the territories of the other High Contracting Party without due process of law and *without the prompt payment of just and effective compensation* » (Emphasis added).

The Protocol to the Treaty expressly extends this guarantee of compensation to « interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party ». The provision aims « to assure that the investments of the ultimate party in interest, lying behind the corporate facade, are safeguarded (1) ». In other words, the Treaty unambiguously protects the investment interest of United States shareholders in Italian companies whose property is taken by the Italian government.

The « taking » of property to which the Treaty refers encompasses a multitude of activities having the effect of infringing property rights. Under international law, a « taking » generally is recognized as including not merely outright expropriation of property, but also unreasonable interference with its use, enjoyment, or disposal. As Christie stated in 1962:

> « Such cases as there are recognize the principle laid down by the commentators, that interference with an alien's property may amount to expropriation even when no explicit attempt is made to affect the legal title to the property, and even though the respondent State may specifically disclaim any such intention (2) ».

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(1) R. R. WILSON, *United States Commercial Treaties and International Law*, p. 201 (1960).
(2) G. C. CHRISTIE, « What Constitutes a Taking of Property Under International Law ? », 38 *British Yearbook of International Law*, p. 307 at p. 309 (1962).

Subsequently, this principle has been repeatedly reaffirmed by international tribunals and commentators (3). The recent and numerous awards of the Iran–United States Claims Tribunal on this question are illustrative. As stated by the Tribunal in *Starrett Housing*, for example:

> « it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner (4) ».

Of particular relevance here, it repeatedly has been recognized that interference with management and control sufficient to constitute a « taking » of property will be considered to have occurred where the foreign investor has no reasonable prospect of regaining management and control. As stated by Dolzer, commenting on the recent *Revere* case:

> « it cannot be doubted that a long-term interruption of effective control by the owner of the use of property in its fundamental economic function would trigger the duty to compensate also under the substantive international law concept of expropriation (5) ».

In *SEDCO, Inc. v. National Iranian Oil Company*, for example, the Iran–United States Claims Tribunal found the appointment of « temporary » managers for an Iranian company controlled by a United States corporation to be a taking of that corporation's shareholder interest because « there [was] no reasonable prospect of return of control ... as of that date (6) ». The Tribunal noted, *inter alia*, that prior to the appointment of managers, Iran had announced an intention to form a new government company to take over activities then performed by the joint company SEDIRAN. It concluded that « the appointed managers were thus ' temporary '

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(3) *See*, e.g., *Certain German Interests in Polish Upper Silesia, Merits, Judgment N. 7, 1926, P.C.I.J., Series A, N. 7; Norwegian Shipowners' Claims* (Norway v. United States of America), 1 *Reports of International Arbitral Awards*, p. 308 at p. 335; *The United States of America on Behalf of Marguerite de Joly de Sabla v. The Republic of Panama*, reported at 28 *American Journal of International Law*, p. 602 (1934); R. HIGGINS, « The Taking of Property by the State », 176 *Recueil des cours*, p. 259 at p. 324 (1982-III); L. SOHN and R. BAXTER, « Convention on the International Responsibility of States for Injuries to Aliens » (« revised Harvard Draft Convention »), *reprinted in* F. V. GARCÍA-AMADOR, L. SOHN and R. BAXTER, *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, p. 133 at p. 204 (1974); « OECD Draft Convention on the Protection of Foreign Property », 7 *International Legal Materials*, p. 117 at pp. 125-126 (1968). *See further*, authorities cited at N. 4 and N. 5 *infra*.

(4) *Starrett Housing Corp., et al. v. Islamic Republic of Iran*, Awd. N. 32-24-1, 4 *Iran-United States Claims Tribunal Reports* (1983-III), p. 122 at p. 154. *See also*, e.g., *Thomas Earl Payne v. Islamic Republic of Iran*, Awd. N. 245-335-2, at p. 10 (8 Aug. 1986) (« It is well settled in this Tribunal's practice, as elsewhere, that property may be taken under international law through unterference by a State in the use of that property or with the enjoyment of its benefits »); *Harza Engineering Company v. Islamic Republic of Iran*, Awd. N. 19-98-2, 1 *Iran-United States Claims Tribunal Reports*, p. 499 at p. 504 (1981-1982) (« [A] taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property »); *ITT Industries, Inc. v. Islamic Republic of Iran*, Awd. N. 47-156-2 (Aldrich, concurring), 2 *Iran-United States Claims Tribunal Reports*, p. 348 at pp. 351-352 (1983-I); *Tippets, Abbet, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, et al.*, Awd. N. 141-7-2, 6 *Iran-United States Claims Tribunal Reports*, p. 219 at pp. 225-226 (1984-II); *Foremost Tehran, Inc., et al. v. The Islamic Republic of Iran*, Awd. N. 220-37/231-1, p. 22 (11 Apr. 1986); *Phelps Dodge Corp., et al., v. Islamic Republic of Iran*, Awd. N. 217-99-2, p. 14 (19 Mar. 1986); *International Technical Products Corp., et al. v. Islamic Republic of Iran, et al.*, Awd. N. 196-302-2, p. 46 (10 Oct. 1985).

(5) Translation. R. DOLZER, « Nationale Investitions-versicherung und völkerrechtliches Enteignungsrecht: Bemerkungen zum Revere Copper Fall », 42 *Zeitschrift für ausländisches öffentliches Richt and Völkerrecht*, p. 480 at p. 505 (1982). In *Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation* (« *Revere* »), the Tribunal found that Jamaica had engaged in « expropriatory action » because, in repudiating its long-term contractual commitments to Revere, it had prevented the company from exercising effective control over its operation in Jamaica. Focussing on the decision-making process in the Jamaican subsidiary, it noted that « [f]reedom to make rational management decisions is at the heart of effective control. Jamaica's actions were found to have undermined this process notwithstanding the fact that Revere's subsidiary retained its formal rights and property. 56 *International Law Reports*, p. 258 at pp. 290-293, 295 (1980).

(6) Awd. N. ITL 55-129-3, pp. 40-41 (28 Oct. 1985).

not in the sense that control would be returned to SEDCO but only in the eventuality of SEDIRAN becoming utterly defunct (7) ». Iran's clear intention not to return the company to shareholder control from the time of appointment of managers was deemed evidence of a taking as of that date.

Similarly, in *Thomas Earl Payne*, the Tribunal found that:

> « The effect [of the appointment of ' temporary ' managers] is to strip the original managers of affected companies of all authority and to deny shareholders significant rights attached to their ownership interest. While one of the purposes of the Law of 16 June 1979 is the appointment of managers on a ' provisional ' basis, the sum effect in this case was the deprivation of any interest of the original owners in the companies once they were made subject to provisional management by the Government (8) ».

By this established standard, the requisition was a permanent taking. The Government of Italy physically seized ELSI's property with the object and effect of ending Raytheon and Machlett's management and control, in order to prevent them from conducting the planned liquidation. While the requisition order by its terms was affective for only six months, Italian officials indicated at the time that it would be extended as necessary to prevent Raytheon and Machlett from conducting the liquidation. They indicated that a new public enterprise would be formed to manage ELSI on an interim basis, while IRI completed arrangements for acquiring ELSI's assets. Thus, from the time the requisition was imposed, notwithstanding the pendency of ELSI's pending appeal of the order (9), Raytheon and Machlett had no reasonable prospect of ever recovering management and control of ELSI, and had no alternative but to declare bankruptcy (10).

It also follows from the same principle and authority that, where interference with management and control constitutes a taking, the scope of the taking is determined by the extent of actual interference. The purported scope of the seizure, and the extent to which title to assets is ultimately transferred to the government, are immaterial. In *Certain German Interests in Polish Upper Silesia*, for example, the Permanent Court held that, by seizing a nitrate factory, the Polish Government had also expropriated the patents and contract rights of the management

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(7) Awd. N. ITL-55-129-3, pp. 42-43.

(8) Awd. N. 245-335-2, p. 11.

(9) A close parallel may be found in the claim of *Sabine G. Helbig*, in which the Foreign Claims Settlement Commission of the United States held that the taking had occurred when the property was seized by the Hungarian Office of the Commissioner for Abandoned Property, notwithstanding the fact that a partially successful appeal of that action was not decided until almost one year later. The Commission reasoned that « [t]he fact that the authorities subsequently ordered that a portion of the property be returned to claimant, which order was never executed, does not constitute a change in the date when the property was actually taken from claimant ». *In the Matter of the Claim of Sabine G. Helbig*, Claim N. Hung.-20590, Decision N. Hung.-941 (1958), Foreign Claims Settlement Commission of the United States, *Tenth Semiannual Report to the Congress*, p. 51 at p. 52 (1959).

(10) It is also well-established that governmental action to bring about a forced sale at less than fair market value constitutes a taking, irrespective of whether the purchaser is an official entity. *See*, e.g., CHRISTIE, *op. cit.*, at p. 327; E. LAUTERPACHT, « The Drafting of Treaties for the Protection of Investment », in *The Encouragement and Protection of Investment in Developing Countries*, p. 18 at p. 30 (International and Comparative Law Quarterly Supplemental Publication N. 3) (1962); D. F. VAGTS, « Coercion and Foreign Investment Rearrangements », 72 *American Journal of International Law*, p. 17 (1978); B. WESTON, « Constructive Takings' under International Law: A Modest Foray into the Problem of ' Creeping Expropriation ' », 16 *Virginia Journal of International Law*, p. 103 at pp. 133-148 (1975); B. WORTLEY, *Expropriation in Public International Law*, pp. 1-2, 127 (1959); R. HIGGINS, *op. cit.*, at p. 326; M. H. MULLER, « Compensation for Nationalization: A North-South Dialogue », 19 *Columbia Journal of Transnational Law*, p. 35 at p. 36 N. 6 (1981); *Société du Chemin de Fer Ottoman de Jaffa à Jerusalem et Prolongements v. United Kingdom*, described *in* J. G. Wetter and S. M. Schwebel, « Some Little-Known Cases on Concessions », 40 *British Yearbook of International Law*, p. 183 at p. 222 (1964); *Case of Gowen & Copeland* (United States of America V. Venezuela), 4 J.B. MOORE, *International Arbitrations to Which the United States Has Been a Party*, p. 3354 (1898) (« *History of International Arbitrations* »); *Zwack v. Kraus Bros. & Co.*, 237 F. 2d 255 (2d Cir. 1956) *aff'g* 133 F. Supp. 929 (Southern District of New York 1955); *Firma Wichert v. Wichert, Annual Digest and Reports of Public International Law Cases*, p. 23, (H. Lauterpacht, ed. 1948) (Switzerland Federal Tribunal); « OECD Draft Convention on the Protection of Foreign Property », *op. cit.*, at pp. 125-126.

company (11). Similarly, in the *Norwegian Shipowners' Claims* case, the United States claimed that it had requisitioned only partially completed ships, but was found to have expropriated the contracts for completed ships, with which it interfered (12). More recently, in *Starrett Housing Corp. v. Islamic Republic of Iran*, the Iran–United States Claims Tribunal found that in expropriating the subsidiaries' physical assets, Iran incurred liability not only for the value of those assets but also for the value of a construction project to be carried out by the subsidiary, the profit which the claimant would have received in management fees and the loans claimant made to the subsidiary for the purposes of the project (13). Similarly, in *Revere* the measure of loss was Revere's total net investment in the Jamaican subsidiary, even though Revere formally retained ownership, as Jamaica's interference with effective control of the enterprise necessarily affected the entire operation (14).

The requisition was thus a taking of *all* of ELSI's assets, even though the requisition order did not expressly seize, nor did ELTEL ultimately acquire, all of these assets.

Accordingly, the United States submits that the requisition was a permanent taking of Raytheon and Machlett's property interests in ELSI, within the meaning of Article V(2) of the Treaty.

SECTION 2. – *Absence of Due Process.*

The first protection set forth by Article V(2) of the Treaty is the protection afforded by « due process of law ». The meaning of « due process » here is the due process required by international law (15). The purpose of this international minimum standard is:

> « to secure protection against arbitrary and unjust treatment in any particular in which the Government of a country does not accord its own nationals as liberal treatment as that which is recognized by international law (16) ».

As discussed above, the process by which this taking was accomplished was not in accordance with governing standards of either domestic or international law. The requisition without which this acquisition would not have been accomplished, was not only an « arbitrary and discriminatory » measure in contravention of the standards of treatment required by the Treaty, but was actually contrary to Italian domestic law.

Moreover, Raytheon and Machlett were denied effective legal recourse against the requisition order by the Prefect's exceptional delay of some sixteen months in ruling on their appeal. As set forth in Chapter V, Section 1, *infra*, this unwarranted delay constituted a denial of justice under international law.

The means by which the taking of ELSI's assets was accomplished thus did not meet international minimum standards of due process, as required by Article V(2) of the Treaty.

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(11) *Certain German Interests in Polish Upper Silesia*, *op. cit.*, at p. 541. As the cases cited in N. 10 relating to « forced sales » demonstrate, it is immaterial whether the government itself ultimately acquires all, or any, of the expropriated assets.

(12) *Norwegian Shipowners' Claims*, *op. cit.*, at p. 334.

(13) *Starrett Housing Corp. v. Islamic Republic of Iran*, *op. cit.*, at pp. 154–156.

(14) *Revere*, *op. cit.*, at p. 296. *See* N. 5, *supra*.

(15) *See* R. R. WILSON, « Property–Protection Provisions in United States Commercial Treaties », 45 *American Journal of International Law*, p. 83 at p. 99 (1951); R. R. WILSON, *The International Law Standard in Treaties of the United States*, pp. 101, 247 (1953).

(16) Memorandum of the Solicitor of the State Department discussing the meaning of a similar promise of due process protection in a 1933 United States–Germany commercial treaty, *quoted in* R. R. Wilson, « Property–Protection Provisions in United States Commercial Treaties », *op. cit.*, at p. 99, N. 84 (1951). *See also*, e.g., *The United States of America on behalf of Harry Roberts, Claimant v. The United Mexican States, Opinions of the Commissioners under the Convention concluded September 8, 1923 between the United States and Mexico*, p. 100 at p. 105 (1927); *The United States of America on behalf of George W. Hopkins v. United Mexican States*, *ibid.*, p. 42 at p. 47; *The United States of America on behalf of L. F. H. Neer and Pauline E. Neer, Claimants v. The United Mexican States*, *ibid.*, p. 71 at p. 73; C. EAGLETON, *Responsibility of States in International Law*, pp. 83–84 (1928); M. WHITEMAN, 1 *Damages in International Law*, pp. 22–23 (1937); E. BORCHARD, « The Minimum Standard of Treatment of Aliens », 38 *Michigan Law Review*, p. 445 at p. 447 (1940); L. SOHN and R. BAXTER, *Revised Harvard Draft Convention*, *op. cit.*, at pp. 236–237. *See also*, authorities cited at Chapter V, n. 3.

SECTION 3. – *Absence of Just Compensation.*

It is a basic and well settled principle of international law that a State which takes the property of an alien must afford « full » or « just » compensation for what has been taken (17). This principle is affirmed in Article V(2) of the FCN Treaty, which specifies that property shall not be taken « without the prompt payment of just and effective compensation (18) ». Just compensation ordinarily entails payment of the fair market value of the property taken, measured at the time of the taking (19), excluding any diminution in value caused by the government action against it, or the perceived risk thereof (20).

In the *Norwegian Shipowners' Claims*, for example, « just compensation » was awarded equivalent to the « real market value » of certain shipbuilding contracts (21). More recently, the Iran–United States Claims Tribunal has applied the « just compensation » clause of the 1955 Treaty of Amity between those two countries as requiring compensation equal to the fair market value of property taken, defined as:

> « the amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalization itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares (22) ».

At least where the taking is wrongful, moreover, as for instance when it violates a treaty obligation, the compensation owed is not limited to the actual market value of the property

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(17) *See*, e.g., *Delagoa Bay Railway* (United States of America and United Kingdom v. Portugal), *summarized in* J. B. MOORE, *op. cit.*, vol. 2, at p. 1896; *Factory at Chorzow, Merits, Judgment N. 13*, 1928, *P.C.I.J., Series A N. 17*, pp. 677–678 (« *Chorzow Factory, Merits* »); *SEDCO, Inc. v. National Iranian Oil Co.*, Awd. N. ITL 59–129–3, p. 11 (27 Mar. 1968); *AGIP S.p.a. v. Government of the Popular Republic of the Congo*, 67 *International Law Reports*, p. 319 at p. 339; *AMCO Asia Corporation v. Indonesia*, 24 *International Legal Materials*, p. 1022 at p. 1037 (1985); I. BROWNLIE, *Principles of Public International Law*, p. 538 (1979); B. CLAGETT, « The Expropriation Issue before the Iran–United States Claims Tribunal: Is ' Just Compensation ' Required by International Law or Not ' », 16 *Law and Policy in International Business*, p. 813 at p. 838 (1984).

(18) In United States practice, the terms « just » and « prompt, adequate and effective » compensation are used interchangeably. For example, in correspondence with the Mexican government setting forth the prompt, adequate and effective standard, Secretary of State Cordell Hull used that phrase and the term « just compensation » interchangeably. *See* G. H. HACKWORTH, 3 *Digest of International Law*, p. 654 (1942). United States courts have also regarded the terms as synonymous. *See*, e.g., *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412 (S.D.N.Y. 1980), *aff'd as modified*, 658 F. 2d 875 (2d Cir. 1981). In the most recent public summary of the international legal principles applicable to expropriation, the Department of State, through the Legal Adviser, interpreted similar language in the 1955 Treaty of Amity with Iran in this fashion. *See* « Memorandum of the Department of State Legal Adviser on the Application of the Treaty of Amity to Expropriations in Iran », 22 *International Legal Materials*, p. 1406–1407 (1983). *See also*, e.g., B. CLAGETT, *op. cit.*, at pp. 841–843.

(19) *See*, e.g., *Chorzow Factory, Merits, op. cit.*, at p. 677; *Norwegian Shipowners' Claims, op. cit.* at p. 334; *Spanish–Moroccan Claims*, 2 *Reports of International Arbitral Awards*, p. 615; *Lighthouse Arbitration*, 23 *International Law Reports*, p. 299 at p. 301 (1956); *ITT Industries, Inc. v. The Islamic Republic of Iran, op. cit.; American International Group, Inc. v. The Islamic Republic of Iran*, Awd. N. 93–2–3, (19 Dec. 1983); 4 *Iran–United States Claims Tribunal Reports*, p. 96 at p. 102, (1983–III); *Starrett Housing Corp. v. The Islamic Republic of Iran, op. cit.*; As discussed in Chapter VI, *infra*, full compensation also should include interest.

(20) *See*, e.g., *American International Group v. The Islamic Republic of Iran, op. cit.*, at pp. 106–107; Article 10(2) of the *Revised Harvard Draft Convention* which describes just compensation for a taking of property « in terms of the fair market value of the property ... unaffected by this or other takings or by conduct attributable to the State and designed to depress the value of the property in anticipation of the taking »; F. V. GARCÍA–AMADOR, L. SOHN and R. BAXTER, *op. cit.*, p. 133 at p. 203 (1974); *SEDCO, Inc. v. National Iranian Oil Co.*, Awd. N. ITL 55–129–3, p. 42 (28 Oct. 1985); *ITT Industries, Inc. v. Islamic Republic of Iran, op. cit.*, at p. 355 (Aldrich, concurring); American Law Institute, *Second Restatement*, sec. 188, comment b; CLAGETT, *op. cit.*, at pp. 862–863; R. LILLICH, « The Valuation of Nationalized Property by the Foreign Claims Settlement Commission », in 1 *The Valuation of Nationalized Property in International Law*, p. 95 at p. 97, N. 13 (R. Lillich ed. 1972); MÜLLER, *op. cit.*, at p. 43; C. OLMSTEAD, « Nationalization of Foreign Property Interests, Particularly Those Subject to Agreement With the State », 32 *New York University Law Review*, p. 1122 at p. 1133 (1957); I. FOIGHEL, *Nationalization and Compensation*, p. 250 (1964).

(21) *Op. cit.*, at pp. 332, 339.

(22) *INA Corporation v. The Government of the Islamic Republic of Iran*, Awd. N. 184–161–1 (13 Aug. 1985), at p. 31. *See also, American International Group, Inc. v. The Islamic Republic of Iran, op. cit.*, at p. 102; *Thomas Earl Payne and The Government of the Islamic Republic of Iran, op. cit.*

taken. Following from the general principle, elaborated at greater length in Chapter VI, that compensation for a wrongful act should correspond to *restitutio in integrum*, compensation for a wrongful taking should redress all of the injuries suffered as a result of the taking. In the *Chorzow Factory* case, for example, the Permanent Court of International Justice found Poland's seizure of the factory to have been in violation of treaty obligations and therefore « wrongful » as a matter of international law (23). The Court concluded that:

> « It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the date of payment (24) ».

This principle is still valid today. In *TOPCO*, for example, sole arbitrator Professor Dupuy noted that:

> « *restitutio in integrum* being in spite of everything the basic principle, it is this principle which (in conformity with the rule laid down by the Permanent Court of International Justice in the Chorzow Factory case ...) will serve as the reference for calculating the amount of a possible pecuniary indemnity ... (25) ».

Even in *LIAMCO v. Libya*, which is noteworthy among recent cases for the limited measure of compensation applied (26), sole arbitrator Dr. Mahmassani unequivocably affirmed the continuing validity of authorities following the *Chorzow Factory* principle in cases where a taking is wrongful:

> « The forementioned [authorities], whether in theoretical juristic opinion or in case law, apply undoubtedly to cases of wrongful taking of property (27) ».

In the present case, therefore, the compensation provided for the taking of ELSI's assets should have corresponded to *restitutio in integrum*, as discussed in further detail in Chapter VI, *infra*. It is manifest that such full compensation was not provided. The Government of Italy did not even pay fair market value for the property which it ultimately acquired, much less for the whole of ELSI's assets which were taken.

For purposes of compensation for the taking of ELSI, ELSI should be valued as a going concern as of 1 April 1968. Notwithstanding the precarious financial situation which had led the shareholders to decide to liquidate, ELSI remained an ongoing enterprise which had, in addition to certain tangible assets, significant intangible assets which placed the fair market value of the company appreciably above that of the physical assets standing alone. These intangible assets included established customer and supplier relationships, developed and fully functioning methods and processes, access to all necessary patents, licenses, technical assistance, and other technology, and an established name and reputation for quality products (28).

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(23) *Chorzow Factory, Merits, op. cit.*, at p. 677.

(24) *Ibid.*

(25) *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, (Award on the Merits), 17 *International Legal Materials*, p. 1 at p. 35 (1977).

(26) *Clagett, op. cit.*, at p. 858.

(27) *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, reprinted in 20 *International Legal Materials*, p. 1 at p. 70 (1981). *See also*, e.g., BROWNLIE, *op. cit.*, at p. 539; D. P. O'CONNELL, 2 *International Law*, p. 1205 (1965); S. FRIEDMAN, *Expropriation in International Law*, p. 218 (1953); *Chorzow Factory, Merits, op. cit.*, at p. 47; M. H. MENDELSON, « Agora: What Price Expropriation? Compensation for Expropriation »; The Case Law, 79 *American Journal of International Law*, p. 414 at p. 416 (1985); G. WHITE, *Nationalization of Foreign Property*, p. 154 (1961). Authorities also recognize that breach of a stabilization clause in a private contract gives rise to a « special right of compensation » for the party wronged. E. JIMÉNEZ DE ARÉCHAGA, « International Law in the Past Third of a Century », 159 *Recueil des cours*, p. 1 at p. 306 (1978-I); S. CHOWDHURY, « Permanent Sovereignty over Natural Resources », in *Permanent Sovereignty over Natural Resources in International Law*, p. 2 at p. 39 (K. Hossain & S. Chowdhury eds. 1980-1984); F. V. GARCÍA-AMADOR, *The Changing Law of International Claims*, pp. 391-395 (1984).

(28) *Supra*, pp. 6-7 and 10-11.

Such intangible assets are of significant value to potential purchasers. As stated by Mr. Scopelliti, former Chief Financial Officer and Controller of Raytheon's European management subsidiary:

> « In my experience, companies are often willing to pay a considerable sum simply for the name, technology, and established customers of an electronics business, in addition to the tangible assets. It is not unusual for buyers of going concerns in the electronics industry to pay a price in excess of twice their book value (29) ».

Knowing this, Raytheon and Machlett had decided, in the liquidation, to preserve these going concern aspects of ELSI's business, in order to sell it for its maximum value (30).

International tribunals have recognized that such intangible assets are valuable assets, which must be considered in determining compensation owed for takeovers of companies. In *Chorzow Factory*, for example, the Permanent Court of International Justice defined the « undertaking », for purposes of valuation, as « including lands, buildings, equipment, stocks, *available processes, supply and delivery contracts, goodwill and future prospects* (31) ». Similarly, in *American International Group, Inc. v. The Islamic Republic of Iran*, the Iran – United States Claims Tribunal held that:

> « the appropriate method is to value the company as a going concern, taking into account not only the net book value of its assets but also such elements as goodwill and likely future profitability, ... (32) ».

Under the particular circumstances of this case, and in view of the difficulty of independently estimating at this time ELSI's fair market value as a going concern almost twenty years ago, the United States submits that a fair measure of that value is given by the aggregate book value of ELSI's assets as of 31 March 1968. This book value does not include ELSI's intangible assets as a going concern, and the book values of other assets which are included are not, *ipso facto*, fair market values (33). Taken as a whole, however, these omissions and adjustments counter-balance each other, so that in this case book value is a fair measure of compensation (34). As stated by Raytheon's former Vice-President and Controller, Mr. Arthur Schene:

> « The aggregate book valuation of the assets represent a fair measure of their value on a going concern basis. Any downward adjustments in the valuation of specific assets would have been more than offset by a reasonable amount of goodwill and the upward adjustment of other assets. For example, had IRI moved in in 1968 and taken over the operation with their ability to open up markets, at least full asset value should have been realized by them (35) ».

In short, as of 1 April 1968, Italy expropriated ELSI as a going concern. Raytheon and Machlett planned to liquidate it as a going concern, and Italy planned to operate it as a going concern. Italy's method of expropriation, however, served as a means to avoid paying full compensation for ELSI's assets at going concern value.

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(29) Annex 17, para. 9.

(30) *Supra*, pp. 10–11; Annex 15, para. 50.

(31) *Chorzow Factory, Merits, op. cit.*, at p. 51 (Emphasis added).

(32) *American International Group, Inc. v. The Islamic Republic of Iran*, Award N. 93–2–3, *op. cit.*, at p. 21.

(33) In principle, « book value » does not reflect going concern or fair market value, because it does not take into account the capacity of an asset to produce future income. Compensation at book value is therefore ordinarily considerably less than full compensation. C. F. Amerasinghe, for example, describes book value as « the usual minimum » in state practice. C. F. AMERASINGHE, « The Quantum of Compensation for Nationalized Property », in 3 *The Valuation of Nationalized Property in International Law*, p. 91 at p. 126 (R. Lillich, ed. 1985). In this particular case, however, in view of the considerations set forth above, book value is in fact a fair measure of going concern value.

(34) The only other contemporaneous estimate of the market value of ELSI's assets is the minimum liquidation value, which had been prepared on a « quick sale » basis, deliberately omitting intangible assets and understating others. *Supra*, p. 11. It should be considered a assured minimum value and does not represent a viable alternative to book value as an approximation of going concern value.

(35) Annex 13, para. 15.

As of 30 March 1968, ELSI's book value was 17.05 billion lire ([36]). The Trustee ultimately received, however, less than only 6.4 billion lire (US$10,240,000) for ELSI's assets ([37]). Italy itself paid only slightly more than 4 billion lire (US$6,400,000) for the assets which it ultimately acquired — assets which had a book value of 12 billion lire (US$19,200,000) ([38]). The value of other assets, including substantial accounts receivable which were never collected, was lost in the requisition and bankruptcy process. In addition, because the expropriation was accomplished by wrongful actions in violation of the Treaty and Supplement, just compensation in this case must include not only compensation for the value of property taken, but also for the other damages resulting from the wrongful actions. As discussed in Chapter VI, *infra*, this includes in particular substantial legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against Italian court actions by creditor banks, and in pursuing its claim for redress. Thus, there can be no doubt that Raytheon and Machlett were denied payment of fair market value for the property which was effectively taken on 1 April 1968 by the requisition.

Accordingly, the United States submits that Italy has taken Raytheon and Machlett's interests in ELSI, without due process or payment of just compensation, in violation of Article V(2) of the Treaty.

([36]) Annex 13, para. 15. *See also*, Annex 30, Attach ment B, Schedule A.

([37]) *See* Annex 13, Schedule C1.

([38]) *Ibid.* It is difficult to determine precisely from the available information how many of ELSI's tangible assets were left in the plant by the time Italy completed its acquisition. However, it appears that Italy acquired, in addition to the plant and equipment, nearly all of the remaining inventory. As shown in Schedule C1, « inventory » includes work in process and finished goods as well as materials and supplies.

CHAPTER V

FAILURE TO PROVIDE PROTECTION AND SECURITY

SECTION 1. – *Delay in Ruling on the Challenge to the Requisition Order.*

When the Government of Italy requisitioned ELSI's plant and equipment on 1 April 1968, ELSI promptly appealed to the Prefect of Palermo to set aside this order. The Prefect, however, did not issue his ruling until 22 August 1969. In the meantime, ELSI had gone bankrupt and the Government of Italy had completed the purchase of ELSI's plant and equipment. As discussed above, this delay in ruling was an arbitrary and discriminatory measure which impaired Raytheon's and Machlett's investment rights and interests. Under the circumstances, moreover this delay constituted a denial of justice — more specifically, a denial of procedural justice [1] — in violation of paragraphs (1) and (3) of Article V of the Treaty [2].

Article V(1) of the Treaty states in pertinent part:

> « The nationals of each High Contracting Party *shall receive*, within the territories of the other High Contracting Party, the *most constant protection and security for their* persons and *property, and shall enjoy* in this respect *the full protection and security required by international law* » (Emphasis added).

This explicit recognition and adoption of the international law minimum standard of the treatment due to aliens [3] is enhanced by Article V(3), which specifies that the protection and security referred to in Article V(1), assuming « compliance with applicable laws and regulations », shall be no less than that due under national or most-favored-nation standards of treatment. Together, Articles V(1) and V(3) obligate the Government of Italy to afford to United States nationals the international standard, the most-favored-nation standard, or the national standard of protection of property — whichever is highest.

It is well established that, as a matter of general international law, unreasonable or unwarranted delay in ruling on a case violates the international standard of treatment. In the 1896 decision in the *Fabiani* case, for example, the President of the Swiss Confederation, acting as sole arbitrator, found that:

> « Upon examining the general principles of international law concerning the denial of justice, that is to say the rules common to most legal systems or laid down by doctrine,

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(1) The concept of « denial of procedural justice » includes injury resulting from a denial of procedural fairness, and due process in relation to judicial proceedings. *See*, e.g., The American Law Institute *Second Restatement* sec. 181 (1965). (*See also* Tent. Draft N. 7, sec. 711, comment a).

(2) This denial of procedural justice is also further evidence that Italy's actions were arbitrary in violation of Article I of the Treaty Supplement. *See* Chapter II, *supra*.

(3) The existence of such an international standard of treatment was reaffirmed most recently by this Court in its Order of 15 December 1979 in the *Hostages Case*, which refers to « the treatment due to [nationals] under general rules of international law as aliens within the territory of the foreign state ». *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports* 1979, p. 7 at p. 14, *See also*, e.g., *Certain German Interests in Polish Upper Silesia, Merits, Judgment N. 7*, 1926, *P.C.I.J., Series A, No. 7*, p. 510 at pp. 523–524; E. ROOT, « The Basis for Protection to Citizens Residing Abroad », 4 *American Journal of International Law*, p. 517 at p. 527 (1910); C. EAGLETON, *Responsibility of States in International Law*, p. 83–84 (1928); M. WHITEMAN, 1 *Damages in International Law*, pp. 21–22 (1937); E. BORCHARD, « The ' Minimum Standard ' of the Treatment of Aliens », 38 *Michigan Law Review*, pp. 445 *et seq.* (1940); A. H. ROTH, *The Minimum Standard of International Law Applied to Aliens*, pp. 122–123 (1949); *Revised Harvard Draft Convention*, reprinted in F. V. GARCIA-AMADOR, L. SOHN and R. BAXTER, *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, pp. 236–237 (1974).

one concludes that denial of justice includes not only the refusal of a judicial authority to exercise its functions, ... but also persistent delays on its part in rendering judgment (4) ».

As Freeman concludes from the numerous arbitral awards in support of this point in his definitive work, *The International Responsibility of States for Denial of Justice :*

« Culpable delay on the part of the courts in disposing of cases involving foreigners is one of the most typical instances of denial of justice and as such engages the State's international responsibility. This point has long been settled.... In effect, ever since the era of private reprisals it has been axiomatic that unreasonable delays are properly to be assimilated to absolute denials of access (5) ».

Ultimately, the premise that a delay in ruling can amount to a denial of justice rests on their equivalence in fact. As Freeman notes:

« it is obvious that the failure to conduct proceedings with reasonable diligence and despatch may produce the same dire effects for the claimant as though he had been denied a judicial remedy altogether (6) ».

The delay of the Prefect in ruling on ELSI's appeal of the requisition of its assets constitutes a culpable denial of justice by this standard. Judged by its practical effect, it constituted a denial of any judicial remedy. When the Prefect finally ruled in ELSI's favor on 22 August 1969, seventeen months after the appeal was filed, the Government of Italy had completed its acquisition of ELSI's plant and equipment. Even though the ruling was ultimately in ELSI's favor, it was too late to have any remedial effect. Not only had any possibility of a voluntary, orderly liquidation been extinguished long before, but also there remained no chance that the ruling might affect the acquisition of ELSI's assets through the bankruptcy (7).

The delay in ruling appears, moreover, to be of an exceptional nature not justified by any legitimate consideration. A prompt ruling on such an appeal was not only possible, but customary. In all previous cases of which the United States is aware, in which the 1865 requisition law had been invoked, the Prefect of the relevant jurisdiction had promptly quashed the requisition (8). ELSI's appeal did not present any special complications justifying this exceptional delay, nor is any reasonable explanation for it apparent. The only conclusion which can be drawn under the circumstances is that this delay was unwarranted and unreasonable, either as the result of negligent or willful action.

In conclusion, the United States submits that the delay in ruling on this appeal constituted a failure to accord the « most constant protection and security » and « the full protection and security required by international law » as required by Article V(1). Moreover, because the delay was far in excess of the delay experienced in prior suits involving companies owned by Italian nationals, it also constituted a failure to accord a national standard of protection, as required by Article V(3).

SECTION 2. – *Failure to Afford Protection to ELSI's Plant and Premises.*

As discussed above, once ELSI's plant and equipment had been requisitioned, ELSI's employees began an occupation of the premises that continued, so far as can be determined,

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(4) Translation. Award of the President of the Swiss Confederation in the case of *Fabiani*, in J. B. MOORE, 5 *History and Digest of the International Arbitrations to which the United States Has Been a Party*, p. 4878 at p. 4895 (1898).

(5) A. V. FREEMAN, *The International Responsibility of States for Denial of Justice*, p. 242 (1938). *See also*, e.g., *The United States of America on behalf of B. E. Chattin, Claimant v. The United Mexican States, Opinions of Commissioners*, p. 422 at p. 432 (1927); C. DE VISSCHER, « Le déni de justice en droit international », in 52 *Recueil des cours*, p. 362 at p. 397 (1935); G. SCHWARZENBERGER, 1 *International Law*, p. 621 (3rd ed., 1957); ROUSSEAU, 5 *Droit international public*, p. 69 (1983); and American Law Institute, *Second Restatement*, sec. 181(h).

(6) FREEMAN, *op. cit.*, at p. 244.

(7) *Supra*, p. 21. As noted at p. 17, *supra*, the *Prefect* was personally involved in negotiations between IRI and the Trustee.

(8) In most other cases, the requisition was quashed in a matter of days and in no case more than thirty days. In this case, the Prefect ruled more than sixteen months after the appeal was filed. Annex 26, para. 10.

up to the re–opening of the plant by ELTEL. This occupation, combined with the idleness of the plant during the requisition, had at least two injurious consequences: it resulted in a deterioration of the plant and related material and equipment, and it impeded the Trustee's efforts to dispose of the plant ([9]).

The occupation appears to have had the tacit approval of local authorities, who made no effort to prevent or to end it, or otherwise to protect the premises ([10]). Either the legal custodians of the plant — first the Mayor, under the requisition, and subsequently the bankruptcy authorities — did not seek, or the police did not provide, the protection which previously had been provided. This failure to afford protection constituted a violation of Article V(1) of the Treaty.

As discussed above, Article V(1) of the Treaty establishes Italy's obligation to provide « the most constant protection and security » to the property of United States nationals, and in particular « the full protection and security required by international law ». One well–established aspect of the international standard of treatment is that States must use « due diligence » to prevent wrongful injuries to the person or property of aliens within their territory. If a State fails to use due diligence to prevent such injury, then it is responsible for this omission and is liable for the ensuing damages ([11]).

The obligation of a State to exercise « due diligence » does not require that it prevent any injury whatsoever. Rather, the obligation is generally understood to require that a State take reasonable actions within its power to avoid injury when it is, or should be, aware that a risk of injury exists ([12]). The precise degree of care that is « reasonable » or « due » depends in part on the circumstances ([13]). Where, however, a State entirely fails to use the means at its disposal to provide protection, there can be no doubt that adequate protection has not been provided. Thus, for example, in the *Hostages Case*, this Court determined that Iran had breached its obligation to protect foreign nationals, based on the finding that Iran was aware of the need for action and had failed to use the means at its disposal to comply with its obligations ([14]).

Similarly in this case, Italy should be charged with knowledge of the need for action to protect the plant and found to have failed to use the means at its disposal to provide appropriate protection. The occupation began only after the Mayor — an Italian government official — had assumed custody of the plant. Italian officials had been following ELSI's situation closely and were well aware of the threat of occupation before it occurred. Prior to the requisition, the police protected the plant, keeping strikers off the premises and allowing only persons with legitimate purposes to enter. The requisition was issued in part to temper the expected outcry from the workers over the actual closing of the plant. Italian officials thus foresaw the situation worsening, yet at the same time they actually decreased their physical protection of the plant ([15]).

Having deprived Raytheon of the right and ability to protect its own property, Italy had a special duty to protect them against hostile actions ([16]). Moreover, having itself assumed custody

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([9]) *Supra*, p. 13; Annex 79, p. 3; *see also* Annex 26, paras. 17–18.

([10]) The failure of Italian authorities to afford protection after the requisition until at least the date ELSI filed a petition in bankruptcy is addressed in the Affidavit of Mr. Merluzzo, Annex 21, paras. 20 and 23. Raytheon and Machlett have little direct knowledge of events in Palermo after the bankruptcy. According to the later statements of Avv. Bisconti and the Trustee, however, as reflected in Annexes 26 and 79, it appears that the occupation continued uninterrupted until ELTEL acquired the plant.

([11]) *See*, e.g., *Case of the Alabama and her Tender, the Tuscaloosa*, summarized in MOORE, vol. 5, *op. cit.*, p. 4144 at p. 4160; E. BORCHARD, *Diplomatic Protection of Citizens Abroad*, p. 217 (1915); EAGLETON, *op. cit.*, at p. 88; ROUSSEAU, *op. cit.*, at pp. 74–75; 1 *Oppenheim's International Law*, pp. 365–367, 8th ed. by H. Lauterpacht (1955); R. LILLICH and J. PAXMAN, « State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities », 26 *The American University Law Review* (1977), p. 217, at pp. 225–231 and 240–245; GARCIA–AMADOR, *op. cit.*, p. 27; American Law Institute, Second Restatement, sec. 183; commentary to Article 11 of International Law Commission Draft Articles, *II Yearbook of International Law*, 1975, p. 70–82.

([12]) *See*, e.g., authorities cited at N. 11, *supra*.

([13]) *See*, e.g., EAGLETON, *op. cit.*, at p. 88, GARCÌA–AMADOR, *op. cit.*, at p. 27.

([14]) *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports* 1980, p. 3 at pp. 32–33. The Court also referred to Iran's awareness of its obligations. Where a treaty obligation is at issue, however, a State must normally be presumed to be aware of its obligations. *See also*, e.g., *William E. Chapman (USA) v. United Mexican States*, 4 *Reports of International Arbitral Awards*, p. 632 at p. 639; BORCHARD, *op. cit.*, at p. 213; authorities cited at N. 11, *supra*.

([15]) *Supra*, p. 13; Annex 21, paras. 20–21.

([16]) *Cf.* Case of *Enrique Rau*, summarized in M. WHITEMAN, *op. cit.*, vol. 1, p. 26 at p. 27.

of the plant, Italy was responsible for its maintenance and care. Instead of enhancing plant security under the requisition, however, Italian officials allowed the occupation to begin and continue without interference and made no apparent effort to protect the premises from the injurious effects of occupation.

Thus, following the requisition, governmental authorities failed to meet even minimum standards of protection for the property in question. Italy failed to use the means at its disposal to continue to keep plant premises free of unauthorized persons, or so far as appears, to preserve and maintain the plant and equipment in any way. Accordingly, the United States submits that the Government of Italy has failed to provide the requisite protection to ELSI's premises in violation of its obligations under Article V(1) of the Treaty.

CHAPTER VI

THE COMPENSATION DUE TO THE UNITED STATES

SECTION 1. – *The Duty to Pay Compensation.*

It is a fundamental principle of international law that a State which has breached its international obligations incurs a duty to make reparation to the injured State (1). This general principle applies, *inter alia*, to obligations assumed by treaty. As the Permanent Court of International Justice stated in the *Chorzow Factory* case, « [i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form (2) ». The Permanent Court regarded « reparation as the corollary of the violation of the obligations resulting from an engagement between States (3) ». Even absent an express provision in the international agreement providing for reparation in the event of breach, the offending State is obligated to make reparation. As the Permanent Court stated in *Chorzow*, « Reparation ... is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself (4) ».

This Court has reaffirmed the principle that a State is entitled to reparation for the violation of its treaty rights on several occasions. In the *United States Diplomatic and Consular Staff in Tehran* case, for example, the Court held that the United States was entitled to reparation from Iran for the latter's breach of its treaty obligations:

> « [T]he Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable rules of general international law, has incurred responsibility

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(1) As defined by Jiménez de Aréchaga, « reparation is the generic term which describes the various methods available to a State for discharging or releasing itself from ... responsibility. The forms of reparation may consist in restitution, indemnity or satisfaction ». E. JIMÉNEZ DE ARÉCHAGA, « International Law in the Past Third of a Century », 159, *Recueil des cours*, p. 1 at p. 285 (1978). In the *Corfu Channel* case, this Court stated that it follows from the establishment of the responsibility of a State for the breach of an international obligation « that compensation is due ». *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4, at pp. 23–24. *See also*, e.g., *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3 at pp. 41–42; Article 1 and commentary thereto of Part 1 of the International Law Commission's Draft Articles on State Responsibility, II *Yearbook of the International Law Commission, 1973*, pp. 173–176, and Article 6(2) of Part 2 of the draft articles, as proposed by the Special Rapporteur, II *Yearbook of the International Law Commission, 1984* (Part Two), p. 100, N. 322; American Law Institute, *Second Restatement* secs. 164, 165, 168 (1965); García-Amador's Draft Articles on State Responsibility, in F. V. GARCÍA-AMADOR, L. SOHN and R. BAXTER, *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, p. 86 (1974); Revised Harvard Draft Convention, *ibid.*, at p. 143.

(2) *Factory at Chorzow, Jurisdiction, Judgment N. 8, 1927, P.C.I.J., Series A, N. 9*, p. 21 (« *Chorzow Factory, Jurisdiction* »). *See also*, e.g., *Interpretation of Peace Treaties With Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221 at p. 228; *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, N.* 74, p. 10, at p. 28; Article 1 of Chapter 1 of the International Law Commission's Draft Articles on State Responsibility, II *Yearbook of the International Law Commission*, 1973, pp. 173–176; Article 17, II *Yearbook of the International Law Commission, 1980* (Part Two), p. 32; Article 5(2) (a) of Part 2 *Report of the International Law Commission, 1985*, pp. 53–54, and proposed Article 6(2), II *Yearbook of the International Law Commission, 1984* (Part Two), p. 100, N. 322.

(3) *Chorzow Factory, Merits, P.C.I.J., Series A., N.* 17, p. 27.

(4) *Chorzow Factory, Jurisdiction, op. cit.*, at p. 21.

(5) *United States Diplomatic and Consular Staff in Tehran, op. cit.*, pp. 41–42.

towards the United States. As to the consequences of this finding, it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States (5) ».

This principle has been repeatedly recognized by decisions of other international fora (6), by international commentators (7), and in efforts to codify international law (8).

SECTION 2. – *The Measure of Compensation.*

A) *Compensation may be measured by the injury to Raytheon and Machlett.*

While the State on the international plane always represents its own interests, the compensation to which it is entitled for breach of a treaty obligation can be measured not only by injuries suffered directly by the State, but also by injuries to its nationals as a result of the wrongful action. This principle was confirmed also by the Permanent Court in the *Chorzow Factory* case. In determining the measure of damages due the German Government for Poland's expropriation of German nationals' property in violation of its treaty obligations, the Court stated:

« It is a principle of international law that the reparation of a wrong [to a State] may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. ... The reparation due by a State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure.... Rights or interests of an individual, the violation of which rights causes damage, are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State (9) ».

International arbitrators and commentators have similarly recognized that damage to the national as a result of a State's treaty violations may serve as a measure of the compensation owed to the injured State. In the *Forests of Rhodope* case, for example, the arbitrator held that Bulgaria's expropriation of Greek nationals' property in Rhodopia violated the Treaty of Neuilly (10). In determining the proper measure of compensation due Greece, the arbitrator held that « [t]he damage suffered by the Greek nationals furnishes an equitable measure of the reparation due to the Greek government (11). As noted by Schwarzenberger, while «[t]he damage suffered by the State is not necessarily limited to that of the individual ... this may offer a convenient measure of the minimum of damage for which reparation is due (12) ».

In these cases, as in the present case, the treaty provisions in question had only an indirect bearing on the direct financial rights of the respective governments, and were aimed rather at the protection of the parties' respective nationals. The United States accordingly submits

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(6) *See*, e.g., *Affaire des Forêts du Rhodope Central (Fond)*, 3 *Reports of International Arbitral Awards*, p. 1405 at p. 1436; *Award Concerning the Claim of George J. Salem*, 2 *Reports of International Arbitral Awards*, p. 1165 at p. 1194.

(7) *See*, e.g., 1 *Oppenheim's International Law*, sec. 156 (8th ed., by H. Lauterpacht 1955); A. V. FREEMAN, *The International Responsibility of States for Denial of Justice*, p. 572 (1938); A. D. MCNAIR, 2 *Law of Treaties*, pp. 539–540, 574 (1961).

(8) *See*, e.g., authorities cited at N. 1, *supra*.

(9) *Chorzow Factory, Merits, op. cit.*, at pp. 27–28.

(10) 1933–1934 *International Law Reports*, pp. 91 *et seq.*

(11) *Ibid.*, p. 101.

(12) G. SCHWARZENBERGER, 1 *International Law*, p. 141 (3d. ed. 1957). Freeman agrees that « the degree of *public injury* — or rather the reparation sought for the violation of a *public* right — is determined by the extent of the *private* loss ». FREEMAN, *op. cit.*, at p. 576.

that the losses suffered by Raytheon and Machlett as a result of Italy's violation of the Treaty are the most appropriate and only convenient measure of damages to the United States for violation of its rights under the Treaty in this case [13].

B) *All of the injuries suffered by Raytheon and Machlett should be included in the measure of compensation.*

1. – *The General Principle*

The proper measure of compensation is that which redresses all of the injuries occasioned by the commission of the international wrong. The Permanent Court enunciated this basic principle in the *Chorzow Factory* case:

> « The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed [14] ».

A State may discharge its duty to make reparation by implementing measures designed to reestablish the situation prior to the wrongful act or omission, i.e. *restitutio in integrum* [15]. Where, however, it is not possible to restore the state of facts that would have existed if the unlawful act had not been committed, or such restoration does not fully redress the injury caused by the State's unlawful act, damages are awarded in lieu of restitution or as a supplement thereto [16]. As stated by the Permanent Court:

> « Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law [17] ».

This principle has been affirmed and applied repeatedly by public international tribunals [18] and private international arbitral bodies [19]. The award in the *Fabiani* case, for example, was

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[13] As used here throughout, « the damages suffered by Raytheon », refers not only to Raytheon's direct financial loss, but also to some US$ 551,300 in losses suffered by its wholly-owned subsidiary, Raytheon Service Company, as detailed in Annexes 13 and 14.

[14] *Chorzow Factory, Merits, op. cit.*, at p. .

[15] *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic* (Award on the Merits) (« *TOPCO v. Libya* »), 17 *International Legal Materials*, p. 1 at p. 36 (1977).

[16] *TOPCO v. Libya, op. cit.* at p. 36. *See also*, e.g., F. V. GARCÍA-AMADOR, 2 *The Changing Law of International Claims*, p. 580 (1984); Claim of Thomas W. Mather, Surviving Partner of Mather & Glover, summarized in M. WHITEMAN, 3 *Damages in International Law*, p. 2021 (1943).

[17] *Chorzow Factory, Merits, op. cit.*, at p. 47. The application of this principle in cases of expropriation is discussed at p. 46, *supra*.

[18] *See*, e.g., *Norwegian Shipowners' Claims*, 1 *Reports of International Arbitral Awards*, p. 308, at p. 338; *Martini Case*, 10 *Reports of International Arbitral Awards*, p. 644, at pp. 665-669; *Opinion in the « Lusitania » Cases*, 7 *Reports of International Arbitral Awards*, p. 32, at p. 39; *Cheek Case*, J. B. MOORE, 5 *History of International Arbitrations*, p. 5068, at p. 5071 (1898); *Claim of Frances Irene Roberts, Administratrix of the Estate and Sole Heir at Law of William Quirk, Deceased, summarized in* WHITEMAN, *op. cit.*, at p. 1821; *Claim of Robert H. May v. Guatemala, Foreign Relations of the United States*, p. 648, at p. 674 (1900); *Claim of Peter Harmony, by his Attorney, Leonard S. Suarez, and Assignees, summarized in* Whiteman, *op. cit.*, at p. 2021; *Case of Patrick Cootey, summarized in* Moore, *op. cit.*, vol. 3, at p. 2770; *Walter Fletcher Smith Claim*, 2 *Reports of International Arbitral Awards*, p. 915.

[19] For recent international arbitrations involving States and private parties, *see*, e.g., *AGIP Company v. Popular Republic of the Congo* (« *AGIP* »), 67 International Law Reports, p. 319, at p. 339; *American Independent Oil Co. (AMINOIL) v. The Government of the State of Kuwait* (« *AMINOIL v. Kuwait* »), 21 *International Legal Materials*, p. 976, at p. 1031 (1982); *TOPCO v. Libya, op. cit.; BP Exploration Co. (Libya Ltd.) v. Government of the Libyan Arab Republic*, 53 *International Law Reports*, p. 297, at p. 347 (1974); *Libyan American Oil Co. v. Government of the Libyan Arab Republic*, 20 *International Legal Materials*, p. 1, at p. 71 (1977); *AMCO Asia Corp. v. The Republic of Indonesia*, 24 *International Legal Materials*, p. 1022, at p. 1037 (1985).

premised on facts similar in this respect to the ones in this case [20]. In *Fabiani*, Venezuelan authorities refused to execute the terms of a private arbitral award against certain Venezuelan nationals in favor of the claimant. Fabiani was forced to declare bankruptcy because he did not have the benefit of money that would have been transferred to him had the government enforced earlier the award. The award in the *Fabiani* case included the value of all property and uncollected notes that Fabiani would have realized had the foreign judgments been executed against his debtor, the expenses he incurred seeking to execute the arbitral award, and the personal injury caused by the denial of justice which brought about his bankruptcy. The bankruptcy, the cessation of Fabiani's commercial operations, and his financial embarrassment all were considered the « direct consequence of the denials of justice, since Fabiani was thrown into bankruptcy at Maracaibo ... for the failure of sums much lower than those which the execution of the arbitral decision would have granted him [21] ».

Authoritative commentators, as well, have consistently recognized that an award of damages should compensate for all losses or injury caused by a State's wrongful acts. As García–Amador explains:

> « While restitution merely restores the property or right of which the alien in question has been deprived, an indemnity is intended to compensate him for all the other consequences of the act or omission contrary to international law .... For all these reason [sic], ' damages ' are, in fact, the only form of reparation which makes it possible in all situations to abide by the principle ... that ' full ' reparation must be made for an injury caused by an act or omission contrary to international law [22] ».

All damages are compensable, provided only that they are proximately caused by the injurious acts. According to Reuter, « The injury for which reparation is due is that which is tied by a chain of causality to the wrongful act [23] ». As Yntema explains:

> « (A) Whenever an international liability arises, there is a duty to make complete compensation and therefore for all the prejudicial consequences of the occurrence giving rise to the liability, whether the damage thus ensuing is direct or indirect. (B) The only limitations upon this duty spring from evidential or equitable considerations: (1) The damage must be shown to be a consequence of the occurrence. (2) It must be reasonably capable of estimation. (3) The compensation must be reasonably adjusted to the particular circumstances of the individual case [24] ».

In the present case, full reparation cannot be achieved through *restitutio in integrum*. The positions of the parties have changed so dramatically that restoration of the state of facts that existed prior to the Government of Italy's wrongful intervention is simply not possible. Accordingly, the Government of Italy should pay compensation in the full amount of the losses sustained by Raytheon and Machlett as a result of its wrongful conduct, as detailed below.

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[20] *Case of Antoine Fabiani*, summarized *in* WHITEMAN, *op. cit.*, at pp. 1785–1789.

[21] *Ibid.* at pp. 1787–1788. In discussing the *Fabiani* case, Freeman noted that « the general result of the case appears, in the large, to be not inconsistent with the view expressed by the World Court [in the *Chorzow Factory* case] to the effect that the State's duty of reparation is one of a *restitutio naturalis*, that is to say, the re–establishment of the situation which in all likelihood would have existed if the delict had not been committed ». FREEMAN, *op. cit.*, at pp. 580–581.

[22] GARCÍA–AMADOR, *op. cit.*, at p. 584. *See also*, D. P. O'CONNELL, 2 *International Law*, p. 1204 (1965); SCHWARZENBERGER, *op. cit.*, at pp. 654 and 655; EAGLETON, *op. cit.*, at p. 182; OLIVER, « Legal Remedies and Sanctions », in *International Law of State Responsibility for Injuries to Aliens*, p. 61 at p. 710 (R. Lillich, ed. and contrib. 1983); FREEMAN, *op. cit.*, at p. 576; proposed draft Art. 6 of the International Law Commission's Draft Articles on State Responsibility, II *Yearbook of the International Law Commission, 1984* (Part Two), p. 100, N. 322.

[23] Translation. P. REUTER, *Droit international public*, p. 266 (1958). As Professor Reuter notes, the use of the terms « direct » and « indirect » is a « vague » and « insufficient » means of attempting to distinguish between consequences which are and are not so directly related to the wrongful act as to be compensable. *Ibid.*

[24] H. E. YNTEMA, « The Treaties With Germany and Compensation for War Damage », 24 *Columbia Law Review*, p. 153 (1924). *See also*, e.g., JIMÉNEZ DE ARÉCHAGA, « International Responsibility », in *Manual of Public International Law*, p. 531 at pp. 568–569 (M. Sorenson, ed. 1968); C. EAGLETON, « Measure of Damages in International Law », 39 *Yale Law Journal* p. 52 at p. 75 (1929).

2. – *The Specific Types of Injury*

(a) *Financial Losses with Respect to Loan Guarantee Payments, Return of Investment, and Open Accounts.*

As shown above, a principal objective of the requisition was to prevent Raytheon and Machlett from disposing of ELSI's assets through the planned liquidation. The Government of Italy wanted to acquire the assets itself and was not prepared to pay for them as of 1 April 1968. The requisition met the immediate political need of responding to the local outcry against the plant's closing, while giving the Government of Italy the opportunity to plan its acquisition strategy. Given ELSI's financial condition, the direct and foreseeable consequence of the requisition order was ELSI's bankruptcy. Even the President of the Sicilian Region acknowledged that ELSI was then left with no alternative but to file for bankruptcy.

Having caused ELSI to declare bankruptcy when it would otherwise have proceeded to liquidate its assets and seek settlements with its creditors, the Italian Government is responsible for losses incurred by ELSI's owners as a result of the involuntary change in the manner of disposing of ELSI's assets.

The bankruptcy realized much less from the sale of ELSI's assets than would have been received from an orderly liquidation. As shown in the following table, the proceeds from an

TABLE

LIQUIDATION VS. BANKRUPTCY PROCEEDS (1)

(Lire in Millions)

	Liquidation at Book Value	Liquidation at Estimated Min. Value	Actual Bankruptcy Proceeds
PROCEEDES FOR DISTRIBUTION	17,053.5	10,838.8	6,373.8
Payment of Creditors:			
Preferred	1,036.8	1,036.8	1,964.7
Secured	3,819.5	3,819.5	3,702.1
Unsecured – Raytheon	1,143.8	510.8	–o–
Unsecured – Other	10,292.4	5,101.7	33.4
TOTAL	16,292.5	10,468.8	5,700.2
Administration and Liquidation Costs	370.0	370.0	673.6
TOTAL PAYMENTS	16,662.5	10,838.8	6,373.8
NET PROCEEDS.....	391.0	–o–	–o–
NET PROCEEDS (Cost) to Raytheon and Machlett:			
Net Proceeds	391.0	–o–	–o–
Guaranteed Loans/Interest	–o–	(3,160.6)	(5,787.6)
Open Accounts	–o–	(633.0)	(1,143.8)
TOTAL (million lire)	391.0	(3,793.6)	(6,931.4)
TOTAL (U.S. dollars)	$625,600 (2)	($6,082,600) (3)	($11,113,600) (4)

(1) Data taken from Annex 13, Schedules E, F, and I1 and Annex 30, Attachment B, except conversion from lire to dollars, as noted below.
(2) Conversion given at Annex 13, Schedule G4.
(3) Conversion given at Annex 13, Schedule 12 (guaranteed loans and interest) and Schedule J (open accounts.)
(4) Conversion given at Annex 13, Schedule 11 (guaranteed loans and interest) and Schedule J (open accounts.)

orderly liquidation of ELSI's assets at book value (as a fair measure of their going concern value) would have been sufficient to pay off all of ELSI's creditors, including amounts owed to Raytheon on open accounts, and still return 391 million lire (US$625,600) to Raytheon and Machlett as a small return of their investment. Even had the liquidation realized no more than the estimated minimum liquidation value, Raytheon would have received some payment on open accounts and a significant portion of ELSI's guaranteed loans would have been paid from the proceeds of ELSI's assets. Instead, under the bankruptcy, Raytheon lost the full value of the open accounts and, more importantly, was required to pay all of the guaranteed loans, thus incurring some 6,931.4 million lire (US$11,113,600) in additional losses. The resulting damage to Raytheon and Machlett, therefore, as compared with liquidation at going concern value, is 7,322.4 million lire (US$11,739,200).

Raytheon and Machlett incurred these losses as a result of the Government of Italy's wrongful intervention. The losses resulted directly from the Government of Italy's actions in violation of the Treaty, and therefore should be included in calculating the compensation due the United States for such violations ([25]).

It should be noted that the Treaty explicitly recognizes as a protected « investment » not only direct contributions to capital but also related financial contributions such as guarantees and advances of funds. As Article I of the Supplement specifies, corporations of either party:

> « shall not be subjected to arbitrary or discriminatory measures ... resulting particularly in ... impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques, or otherwise ».

Thus, the guarantees and the open accounts, as well as the direct return of capital which Raytheon and Machlett lost, are protected interests — being an « investment » which was made « in the form of loans, funds, or otherwise » — and must be considered in awarding compensation for violation of the Treaty ([26]).

(b) *Legal Expenses in Connection with Bankruptcy and Defense Against Italian Bank Suits*

A further direct consequence of the Government of Italy's actions in violation of the Treaty was that Raytheon incurred substantial outside legal expenses in connection with the bankruptcy and in defending against suits brought in Italian courts by certain government-owned and government-controlled creditor banks. As discussed above, in the aftermath of the requisition and bankruptcy of ELSI, five Italian government banks brought suit against Raytheon

([25]) In accordance with the basic principle that compensation should seek to restore the situation which would have existed without the wrongful act, compensation should be awarded in United States dollars. *See*, e.g., *Morrison-Knudsen Pacific, Ltd. v. Ministry of Roads and Transportation*, 143-127-3 (24 July 1984) at p. 35; *Craig v. Ministry of Energy of Iran*, Awd. N. 71-346-3 (2 Sep. 1983) at pp. 17-18. Raytheon and Machlett are United States companies, whose principal business currency is dollars. Raytheon's loan guarantee payments were met by purchasing lire with dollars, as were its legal expenses in defending the creditor claims and other costs. The losses were thus incurred in dollars. Moreover, in view of the changing currency values since the time of loss, only if compensation is calculated in dollars can it accurately reflect the actual losses without distortion caused by subsequent monetary fluctuations.

By the same token, compensation for the portion of open accounts owed to Raytheon which it was precluded from recovering should be measured in dollars, converted at the official rate of exchange in effect at the time. Had any of these payments been received, they would have been promptly converted to dollars and repatriated. The loss was suffered and should now be measured in dollars.

([26]) Similar losses have been recognized in arbitral awards in the absence of a treaty. For example, in the *Cerruti* case, which arose when Colombia seized the assets of an Italian national and those of a company in which he was a partner, the arbitrator required Colombia to assume the outstanding debts of the partnership for which Cerruti could be held personally liable. *Case of Cerruti, summarized in* MOORE, *op. cit.*, vol. 2, at pp. 2117 *et seq.* The arbitrator in effect acted to prevent the passing-on to the investor of company debts, such as the guarantees in the present case.

In the *Shufeldt* case, which concerned the breach of a concession agreement with Guatemala, Guatemala was found liable for, *inter alia*, reimbursement to the concessionaire of amounts advanced to his laborers which were uncollected at the time of breach. *Shufeldt Claim*, 2 *Reports of International Arbitral Awards*, pp. 1083 *et seq.*

for payment of certain of ELSI's debts which Raytheon had *not* guaranteed. Italian courts subsequently dismissed all of the lawsuits as groundless, but only after several years of litigation. These lawsuits would not have been filed had ELSI been able to liquidate in an orderly manner, since the banks would have been paid in full or, at worst, would have settled their debts with ELSI. The evidence indicates, moreover, that these suits were not only a foreseeable consequence of the Government's actions, but part of its plan to shift the costs of its actions to Raytheon. The President of the Sicilian Region had advised Raytheon even before the requisition that such suits would be brought ([27]).

As detailed in Annex 40 and Annex 13, Schedule K, Raytheon incurred US$115,638.35 of outside legal expenses in connection with the bankruptcy and US$766,936.77 in defending against these lawsuits. As part of the foreseeable consequential damages stemming from Italy's wrongful intervention in ELSI, these amounts should be included in the compensation to be awarded ([28]).

(c) *Costs Incurred by Raytheon In Pursuing Its Claim.*

As also detailed in Annex 40 and Annex 13, Schedule K, Raytheon incurred outside legal and related expenses of some US$57,226.38 in pursuing its claim against the Government of Italy for its actions against ELSI. Therefore, compensation in this case should include this amount, for such costs are a loss which would not have occurred but for Italy's wrongful conduct.

International arbitral tribunals frequently have allowed recovery for the costs incurred in seeking international reparation. In the *Salvador Commercial Company* case, for example, the award included amounts which the claimant had expended both prior to the intervention of the United States on his behalf and after United States' espousal of the claim ([29]). Similarly, in the *Shufeldt* case, the arbitrator awarded the claimant the expenses it had incurred in trying to come to a settlement with the Guatemalan Government ([30]). In the *Poggioli* case, the award included compensation for the claimant's travel expenses in submitting the claim to the legation and the Venezuelan Government ([31]).

Thus the full amount of damages suffered by Raytheon and Machlett is US$625,600 for loss of investment, US$11,739,200 for losses resulting from open accounts and payment of guaranteed loans, and US$939,800 for legal expenses incurred by Raytheon in relation to bankruptcy proceedings, in defending against related litigation, and in pursuing its claims, for a total of US$12,679,000, plus interest, computed as described below.

SECTION 3. – *The Award of Interest.*

A) *Interest should be awarded to compensate for the loss of USE of money over time.*

The principle that compensation should redress the injuries caused by the respondent's wrongful actions entails, as a corollary, that interest be awarded to compensate for the loss of use of money over time.

([27]) *Supra*, pp. 13–14.

([28]) In the *Case of Cerruti, op. cit.*, in order to preserve the full amount of compensation for the property taken, the Government of Colombia was required to pay litigation costs incurred by Cerruti in defending against private creditors seeking to recover from him personally debts of the company whose assets had been seized. The arbitrator noted that Colombia had « by its acts destroyed [Cerruti's] means for liquidating [company] debts ... for which he may be held personally liable ». *Ibid.*, at p. 2121. Similarly in this case, to ensure full recovery by Raytheon of amounts owed for the unlawful taking of its property, it too should be reimbursed for litigation costs which resulted from the taking. The creditors that brought suit, moreover, were Italian government banks, acting pursuant to a government plan to increase Raytheon's losses from its ELSI operation to the maximum extent possible. These losses were much more directly the consequence of wrongful government action than those which Colombia was required to assume in *Cerruti*.

([29]) *Claim of « Salvador Commercial Company » et al.*, 15 *Reports of International Arbitral Awards*, p. 467 at p. 469.

([30]) 2 *Reports of International Arbitral Awards*, p. 1101.

([31]) 10 *Reports of International Arbitral Awards*, p. 669 at p. 691.

International law commentators agree that just compensation to an injured party requires the payment of interest on its loss, as « a necessary part of a just national indemnification (32) ». Lillich states « [i]nterest as part of an award by an international tribunal ... is recognized by customary international law ... as an element of damages inherent in just compensation (33) ». Similarly, Eagleton notes that « [t]he award of interest is usually considered to be merely a part of the duty to make full reparation (34) ».

International tribunals and commissions have long viewed interest as a vital element of compensation. In *The Russian Indemnity Case*, for example, the Permanent Court of Arbitration stated that:

> « all interest–damages are always reparation, compensation for culpability .... Legal interest allowed a creditor for a sum of money ... is the legal compensation for the delinquency of a tardy debtor exactly as interest–damages or interest allowed in the case of ... the non–fulfillment of an obligation, are compensation... (35) ».

The Permanent Court of International Justice awarded interest in 1923 in the *Wimbledon* case (36) and further expressed agreement with the proposition that compensation for a taking must include interest in the *Chorzow Factory* case (37). Similarly, in the *Illinois Central Railroad Company*, the Mexican–United States Claims Commission held that interest « must be regarded as a proper element of compensation (38) ».

More contemporary cases consistently reaffirm this principle. In 1962, for example, the Foreign Claims Settlement Commission of the United States, citing the opinions of mixed claims commissions and views of authoritative commentators, concluded that an award of interest « is not only in conformity with principles of international law ... but is also required by equity and justice ... (39) ». The Iran–United States Claims Tribunal also has ruled consistently that principles of international law entitle a successful claimant to interest. As stated in the leading Tribunal award in *McCollough & Company, Inc. v. The Ministry of Post, Telegraph and Telephone et al.*:

> « The first principle [which can be deduced from international practice] is that under normal circumstances, and especially in commercial cases, interest is allocated on the amounts awarded as damages in order to compensate for the delay with which the payment to the successful party is made (40) ».

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(32) J. B. MOORE, 6 *Digest of International Law*, p. 1029 (1906), quoting J. D. Davis, Treaty Notes, in *United States Treaty Volume* (1776–1887).

(33) R. LILLICH, « Interest in the Law of International Claims », *Essays in Honor of Voitto Saario and Toivo Sainio*, p. 51 at p. 59 (1983).

(34) C. EAGLETON, *The Responsibility of States in International Law*, p. 203 (1928). *See generally*, J. H. RALSTON, *The Law and Procedure of International Tribunals*, pp. 127–136 (1925); M. WHITEMAN, *op. cit.*, pp. 1913 *et seq.* (1943); LILLICH, *op. cit.*, at pp. 51–59; G. WETTER, « Interest as an Element of Damages in the Arbitral Process », 5 *International Financial Law Review*, pp. 20 *et seq.* (Dec. 1986); Article 38(1) of the Revised Harvard Draft Convention, F. V. GARCIA–AMADOR, L. SOHN and R. BAXTER, *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, p. 341 (1974).

(35) *The Russian Indemnity Case* (1912), 1 *Hague Court Reporter*, p. 297 at p. 313, Perm Ct. Arb. (1916), reprinted in 7 *American journal of International Law*, p. 178 at p. 191 (1913). In this case, however, the Court found that Russia had waived its claim to interest, 1 *Hague Court Reporter*, p. 323.

(36) *S.S. « Wimbledon », judgments*, 1923, *P.C.I.j., Series A, N.* 1, p. 15 at p. 33. In this case, the Permanent Court awarded interest from the date of award on the ground that this was « the moment when the amount of the sum due has been fixed and the obligation to pay established ». *Ibid.*

(37) In *Chorzow Factory, Merits*, the Permanent Court viewed the reparation of the value of the property taken plus interest as the minimum to which a claimant deprived of its property is entitled. *Op. cit.*, at p. 47. As discussed below, in this case the Court found that just compensation would include other damages as well, since the expropriation was contrary to international law.

(38) *Illinois Central Railroad Co. (USA) v. United Mexican States*, 4 *Reports of International Arbitral Awards*, p. 134 at p. 137.

(39) *In the Matter of the Claim of john Hedio Proach*, Decision N. PO–652, Foreign Claims Settlement Commission of the United States, *Decisions and Annotations*, p. 549, at p. 552 (1968). *See also*, e.g., cases cited at N. 58, *infra*.

(40) Award N. 225–89–3 (22 Apr. 1986), pp. 37–38. *See also*, e.g., cases cited at N. 59 and N. 61, *infra*

The United States accordingly submits that interest should be awarded in this case in full compensation for Raytheon's loss of use of money over time as a result of Italy's actions in violation of the Treaty.

B). – *Interest should be awarded at the United States prime rate.*

As shown in the preceding section, the purpose behind an award of interest is to compensate a claimant for the loss of use of its money from the date of the injury and to thereby make the claimant whole. The rate chosen therefore should be that which, as nearly as possible, equals the amount of the claimant's actual losses. « The rate of interest is determined according to the circumstances, the object being to determine a just compensation for the wrong ([41]) ». Or, as D. P. O'Connell suggested, the proper inquiry should be: « [W]hat could the claimant reasonably have expected had he had the use of the property ([42]) ? ».

This approach has led international tribunals to the choice of different specific rates of interest in different cases. Among the various rates of interest employed have been: the interest rate prevailing in the country of the claimant's residence ([43]), a fair rate in light of prevailing world financial conditions ([44]), and that prevailing at the place where the claim arose ([45]). In choosing the appropriate financial market and interest rate, international commissions have been guided by the essential purpose of an award of interest — to fairly compensate the injured party for the loss of use of its money ([46]).

The principle of full compensation generally dictates, in commercial cases, the choice of a commercially reasonable rate of interest which fairly compensates for the loss of use of funds. As stated by Lillich, « Since the purpose of interest is to provide just compensation to claimants, the rate of interest must reflect the economic realities of the times ([47]) ». This conclusion is not new. In the *Wimbledon* case, for example, the Permanent Court took into account « the present financial situation of the world », especially including « the conditions prevailing for public loans » in choosing a rate of interest ([48]).

In more recent times, with domestic interest rates on occasion reaching all–time highs, the practice of international tribunals reflects more particular emphasis on and consistent application of this principle. As noted by the Iran–United States Claims Tribunal, « The international awards which do not allocate interest or which fix very low rates are rather dated or concern non–commercial disputes between governments ([49]) ».

Contemporary international practice does not offer detailed guidance on which particular « commercially reasonable rate » should be chosen to reflect fairly the financial injury caused by the loss of use of money over time ([50]). Where an actual rate of loss is claimed, for example,

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([41]) EAGLETON, *op. cit.*, at p. 205.
([42]) O'CONNELL, *op. cit.*, at p. 1213.
([43]) *See*, e.g., *S.S. Wimbledon, op. cit.*, at p. 32.
([44]) *See*, e.g., *The « Macedonian »* (United States of America v. Chile), J. B. MOORE, 2 *History and Digest of International Arbitrations*, p. 1466 (1898).
([45]) *See*, e.g., *Puerto Cabello and Valencia Railway Company Case*, 9 *Reports of International Arbitral Awards*, p. 510 at pp. 526–527; BORCHARD, *op. cit.*, at pp. 429–430. In older expropriation cases, and in contract disputes which are decided according to *lex loci contractus*, a local statutory rate of interest frequently has been chosen *See*, e.g., LILLICH, *op. cit.*, at p. 58.
([46]) *See*, e.g., J. H. RALSTON, *International Arbitral Law and Procedure*, pp. 127–136 and cases cited there in.
([47]) LILLICH, *op. cit.*, at p. 56.
([48]) *S.S. Wimbledon, op. cit.*, at p. 32.
([49]) *McCollough & Company, Inc. v. The Ministry of Post, Telegraph and Telephone et al.*, Awd. N. 225–89–3, p. 35 (22 Apr. 1986).
([50]) *See*, e.g., the survey of recent international private arbitral awards in *McCollough, op. cit.*, at pp. 35–37. The Chamber in *McCollough* concludes that the circumstances which may be taken into consideration are « unlimited ». *Ibid.*, at p. 38. This case, however, takes an unusually broad view of « relevant factors », including arbitrator « discretion »; it may be questioned whether including such factors does not amount to a decision *ex aequo et bono* rather than in accordance with principles of law. It should be noted as well that *McCollough* considers cases which are determined under contractual provisions or *lex loci contractus* rather than international law. The recent cases cited in *McCollough* in which the choice of a rate of interest is not decided under national law, with the exception of the *Revere* case, award interest at commercially reasonable rates ranging from 9 to 18 %. In

that the claimant was forced to borrow money at a specific rate, that rate may be used (51). Where an « actual » rate is not sought or awarded, however, one of two approaches is generally taken. Either a prevailing standard financial rate may be chosen, selected in light of the financial context and circumstances of the injured party, or a rate which is judged to be generally reasonable, or « fair », for commercial transactions may be chosen (52). In *Sylvania*, the Iran–United States Claims Tribunal decided that injury to United States corporations, as a general rule, was most fairly measured by a United States market rate (53).

In this case, the United States submits that the United States average annual prime rate should be used (54). The injury here consists of United States dollar losses incurred by Raytheon, a United States company. Had it not been for the wrongful intervention of the Government of Italy which is the subject of this claim, Raytheon would have retained in the United States some US$9.3 million which it spent to pay ELSI's guaranteed loans and some US$ 940,000 which it spent for legal expenses. In addition, it would have been able to repatriate some US$2.5 million for amounts due on open accounts and surplus proceeds of liquidation. The relevant financial market for measuring the loss is thus that faced by Raytheon in the United States. The prime rate, which is « the interest rate charged for the very best credit of short term maturity (55) », « is the rate used [by United States banks] as a base to determine rates on loans to [their] most creditworthy customers » at any given point in time (56). The prime rate thus reflects the minimum cost of money to Raytheon in the United States market (57). The average prime rate over the relevant period was approximately 10 per cent. It is a « fair rate » which is consistent with both general approaches to the choice of an interest rate, where a specific « actual » rate is not claimed.

Benvenuti, commercial rates are chosen even though the decision nominally is governed by local law. In the *Revere* case, the Tribunal found that the applicable arbitration rules precluded an award of interest, except for non-payment of the arbitration award. *See, AMINOIL v. Kuwait, op. cit.*, at p. 1042; *Benvenuti et Bonfant s.r.l. v. The Government of the People's Republic of the Congo* (« *Benvenuti v. Congo* »), 21 *International Legal Materials*, p. 740, at p. 762 (1982); *Norwegian Agent v. Belgian Shipowner*, 8 *Yearbook of Commercial Arbitration*, p. 94 (1983); *Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation*, 17 *International Legal Materials*, p. 1321 at p. 1367 (1978); *Saudi Arabian Hotel Company v. Insurance Company of a European Country*, 10 *Yearbook of Commercial Arbitration*, p. 41 (1985); *Stellar Chartering & Brokerage, Inc. Time-Chartered Owners of the M/V Continental Trader (USA) v. Rijn, Maas en Zee Scheepvaartkantoor, Charterers (Netherlands)* (« *Stellar v. Rijn, Maas en Zee* »), 7 *Yearbook of Commercial Arbitration*, p. 147 at p. 149 (1982).

(51) *See*, e.g., *Dames & Moore v. The Islamic Republic of Iran*, Awd. N. 97-54-3, 4 *Iran-United States Claims Tribunal Reports*, p. 212 (1983-III); WETTER, *op. cit.*

(52) The Iran–United States Claims Tribunal, faced with a large number of similar cases, generally ordered simply a « fair rate » of 10–12 %. This may be a « fair rate » for the specific case or a uniform « fair rate ». *See also*, e.g., *Saudi Arabian Hotel Company v. Insurance Company of a European Country, op. cit.; Norwegian Agent v. Belgian Shipowner, op. cit.; Benvenuti v. Congo, op. cit.* These rates were presumably chosen by the panels in light of specific relevant rates.

(53) *Sylvania Technical Systems, Inc. v. The Government of the Islamic Republic of Iran* (« *Sylvania* »), Awd N. 180-64-1 (27 June 1985). *See also*, e.g., LILLICH, *op. cit.*, at p. 59; *AGIP, op. cit.; Stellar v. Rijn, Maas en Zee, op. cit.* In *Sylvania*, the Chamber chose an investment rate — average rates of interest paid on six-month certificates of deposit — rather than a borrowing rate because it decided to formulate a uniform rule which could fairly reflect injury in all cases. *Ibid.*, at pp. 31–34. *See* discussion in WETTER, *op. cit.*, at p. 21.

(54) The actual prime rate changes from time to time during any given year, making calculations over a number of years extremely cumbersome. The yearly average prime rate is therefore suggested as a more convenient and fairly equivalent measure for interest over longer periods of time. This is given in Annex 96, which was obtained from the United States Federal Reserve System Board of Governors.

(55) G. MUNN, *Encyclopedia of Banking and Finance*, p. 778 (8th ed. by F. L. Garcia 1983).

(56) *Sylvania, op. cit.*, at p. 32, N. 6.

(57) As noted at N. 53 *supra*, in some cases international tribunals have used an investment rather than a borrowing rate. However, unless a specific investment loss is claimed, it is more difficult to choose an appropriate investment rate. The rates of return on investments vary widely, from the low rates paid on bank savings accounts to the very high rates possible from successful aggressive investments. Since Raytheon, like most major corporations, relies significantly on borrowing for its financing, a standardized borrowing rate is both an appropriate and a more reliable measure in this case.

C). – *Interest should be calculated from the date of injury to the date of payment of the award, and compounded annually.*

It is generally accepted that interest should be calculated from the date of injury until the date of payment of the award ([58]). This follows from the principle that interest is paid in order to compensate the injured party for the loss of use of its money. The date of injury is determined in light of what would have occurred, absent the wrongful actions causing the injury. Thus, with respect to Raytheon's losses for guarantee payments and other actual payments, the date of injury is the date of payment. With respect to losses on open accounts, it is the date on which Raytheon would have received payment on these open accounts if it had been allowed to proceed with the liquidation plan. For the sake of simplicity, however, the date of injury which has been used for purposes of calculating interest is the end of the calendar year in which the injury occurred ([59]).

By application of the same principle — that interest should compensate for the loss of use of money — interest should be compounded on an annual basis. While compound interest has not been uniformly sought or awarded, in a commercial dispute such as this one it is unquestionably part of a commercially reasonable rate. As stated in the *Fabiani* case:

> « One has to recognize that Fabiani could have invested in his enterprises, in an interest bearing way, the simple interest on the amounts of money that had been allocated in the arbitral award, ... The compounding of interest is authorized in the field of current accounts and of similar operations since the legislator presumes that in commerce money does not remain unproductive ([60]) ».

In the *AMINOIL* case, interest was also awarded on a compound basis ([61]).

Commentators reaffirm that compound interest should be awarded where appropriate to compensate for actual loss. As F. A. Mann has recently stated:

« Is it open to the court to hold the plaintiff entitled to compound interest in respect of damages awarded to him? In theory the answer should once again be in the affirmative ([62]) ». Wetter adds:

> « It is submitted that the issue as to whether or not compound interest is permissible as an element of damages must be resolved with reference to the ultimate legal rationale for awarding interest ([63]) ».

The United States accordingly submits that the award of compound interest is appropriate in this case. Raytheon itself is a business enterprise that was generating earnings. Moreover, Raytheon, like most major corporations, relies significantly on debt financing. If Raytheon had not suffered financial losses as a result of Italy's wrongful actions, these funds would either have generated additional earnings or would have been used to repay debt. These funds therefore

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([58]) *See*, e.g. *AGIP*, *op. cit.*, at p. 343; *Delagoa Bay and East African Railway Company* in LA FONTAINE, *Pasicrisie Internationale*, p. 544 (1902); *Katherine A. MacMurdo Case*, *ibid.*, at p. 397. An excellent collection of earlier State practice is found in WHITEMAN, *op. cit.*, at pp. 1963–1975. *See also*, e.g., EAGLETON, *op. cit.*, at p. 205; LILLICH, *op. cit.*, at pp. 55–57. Some earlier decisions by international tribunals included interest only until the date of the award on the theory that it had no authority to allow interest for a period of time beyond that of its existence. *See RALSTON*, *op. cit.*, at p. 87, sec. 170. As the International Court of Justice is a permanent body, however, an award of interest until the date the award is paid would not be an act beyond the power of the Court. *See*, e.g., *S.S. Wimbledon*, *op. cit.* The Iran–United States Claims Tribunal has also routinely awarded interest up to the date of payment. *See*, e.g., *Sylvania*, *op. cit.*, at p. 34; *Woodward–Clyde Consultants v. The Government of the Republic of Iran, et al.*, Awd. N. 73–67–3, 3 *Iran–United States Claims Tribunal Reports*, p. 239 at p. 251 (1983–II).

([59]) Annex 13, Schedules G2 and H2.

([60]) Translation. *Antoine Fabiani*, *op. cit.*, at p. 183.

([61]) *AMINOIL v. Kuwait*, *op. cit.*

([62]) A. MANN, « On Interest, Compound Interest and Damages », 101 *The Law Quarterly Review*, p. 30 at p. 44 (1985).

([63]) WETTER, *op. cit.*, at p. 72.

would have generated either interest earnings or interest savings, which in turn would have been devoted to a profitable use. The calculation of interest must therefore be compounded in order to reflect the extent of actual injury from their loss.

In conclusion, in order to provide compensation which reflects the extent of injury caused, the United States submits that the Court should award interest at the average annual United States prime rate, compounded annually, from the date of the injury to the date compensation is paid.

SUBMISSIONS

Accordingly, the United States submits to the Court that it is entitled to a declaration and judgment that:

(*a*) Italy — by engaging in the acts and omissions described above, which prevented Raytheon and Machlett, United States corporations, from liquidating the assets of their wholly-owned Italian corporation ELSI and caused the latter's bankruptcy, and by its subsequent actions and omissions — violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated:

– Article III(2), in that Italy's actions and omissions prevented Raytheon and Machlett from exercising their right to manage and control an Italian corporation;

– Article V (1) and (3), in that Italy's actions and omissions constituted a failure to provide the full protection and security as required by the Treaty and by international law;

– Article V (2), in that Italy's actions and omissions constituted a taking of Raytheon's and Machlett's interests in property without just compensation and due process of law;

– Article VII, in that these actions and omissions denied Raytheon and Machlett the right to dispose of their interests in immovable property on terms no less favorable than an Italian corporation would enjoy on a reciprocal basis;

– Article I of the Supplement, in that the treatment afforded Raytheon and Machlett was both arbitrary and discriminatory, prevented their effective control and management of ELSI, and also impaired their other legally acquired rights and interests;

(*b*) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to compensation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compunded on an annual basis; and

(*c*) that Italy accordingly should pay to the United States the amount of US$ 12,679,000, plus interest, computed as described above.

15 *May* 1987

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73. – Letter from Joseph Oppenheim, Vice President, Raytheon Company, to Industria Elettronica Telecomunicazioni S.p.A., dated 26 June 1969.
74. – Transcript of Bankruptcy Hearing, Civil and Criminal Court of Palermo, 13 July 1969.
75. – I.R.I., Istituto per la ricostruzione Industriale, 1985 *Yearbook*, pages 260–264.
76. – Judgment of Prefect of Palermo, dated 22 August 1969.
77. – Council of State Opinion Regarding Appeal by Mayor of Palermo, 19 November 1971.
78. – Ruling by President of Italy Dismissing Appeal by Mayor of Palermo, dated 22 April 1972, registered 19 May 1972.
79. – Lawsuit for damages filed by the Trustee against the Minister of the Interior and the Mayor of Palermo, dated 16 June 1970.
80. – Judgment of the Court of Palermo, decided 2 February 1973, filed 29 March 1973, registered 4 April 1973.
81. – Judgment of the Court of Appeals of Palermo, registered 24 January 1974.
82. – Judgment of the Supreme Court of Appeals, dated 26 April 1975.
83. – Certificate of Good Standing, State of Delaware, Raytheon Service Company, dated 22 December 1986.
84. – Proof of Raytheon Company's 100 % ownership of Raytheon Service Company, dated 8 October 1986.
85. – Senate of the Republic, Bills and Reports – 1948–1949, N. 344–A, Report of the Majority, page 2, Sent to the Office of the President on 28 May 1949.

86. – Commercial Treaties: Hearings Before the Special Subcommittee on Commercial Treaties and Consular Conventions, Committee on Foreign Relations, United States Senate, 82d Congress, 2d Session (1952).

87. – « Commercial Treaty Program of the United States », Department of State Publication 6565, Commercial Policy Series 163 (January 1958).

88. – Letter of the Secretary of State dated 25 January 1952, contained in the Message from the President of the United States transmitting the Supplementary Agreement, Senate Print Executive H, 82nd Congress, 2nd Session, page 2.

89. – Senate of the Republic, Parliamentary Proceedings, Legislature III, Bills and Reports – Documents, 1958–1960, N. 931–A, page 2, sent to the Office of the President on 18 July 1960.

90. – Chamber of Deputies, Parliamentary Proceedings, Legislature III, Documents – Bills and Reports, N. 537, page 3, presented to the Office of the President on 8 November 1958.

91. – United States Code, Title 5, Sec. 706 (2) (A) (1982).

92. – Delaware Code Annotated, Title 8, Secs. 271, 275 (1983 and Supp. 1986).

93. – Connecticut General Statute, Annotated, Secs. 33–372, 33–375 (West 1958 and Supp. 1986).

94. – Delaware Code Annotated, Title 10, Secs. 6101–6115 (1975).

95. – Italian Criminal Code, Secs. 508, 614, 615, 633, 634.

96. – Table of United States prime rates covering the period from January 1964 to March 1987.

COUNTER - MEMORIAL

SUBMITTED BY ITALY

(CASE CONCERNING ELETTRONICA SICULA S.P.A. - ELSI)

16 NOVEMBER 1987

INTRODUCTION

In the present proceedings the Government of the United States has attempted to show that the Italian Government is responsible for a number of violations of international law, particularly of the provisions contained in the Treaty of Friendship, Commerce and Navigation between Italy and the United States of 2 February 1948 and the Agreement supplementing the Treaty of 26 September 1951. It is claimed that the alleged violations caused damage to two United States companies, the Raytheon Company and Machlett Laboratoires Inc., on behalf of whom the Government of the United States has brought the present action.

In answer to the Memorial submitted by the Government of the United States on 15 May 1987, the Italian Government submits the present Counter-Memorial.

One of the purposes of this Counter-Memorial is to refute the reconstruction of the facts presented by the Government of the United States (Part I).

This part is followed by some considerations concerning the jurisdiction of the International Court of Justice (Part II) and the admissibility of the United States claims (Part III). In Part III the Italian Government lodges an objection on admissibility, which, in the defendant Government's view, should lead to the rejection of the claims.

However, the Italian Government, in order not to hinder the rapid administration of international justice, declares that it would favour the conclusion of an agreement between the parties, under Article 79, paragraph 8, of the Rules of Court, that the objection should be heard and determined within the framework of the merits.

Part IV of the Counter-Memorial deals with points of law relating to the substance of the allegations made by the Government of the United States. In practice, this consists of the interpretation of the above-mentioned 1948 Treaty and 1951 Supplementing Agreement and the problems related to their correct application.

Lastly, Part V of the present Counter-Memorial deals with issues that may be of interest only in the case of some of the claims made by the Government of the United States being upheld by the Court. This Part centers around the methods used to calculate the damage suffered and the evaluation of such damage.

In accordance with Article 49, paragraph 2, of the Rules of Court, the Counter-Memorial finally includes the submissions that the Italian Government respectfully presents to the Court.

PART I

STATEMENT OF FACTS

1. *Necessity to provide an objective account of the facts which are relevant to the case.*

The statement of facts contained in the Memorial submitted by the Government of the United States shows a great many inaccuracies, gaps and tendentious interpretations. It is therefore necessary to run over all the relevant circumstances of the case in order to provide a more complete and above all more accurate account.

2. *ELSI's problems from 1962 to 1967; the substantial financial aid given by Italian authorities.*

From 1962, the year in which Raytheon became ELSI's controlling shareholder, ELSI proved to be a constant loss-maker, incapable of competing with other companies in the sector. As also the annexes to the claimant Government's Memorial show (1), ELSI's accumulated losses reached Lire 326,900,000 in 1962, Lire 1,228,600,000 in 1963, Lire 284,700,000 in 1964, Lire 361,000,000 in 1965, Lire 2,007,000,000 in 1966, and the record figure of Lire 2,681,300,000 in 1967.

Certainly ELSI's difficulties were not due to the fact that it was a foreign-owned company (2). ELSI's main competitors in Italy were in fact also non-Italian companies, namely, Philips, a Dutch company, Siemens, a German company, and Thomas Houston, a French company. The reason why ELSI continued to lose its market shares was due solely to the fact that the competitors managed to offer the same or even superior-quality products at considerably lower prices (3).

And that is not all. Unlike its non-Italian competitors, ELSI was always able to count on substantial financial aid from the Italian Government. Back in 1956, when Raytheon first became a shareholder in ELSI, it successfully requested the Sicilian Regional Government to take a 33.3 % stake on the company, and obtained a ten-year low-interest loan of Lire 700 million from the Regional Government through its financial company, IRFIS (4). Between 1956 and 1966, ELSI was granted further low-interest loans totalling Lire 6,000 million, of which Lire 3,500 million were given in the last four years when the company was wholly controlled by Raytheon (5). This does not take account of all the other grants of various kinds, such as the tax relief for the merger with the former group company, SELIT, in 1965 (6). This shows that the treatment meted out to ELSI by Italian authorities was anything but discriminatory.

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(1) Cf. Memorial submitted by the United States of America (Case concerning Elettronica Sicula S.p.a. – (ELSI)) (hereinafter referred to as « Memorial »), Annex 13, Schedule B1.

(2) Contrary to what Raytheon managers claim, according to what is said in the Memorial, pp. 7-8.

(3) For an explicit admission in this regard on the part of ELSI management, see « Project for the Financing and Reorganization of the Company – 1967 Report prepared by Raytheon Elsi S.p.a. » (hereinafter referred to as « 1967 Report »), Memorial, Annex 22, p. 7.

(4) See Letter-agreement of 21 October 1956: Memorial, Annex 11.

(5) See for these figures « 1967 Report », p. 35.

(6) See documents N. 31, containing the minutes of the meeting of the ELSI Board of Directors, at which the merger decision was taken.

3. *The basic reasons underlying the economic weakness of ELSI.*

The truth is that ELSI had been a loss–maker from the very beginning. The bulk of its products were cathode tubes and semi–conductors (7), and it is common knowledge that if products of this kind are to make a profit, they must be manufactured in the immediate vicinity of the raw materials suppliers (particularly the producers of glass tubes) and of the customers for the finished products (the radio and TV manufacturers). But ELSI had been set up at Palermo, far away from the large industrial settlements in the North of Italy, with the result that, only because of the extra cost of transportation, the prices of its products were at least 10 % higher than those of its competitors (8). Moreover, some products were being manufactured using methods that were manifestly outdated. This is the case of the semi–conductors, whose production line (which ELSI had purchased directly from Raytheon) was technologically obsolete already at the time it was installed (9). Other products did not have reliable market outlets, or their market was dwindling to nothing. For example, sales of microwave tubes depended very largely on sporadic military orders. The cathode–ray tubes, which were solely for black–and –white television sets, were losing their prospective purchases because in the mid–60's, Italy was about to introduce colour television (10).

All of this was taking place with manifestly disproportionate labour costs. In 1960, the company employed 530 people, rising to over 1,000 in 1967. Training costs were initially amply offset by the lower wages paid to workers in Sicily, but when wages in the area began to draw level with those of the rest of the country, the company's labour costs grew out of all pro portion (11).

4. *Raytheon's initial apathy towards ELSI; the high cost of its technical assistance.*

There can be no doubt that many of ELSI's problems could have been avoided if Raytheon had shown greater concern about ELSI's fate. But it did not. The very decision of acquiring a participation in ELSI was taken on the spur of the moment, rather than as the results of a clearly thought–out plan (12), and even afterwards, as far as its investments in Italy were concerned, Raytheon continued to concentrate its attention on SELENIA. This company, which was controlled by Raytheon jointly with FINMECCANICA–IRI and FIAT, manufactured sophisticated military equipment with satisfactory commercial results (13), while ELSI was ignored for many years.

The company continued to be managed by two Italian technicians — Carlo Calosi and Aldo Profumo, as President and Managing Director, respectively — who had already been employed by the former owners: this despite the fact that under their management the company had only recorded losses. Tom Philips, the President of Raytheon from 1964, was reported as having said on the subject of the managerial choices made by the two Italian executives: « [...] It seemed that more emphasis was being placed on the social, or rather the societal importance of operations in Sicily than on their need to return profits to their investors » (14). Calosi and Profumo were not, however, dismissed from their posts until 1967 when Raytheon's top management finally realized the desperate straits in which ELSI found itself. But it was too late by then, and all the former President of Raytheon, Charles Adams, could do was to let off steam with Calosi: « You have made a terrible mess of things! » (15).

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(7) For the exact figures see the « 1967 Report », pp. 20–21.

(8) See Memorial, Annex 15, p. 5; OTTO J. SCOTT, *The Creative Ordeal: The Story of Raytheon*, New York 1974, p. 364.

(9) See Affidavit of Ing. Busacca (Document N. 44).

(10) See in this connection the hardly reassuring analyses and predictions made by the ELSI management itself in the « 1967 Report », pp. 9 and 24.

(11) See, in this connection, the « 1967 Report », pp. 16–17.

(12) As SCOTT, *op. cit.*, pp. 246–247, shows, it was owing to ELSI's delay in paying the royalties due to Raytheon that the latter eventually accepted the proposal to convert its loans into shares of what at the time was only an insignificant Palermo–based company.

(13) For these data, see SCOTT, *op. cit.*, pp. 328–329 and 331–332.

(14) SCOTT, *op. cit.*, p. 346.

(15) SCOTT, *op. cit.*, p. 365.

In reality, the company was not only being run at a loss, but was managed on the verge of illegality. It was not without reason that the expert witness for the bankruptcy, Giuseppe Mercadante, said that ELSI's standard practice was to artificially increase the sales volume (probably with a view to showing the parent company in the United States positive results) (16). The bankruptcy receiver, Mr. Siracusa, commenting on Giuseppe Mercadante's report, put the company's insolvency down to the cavalier way it had been managed and to the « poor organization and mistaken policies of the commercial department » (17).

Raytheon's apathy towards ELSI is demonstrated above all by its very low capital investment in the company. In the period 1962–66, Raytheon's investments in equity in ELSI totalled a bare 3,600 million.

The inadequacy of these investments to meet the needs of the company is proved by the facts that in 1966, with a share capital of only Lire 4,000 million, ELSI had outstanding debts totalling Lire 15,910 million of which only Lire 4,230 million were guaranteed by Raytheon (18). This excessive indebtedness naturally gave rise to huge interest charges: Lire 839 million in 1965, Lire 865 million in 1966 and Lire 960 million in 1967. Figures of this magnitude would have caused a crisis in any company, but in ELSI's case the debt burden was absolutely out of all proportion, considering that the company's sales during that same period never exceeded Lire 8,000 million, and that the item « operating profits/losses » (sales minus production costs, after deduction of interest charges) in the 1967 balance sheet showed a loss of Lire 1,721 million (19).

Moreover, while Raytheon left ELSI under-capitalized, it did not hesitate to charge very high rates for the technical assistance it supplied to its subsidiary, right to the very end, in the period 1965–67, ELSI had to pay about 800 million a year for « updating, preparation, studies and other work », and yet during the same period a further 650 million was paid for « group assistance royalties, and technical consultancies » (20).

In conclusion, there seems to be good reason for the highly critical judgment of the expert witness Mr. Mercadante on the subject of Raytheon's attitude to ELSI during all those years: « [...] There are grounds for believing that the parent company, which provided assistance to its subsidiary upon remuneration had ample time to realize that the subsidiary's indebtedness was swelling progressively and growing out of all proportion to the volume of production, and we are surprised that the parent company did not see it fit to bring the subsidiary within more realistic limits » (21).

5. *The 1967 report and the search for an Italian partner.*

At the beginning of 1967, ELSI's accrued losses had far exceeded one third of the share capital, with the result that under Article 2446 of the Italian Civil Code, ELSI had to reduce its equity from Lire 4,000 to 1,500 million. It was only at this point that Raytheon finally decided to act.

A delegation, headed by the Raytheon President, Tom Philips, went to Palermo, and the first thing they did was to replace Carlo Calosi with John Clare as President of ELSI and to appoint Justin J. Guidi as the second managing director of ELSI, alongside Aldo Profumo.

At the request of the parent company, ELSI's new management prepared the « Project for the Financing and Reorganization of the Company – 1967 Report », in which they thoroughly analyzed the causes of the crisis and the possibilities of pulling out of it. The prospects that lay ahead were dramatic. The report made no bones about the fact that, if one had left the company to its own devices, its days were practically numbered: « Given the current product base, the current level of spending and the increasing adverse pressures mentioned above, heavy

(16) See Document N. 36, pp. 20–21.
(17) See Document N. 40, p. 4.
(18) « 1967 Report », p. 35, and *ibidem*, Appendix B2.
(19) Memorial, Annex 13, Schedule B3.
(20) See Document N. 36 pp. 15 and 27.
(21) See *ibidem*, p. 29.

losses will continue and in all probability increase ... » (p. 36); « The current product and people structure of Raytheon Elsi does not produce desirable results, and in fact continued operations on the current basis is quite unsound » (p. 37). The only chance of survival was indicated to be an intervention by Italian authorities to the effect that, inter alia, (*a*) ESPI (Ente Siciliano per la Produzione Industriale) would immediately invest in ELSI Lire 6,000 million as additional capitalization of the company; (*b*) the central Government would guarantee that over the next four years ELSI would receive government procurement orders for not less than Lire 5,000 million; (*c*) the personnel would be given retraining courses organized at the expense of the Sicilian Regional Government; (*d*) the central Government would undertake to do what it could so that ELSI could obtain all the other financial facilities available under current legislation for the development of Southern Italy (pp. 37–39).

On being informed of the gravity of the situation, the Italian authorities immediately stated their readiness to examine the possibility of a solution acceptable to everyone in joint consultation with the ELSI management. In no way did they reject altogether the suggestion of public intervention on behalf of the ailing company. It was simply a question of defining the terms of intervention, since it was unthinkable that all of ELSI's demands might be accepted. The Sicilian Region Government immediately pointed out that the financial contribution it was being asked to make exceeded its resources, and that at all events, it would acquire a direct stake in ELSI only if it was joined by another partner, possibly a company of the IRI group. Raytheon had itself already been in touch with some companies on its own account. But IRI's response was decidedly negative. IRI was studying the possibility of enhancing its own companies' presence in the electronics sector, and it was therefore not at all interested in helping ELSI which — at least according to the restructuring plans elaborated by the company's management — would have inevitably become their direct competitor (for further details, see *infra*, paragraph 18).

6. *ELSI's financial difficulties and the labour disputes: 1967–68.*

Meanwhile, ELSI's difficulties went from bad to worse. The balance sheet of 30 September 1967 closed with a loss of Lire 2,681 million, with the result that less than one year after the last reduction, the company's share capital should have been reduced once again because of losses. The company directors, who, under Article 2446 of the Italian Civil Code, should have asked the shareholders already before the end of the fiscal year « to take the appropriate steps », did nothing of the sort even after that date: and yet the losses continued to increase also in the last quarter of 1967 and the first quarter of 1968. According to the estimates of Raytheon's expert accountant, on 31 March 1968 ELSI had accrued losses of Lire 3,750 million (22). This being so, ELSI's management clearly failed to comply with its duties under Italian law to protect the company's creditors (not to mention its shareholders!) in the event of persistent losses totalling over one third of the share capital (23).

ELSI's financial difficulties were compounded by serious labour disputes during that same period. Already in June 1967, because of the uncertain market prospects and the need to cut its exorbitant production costs, the company had announced the shedding of 300 jobs. Faced with the inevitable protests on the part of the trade unions and the threat of a solidarity strike by all the workforce which would have brought production to a complete halt, the Sicilian Regional Government immediately came to ELSI's rescue. An agreement was concluded under which the company agreed not to dismiss all the 300 employees, but merely to lay off temporarily 168 of them, and the Regional Government undertook to pay the wages of the laid-off workers until they were able to resume work (24). For a few months, peace was restaured in the factory, but at the beginning of 1968, when it became clear that not only would the company never be able to take back the laid-off workers, but also that its days were numbered, serious union unrest resumed. In January and February 1968, the days on which the whole workforce, or specific

(22) Memorial, Annex 13, Schedule B1.

(23) For the full text of article 2446, Civil Code, see Documents N. 19.

(24) *The claim of the Raytheon Co. and Machlett Laboratories, Inc. against the Government of Italy in connection with Raytheon-Elsi S.p.A.* (hereinafter referred to as « The Claim »).

departments, were on strike were more numerous than those of normal activity. In early March, the company decided to dismiss the 168 laid–off workers.

The reaction of the workforce was immediate. On 4 March 1968, the company's workforce was called out on an indefinite strike, and a sit–in on the factory premises began ([25]).

To have an idea of the general situation at ELSI at that time, it should be borne in mind that even before the workers' sit–in, precisely on 2 March 1968, all that remained of the company's administration, including its accounting records, was transferred wholesale to a small regional office in Milan ([26]), and thereafter the Board no longer met at the Palermo headquarters, but began instead to meet in Rome. After January 1968 the accounts for the company's operations were no longer kept properly, and when Arthur Schene, the Vice–President of Raytheon's Board of Auditors was summoned urgently to Italy in early April to draw up the balance sheet for the liquidation of the company, he had to work on the basis of records that had been kept only up to 31 December 1967 ([27]). Only afterwards, in their petition for bankruptcy, did the directors try to explain this further example of malpractice which — incidentally — is a criminal offence under the Italian Bankruptcy Act ([28]). The reasons advanced for having been prevented from keeping the accounts properly were — in order of appearance — the Christmas and the New Year's holidays, the earthquake that struck part of Sicily in January, and the strikes ... ([29]).

7. *The decision to liquidate ELSI : the actual prospects of an « orderly liquidation ».*

On 16 March 1968, the Board of ELSI, « in view of the continuous deterioration of the company's financial situation » decided to put the company into liquidation. More specifically, « production was to be discontinued immediately, whereas commercial activities and employment contracts were to be terminated on March 29, 1968 » ([30]).

According to the United States Government, this decision was taken by ELSI's two shareholders with the view of beginning an « orderly », or as it is elsewhere described, « voluntary » liquidation of the company, « in order to minimize their losses ». The claimant Government also contends that only after the Mayor of Palermo had requisitioned the factory the company's financial conditions worsened to such a degree that banckruptcy became inevitable ([31]).

But this is far from the truth. ELSI's decision to halt production immediately and to stop any commercial activities within two weeks, was by no means a free choice: it was a matter of absolute necessity. On 7 March 1968, Raytheon formally notified ELSI that, even though it had noted that « (...) Raytheon–Elsi requires additional equity capital in order to continue its operations (...), Raytheon company cannot obbligate itself further and must decline to subscribe to any further stock which might be issued by Raytheon–Elsi or to guarantee any additional loans which might be made by others to Raytheon–Elsi » ([32]). ELSI was therefore certain that it could no longer count on Raytheon for even the slightest help. And since its coffers had dried up a long time earlier, the only way to meet its commitments shortly falling due for payment was to liquidate its assets.

After all, this had been bluntly anticipated by the President of ELSI, John D. Clare, at a meeting on 20 February 1968 with the President of the Sicilian Regional Government, Vincenzo Carollo. According to the full version of the minutes of that meeting, drafted by ELSI, and

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([25]) See Memorial, Annex 81, p. 20 (containing the decision of the Court of Appeal of Palermo of 24 January 1974); see also « The Claim », p. 29, where reference is made to « complete strike ... which was never settled »; a further explicit admission in this connections is made in the explicative report of ELSI Board of Directors, attached to the petition in bankruptcy, see Document N. 32.

([26]) See Memorial, Annex 30, containing a statement to this effect by Domenico A. Netti, an ELSI Auditor.

([27]) See Memorial, Annex 13, pp. 8–9.

([28]) Compare Articles 216–217 of the Italian Bankruptcy Act, the full text of which is contained in Document N. 21.

([29]) See Explanatory Report on the petition in bankruptcy (Document N. 32).

([30]) See Memorial, Annex 31, p. 4.

([31]) See Memorial, p. 10 et seq.

([32]) See Charles F. Adams's letter to John D. Clare, attached as Exhibit III–13 to « The Claim », but omitted in the Annexes to the Memorial.

annexed as Exhibit II–15 to « The Claim », « [...] CFA [Charles F. Adams, *ed.*] stressed that ELSI cannot survive without immediate cash help, which Raytheon cannot provide. JDC [John D. Clare, *ed.*] drew a precise time chart showing (*a*) Feb. 23 – Board meeting; (*b*) Feb. 26–29 – inevitable bank crisis; (*c*) March 8 – we run out of money and shut the plant ». Surprisingly, the text of the minutes that appears as Annex 15 to the Memorial, Exihbit B, has been altered, and the words quoted above have been replaced by the insignificant words « Both CFA and JDC stressed again the urgency of the situation ».

Moreover, the conclusive evidence that the liquidation of ELSI, which was decided by the Board on 16 March 1968, was anything but « orderly », is given by the company's balance sheet at that date. On 31 March 1968, the company had outstanding debts totalling Lire 16,292 million, of which Lire 4,855 million was owing to preferential creditors, and Lire 11,435 million to unsecured creditors (33). To meet these debts, the company had assets whose book value was Lire 17,053 million, but whose quicksale value had been calculated by ELSI's expert accountants as no more than Lire 10,838 million (34).

Even supposing, for the sake of argument, that everything had gone as planned by ELSI, namely, that the sale of the assets had made Lire 10,838 million (35), after deducting the amount needed to pay the preferential creditors, the remainder would only have been sufficient to pay 50 % of the unsecured creditors! But if this is so, it is patently evident that what is now presented as an orderly and voluntary liquidation, decided by the shareholders in order to avoid further losses, was in reality a desperate attempt on the part of an insolvent company to avoid bankruptcy by having its creditors accept an amicable settlement.

The ELSI management were perfectly well aware of the real meaning of the decision taken on 16 March 1968: « With the proceeds of the sale it was ELSI's intention to satisfy all the creditors in an amicable way » (36). Indeed, they also knew perfectly well that in order to succeed in their endeavour they had to obtain at least the tacit approval of all the creditors. If only one creditor had demanded to be paid immediately and in full, bankruptcy would have been unavoidable. This is why the liquidation plan provided for the full payment not only of the preferential creditors but also of the mass of small creditors: as it was stated, the danger was that « [...] a small irresponsible creditor would take precipitous action which would raise formidable obstacles in the way of orderly liquidation » (37).

Such a risk apparently represented a sort of nightmare for Raytheon: indeed, despite the fact that it had formally announced that it would never pay ELSI an extra lira, it immediately arranged to pay ELSI Lire 150 million to silence the more unruly among the small creditors (38).

But the large creditors, who were being asked to accept 50 % of the amount owed them, were six banks which had outstanding claims of about 9,000 million against ELSI, of which just over a half was guaranteed by Raytheon (39). In the Memorial of the United States Government one reads that « Raytheon reasonably anticipated, however, that the bank creditors with large unsecured, unguaranteed loans would quickly settle their claims at no more than 50 % of this value as part of the orderly liquidation, as such a settlement would guarantee prompt and substantial payment, as compared with receiving little or nothing in bankruptcy » (40). There

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(33) Memorial, Annex 13, Schedule F.

(34) Memorial, p. 60. For an indication of the criteria followed for the determination of the « quick–sale value », see Memorial, Annex 17, p. 4 et seq., whereas for a comparison between the different items in the balance sheet and in their estimate quick–sale value, see *ibidem*, Exhibit A.

(35) The hypothesis that the « book value » of 17,053 million could be realized is not even worth being taken into consideration, although the United States Government is now claiming that it was the most likely one (Memorial, pp. 11 and 60–61). Not only at the time all ELSI (and Raytheon) plans and calculations were based on the « quick–sale value » (See, in this connection, Charles F. ADAM's Affidaviti, Memorial, Annex 9, p. 10; Arthur SCHENE's Affidavit, Annex 13, p. 7, Joseph A. SCOPELLITI's Affidavit, Annex 17 p. 8), but also in the Raytheon and Machlett claim of 1974 against the Italian government this was the value which had been chosen for the computing of damages.

(36) See « The Claim », p. 33.

(37) See « The Claim », p. 33.

(38) See Memorial, Annex 17, p. 8.

(39) For the exact figures, see Memorial, Annex 13, Schedule E.

(40) See Memorial, p. 11.

is no telling whether ELSI's directors really were so sure that they would be able to reach an immediate agreement with the banks: the fact is, that on 1 April 1968, not knowing what the Mayor of Palermo was about to decree, the parties held yet another meeting which came to nothing ([41]). Yet the passage just quoted from the Memorial is mentioned not only because it alleges that an agreement between ELSI and the banks was a foregone conclusion, but also because it openly states that the banks had everything to gain by being content with 50 % of their loans because « such a settlement would guarantee prompt and substantial payment, as compared with receiving little or nothing in bankruptcy »! This statement clearly implies that from the very moment in which the « orderly » liquidation of ELSI had been decided, the only real prospect for the company was either bankruptcy or an « amicable settlement » with the creditors. And all the parties were perfectly well aware of this: ELSI, Raytheon and the banks!

8. *The requisition of ELSI's plant and equipment; its legal basis, nature, justification and effects.*

On 1 April 1968, the Mayor of Palermo ordered that the plant and equipment owned by ELSI be requisitioned for a period of six months ([42]). This decision is the main point on which the charges made by the Government of the United States against the Italian authorities are hinged. It therefore appears necessary to clarify the nature, the content and the effects of the Mayor's decree.

We shall begin by pointing out that under Italian law the legal basis of the decree is Article 7 of Law N. 2248 of 20 March 1865, Annex E (the so-called administrative litigation law) ([43]). The article in question states that « when because of grave public necessity, the administrative authorities must dispose of private property without delay ... the administrative authorities will proceed by means of a decree indicating the reasons, without prejudice to the rights of the parties ». This means that the administrative authorities are empowered to « dispose of private property » and therefore also to take requisition measures, provided that this is justified by a state of « grave public necessity » and of urgency (there is the need to act « without delay »); however, the parties must be ultimately compensated.

If the private property concerned consists of immovable property and it has been requisitioned in accordance with the above-mentioned law, there can only be a « *requisition in use* » ([44]). As a rule, the extension of the requisition measure will depend on the duration of the state of necessity: in any case, the decree itself must be accompanied by an indication of a time limit (in the case in hand, this was six months) which may be further extended upon expiry. Within this time limit, the authority can use the immovable property, but cannot acquire it or sell it to others. All this is implicit in the terms « without prejudice to the rights of the parties ».

The difference between requisition in use and expropriation is clear: expropriation deprives the private individual of his right of ownership, which is transferered to the administrative authority expropriating the property. On the other hand, requisition in use deprives the owner only of the use of the property over a certain period of time. Under Italian law, expropriation is regulated by specific legislation, notably Law N. 2359 of 25 June 1865 (on compulsory expropriation in the public interest), and is also covered by a provision in the Constitution (Article 42, paragraph 3, according to which « private property, in such cases as are provided for by law and upon payment of compensation, may be expropriated for reasons of public interest »); requisition in use, on the other hand, is covered by the above-mentioned Article 7 of Law N. 2248 of 20 March 1865.

Three aspects of the content of the decree issued on 1 April 1968 by the Mayor of Palermo deserve special mention: the provisions explicitly referred to, the detailed reasons given and the measures actually taken. With regard to the first aspect, it is noteworthy that the decree referred not only to the above-mentioned Article 7 of Law N. 2248 of 20 March 1865, Annex E, but also to Article 69 of the regional legislation governing local authorities, namely Legisla-

([41]) See « The Claim », pp. 34-35.
([42]) See Memorial, Annex 33.
([43]) See Memorial, Annex 34.
([44]) See SANDULLI, *Manuale di diritto amministrativo*, 13th ed., Naples 1982, p. 789.

tive Decree N. 6 of 29 October 1955 of the President of the Sicilian Region ([45]). Under the heading of « orders based on emergencies and urgency », the latter provision (paragraph 1) states that « the Mayor issues emergency and urgent orders in matters of civil works, local police and health for reasons of public health and safety ». It thus underlines and defines the Mayor's powers also to take, *inter alia*, urgent measures in local police matters for reasons of public safety. The Mayor's authority to dispose of private property on this basis was considered to be « unchallengeable » (« *indubitabile* ») by the Prefect of Palermo when he was called upon to rule on the appeal taken by ELSI against the requisition decree we are examining ([46]). The decree was justified on a number of circumstances: in the first place the decision by ELSI to shut down its plant and dismiss about one thousand employees, a decision that was followed by the strikes called by trade unions with the support of public opinion. Other relevant considerations were the damage to local economy, the strong interest shown by the press and the danger of law and order being perturbed. All these circumstances led the Mayor to form the opinion that the conditions of grave public necessity and urgency specified in particular in Article 7 of Law N. 2248 of 20 March 1865 actually existed in the ELSI case.

As already seen, the decree issued by the Mayor of Palermo provided for the requisition, for the duration of six months and « except as may be necessary to extend such period, and without prejudice for the rights of the parties concerned and of third parties », of the plant and equipment owned by ELSI. The same decree acknowledged the right of the company to be paid compensation for the requisition, although the assessment of such compensation was deferred to a subsequent order.

The requisition decree did not deal with the measures to be taken for the purpose of the temporary management of the plant; provision for this was made by the Mayor immediately afterwards by means of separate orders. On 6 April 1968, the Mayor issued a special order entrusting the management of the plant to Mr. Aldo Profumo, the managing director of ELSI, also « for the purpose of avoiding damage to the equipment and machinery due to the cessation of all activities including maintenance » ([47]). After Mr. Profumo refused to accept this appointment and to carry out the tasks assigned to him in the interest of ELSI, on 16 April the Mayor wrote to Mr. Silvio Laurin, the senior company director, to notify him that « (...) in view of the continuing absence of Ing. Profumo, to whom the management of the requisitioned plant had been entrusted, I hereby appoint you to replace him temporarily in the same capacity with the same powers, functions and limitations. The choice of yourself is justified by the need (...) to ensure the coordination of management activities to safeguard the interests of government authorities and the rights of third parties » ([48]). Mr. Laurin accepted the appointment. The Mayor also appointed Mr. Armando Celone and Mr. Nicolò Maggio as his representatives to enforce his orders in the factory ([49]).

9. *Precedents concerning the requisition of plants ordered by other Italian local authorities (1950–1986).*

An examination of Italian judicial decisions concerning the requisition of industrial plants during the years 1950–1986 indicates that the requisition of plants was not episodic in nature but was often used to protect existing jobs in plants facing the threat of closure. Under the circumstances, its purpose was that of preventing the financial difficulties of certain companies from having negative repercussions on workers' employment. Emblematic in this regard is the well-known « Marzotto affair », which arose out of the decree to requisition a plant of Marzotto S.p.A. of Valdagno issued by the Mayor of Pisa on 25 June 1968 ([50]). Another such case is that of a plant of S.p.A. Torrington, a company in liquidation which was requisitioned

([45]) See Memorial, Annex 35.
([46]) See Memorial, Annex 76.
([47]) See Document 34.
([48]) See Document 35.
([49]) See Document 33.
([50]) See decision N. 3086 of the Court of Cassation of 23 October 1974 (Document N. 23).

by the Mayor of Genoa in order to prevent it from being closed down and the employees from losing their jobs (51). A third case is that of a plant belonging to the Italiana Zuccheri company, which was requisitioned for 90 days by the Mayor of Chieti on 16 July 1974 and handed over to the Abruzzo Development Agency, which was given the task of managing it so as to avoid the suspension of activity and thus to safeguard job stability (52).

Also worth mentioning are the cases of Soc. SITE, whose plant was requisitioned by order of the Mayor of Padua on 29 September 1974 just as it was about to be closed down (53) and Soc. Manifattura dell'Adda. The latter company's plant was requisitioned by the Mayor of Berbenno di Valtellina in order to ensure the continuity of its productive activity, which was considered to be essential for the economy of the area (54).

On other occasions requisition of a company plant has been ordered so as to ward off the negative repercussions on the economy and law and order caused by prolonged suspension of the company's productive activities. This is the cases of Soc. Terites and Soc. San Marco, whose plants were requisitioned in order to safeguard the future activity of the plant in the interest of local employment and of law and order (55). Then there is the case of the plant of Soc. SIDELM, requisitioned by the Mayor of Brindisi on 14 September 1974 for reasons of law and order and to ensure the continuity of productive activity in a plant considered essential for the economy of the area and the public interest (56), and that of the Felice Fossati cotton mills, which was requisitioned by the Mayor of Sondrio on 2 February 1975 in order to ward off the threat to law and order due to the plant closing down (57). The best known case is still, however, that of Soc. Eridania, whose plant was requisitioned by the Mayor of Cremona in order to avoid damage to the economy of the area and the threat to law and order caused by the company's plans to close down the plant.

A similar decree was issued against Soc. Eridania Zuccherifici Nazionali shortly afterwards, on 5 December 1968, by the Mayor of Ferrara (58).

The above-mentioned cases show that the requisition of the ELSI plant was by no means an isolated event, let alone the result of persecution of a company controlled by United States shareholders. In fact, it is clear that the authority given to the Mayor by Article 7 of Law N. 2248 of 20 March 1865, Annex E, has very often been used in similar cases to that of ELSI.

10. *Compensation for the damage caused by the requisition.*

It has already been pointed out that the requisition decree of the Mayor of Palermo recognized the principle that ELSI was entitled to compensation. It is true that this recognition was not followed by any action by the Mayor to determine the amount of such compensation. However, it should be borne in mind that some days after the requisition (that is, on 19 April 1968) ELSI lodged an appealwith the Prefect of Palermo, claiming that the decree was illegitimate (59). After the favourable decision of the Prefect on 29 December 1969, the bankruptcy receiver sued the Ministry of the Interior before the Tribunal of Palermo on 29 December 1969, claiming damages for the requisition (60). This claim was rejected by a decision of 2 February

(51) See decision N. 72 of the Council of State, Section IV, of 7 February 1978 (Document N. 29).
(52) See decision N. 198 of the Abruzzo Tribunale Amministrativo Regionale of 30 December 1976 (Document N. 24).
(53) See decision N. 208 of the Council of State, Section IV, of 25 February 1975 (Document N. 26).
(54) See decision N. 210 of the Lombardy Tribunale Amministrativo Regionale of 30 July 1975 (Document N. 27).
(55) See respectively decisions by the Prefect of Milan of 12 November 1971, *Il Foro Italiano – Repertorio* (1972), *Requisizione*, N. 7, and by the Prefect of Cremona of 28 November 1975, *ibidem* (1976), *Requisizione*, N. 23.
(56) See decision N. 3 of the Apulia Tribunale Amministrativo Regionale of 28 January 1975 (Document N. 25).
(57) See decision N. 21 of Council of State, Section IV, of 18 January 1977 (Document N. 28).
(58) On these cases, see respectively decisions by the Prefect of Cremona on 8 December 1968 (*Foro Italiano-Repertorio* (1969), *Requisizione*, N. 7 and by the Prefect of Ferrara, quoted in the decision No. 405 of Council of State, Section IV, of 8 April 1975, 99 *Il Foro Italiano* (1976) III–14.
(59) See Memorial, Annex 36.
(60) See Memorial, Annex 79.

1973 ([61]) but this decision was reversed by the Court of Appeal of Palermo on 23 November 1973 ([62]). The latter decision was upheld by the Court of Cassation on 26 April 1976 ([63]).

Thus, the receiver in the ELSI bankruptcy succeeded in obtaining compensation for the damage caused by the requisition. The damages actually awarded amounted to 5 % of the value of the requisitioned property, as assessed by the bankruptcy evaluator (exactly, Lire 114,014,711). Clearly, the claim for damages was based on the premise that the measure was illegitimate, while compensation in the strict sense only applies to the case of a legitimate requisition decree. The Court of Appeal of Palermo, in the above-mentioned decision of 23 November 1973, correctly pointed out that « in application of principles of law that have never been questioned, any impediment to the enjoyment of private property is by itself an economic sacrifice and as such gives entitlement to the payment of adequate compensation, when carried out legitimately (e.g. occupation, requisition, etc.) and to the payment of damages when it is illegitimate ».

11. *Requisition and occupation of ELSI's plant; the impact of requisition on the prospect of an « orderly liquidation »; requisition and bankruptcy petition.*

Let us now consider three points in which the version of the facts given by the claimant Government is based on a complete misrepresentation. These points are the problem of the relationship in time between the requisition of ELSI's plant and its occupation by ELSI's employees, the question of the effects that the requisition had on the prospect of an orderly liquidation of the company and the issue of whether the requisition actually caused the bankruptcy.

With regard to the first point, it must be recalled that the plant had been occupied by the employees since early March 1968, and not only after the requisition ([64]). The claimant Government's allegation that the Italian authorities behaved in such a way as, if not actually to encourage the occupation, at least to make it possible and subsequently to tolerate it ([65]), is far from being true.

The only action which one way or another succeeded in calming down the ELSI employees, who were exasperated by the company's decision to cease all activity and dismiss all its workforce, was the requisition decreed by the Mayor. Rightly or wrongly the employees saw this as an affective way of safeguarding their position. This is why, after the requisition, the occupation quickly took on a purely symbolic character with all the workers now feeling directly responsible for everything that happened inside the factory. It is a fact that — as expressly stated also in the above-mentioned decision by the Tribunal of Palermo on 2 February 1973 — the occupation not only caused no ascertained damage to the equipment and material located in the factory but did not even prevent the regular performance of the winding-up operations.

With regard to the company's « orderly » liquidation plan and the effects of the requisition on it, it must be pointed out from the outset that ELSI was already insolvent when the requisition decree was issued. The company, whose assets in the estimation of its own management had a quick-sale value of no more than Lire 10,500 million, had accumulated more than Lire 16,000 million in debts. After its two shareholders refused to contribute further capital, the company was forced to liquidate part of its assets to meet its commitments when they fell due. As both Raytheon and Machlett were to state in their 1974 claim against the Italian Government: « At the end of the month of March 1968, the situation relating to ELSI was as follows: (...) ELSI had run out of money and had no prospect of receiving funds except from the sale of assets (...). Substantial payments were due from ELSI, the maturities of which had not been extended » ([66]).

([61]) See Memorial, Annex 80.
([62]) See Memorial, Annex 81.
([63]) See Memorial, Annex 82.
([64]) See *supra*, paragraph 6. The claimant Government's contention that « the occupation began only after the Mayor — an Italian government official — had assumed custody of the plant » (Memorial, p. 54) contradicts evidence.
([65]) See Memorial, p.p. 53 54 et seq.
([66]) « The Claim », pp. 35-36.

The « orderly » liquidation decided by the Board of Directors on 16 March 1968 was therefore only a bluff. An « orderly » and voluntary liquidation presupposes that the company has sufficient assets to fully satisfy its creditors (67).

In the case of ELSI it was common knowledge from the outset that in the best possible case the unsecured creditors would receive only 50 % satisfaction: had one of them refused the settlement and requested full payment, bankruptcy would have inevitably ensued. Under these circumstances, the ELSI management was under an obligation, also according to criminal law, either to file for bankruptcy or to formally propose an amicable settlement to all the creditors.

The truth is that ELSI had actually been in a state of virtual liquidation already from the beginning of the year (and its plant had been occupied by the employees ever since early March). If it was not possible to sell on the open market all or part of its assets at the prices fixed in the company's « orderly » liquidation plan, the fault did not lie with the Mayor's requisition, which was issued only on 1 April 1968. The fact is that even before this event no one was willing to purchase at those prices the assets of a company which was clearly insolvent.

In any case, it must be ruled out that the bankruptcy was a consequence of the requisition, as is claimed by the Government of the United States (68). In this connection, it may be sufficient to recall the statement of the Court of Appeal of Palermo in the above-mentioned decision of 23 November 1973: « The fact that the Company was insolvent during the time immediately prior to the Mayor's intervention — in connection with which we recall the many and noisy demonstrations which this gave rise to, as we are reminded by the Court — is sufficient to rule out any causal link between the subsequent requisitioning order and the Company's bankruptcy and that the Company's state of insolvency was decisive and sufficient cause for its failure (Article 5, Bankruptcy Law) » (69).

12. *The appeal against the requisition decree.*

The requisition decree of 1 April 1968 was appealed against by ELSI to the Prefect of Palermo 18 days later (on 19 April 1968). A much shorter time was to pass between this appeal and the bankruptcy petition, filed with the Court of Palermo by the company on 25 April. Therefore, while the appeal against the decree was pending, the bankruptcy proceedings were opened. At the same time increasing efforts were made to find a definitive solution to the problems of the company. It can therefore be said that, from the month of April 1968 onwards, three parallel events were in progress: the appeal proceedings against the requisition decree, the bankruptcy of the company, and the rescue operation in which IRI became more and more involved. We shall describe each of these events, taking the interactions between them into account.

13. *The decision taken by the Prefect of Palermo on the appeal.*

The ELSI appeal to the Prefect of Palermo requested the setting aside of the requisition decreee. It was claimed on the one hand that the laws on which the requisition was based (Article 7 of Law N. 2248 of 20 March 1865, Annex E; Article 69 of the Legislative Decree N. 6 of the President of the Sicilian Region of 29 October 1955) had been violated and, on the other, that the Mayor had misused his powers. It should be noted that the Prefect's decision of 22 August 1969 rejected the arguments concerning the first issue and thus ruled that the above-mentioned laws had been correctly applied. In particular, the Prefect pointed that « it is undisputed, in case-law and legal doctrine, that the Public Administration is empowered by the

(67) See Articles 6 and 160 of the Italian Bankruptcy Law (Document N. 21) according to which it is primarily up to the insolvent enterprise itself to request the declaration of its bankruptcy or alternatively to propose an amicable settlement to the creditors. Accordingly, Art. 217 N. 4 of the same law states that the debtor shall be sentenced from 6 months to 2 years of imprisonment if he has aggravated the economic situation by abstaining from petitioning for the declaration of bankruptcy or by other serious negligence.

(68) See Memorial, p.p. 39-40.

(69) Memorial, Annex 81, p. 14. Article 5 of the above-mentioned Bankruptcy Law states: « Any entrepreneur in a state of insolvency shall be declared bankrupt. The state of insolvency is revealed by cases of default or by other external facts which indicate that the debtor is no longer able to meet his obligations regularly ».

above-mentioned Article 7 to dispose of the private property whenever the necessity exists to face a situation of actual and imminent danger for a public interest (public health, public order, etc. ...) and therefore the grounds of an urgent emergency are given ».

However, the Prefect ruled that the decree appealed against was nevertheless illegitimate since, in his view, « the purpose to which the requisition was directed could not be actually achieved by the order »; in other words, the Mayor had not taken account of the fact that the company could not continue its activity unless there were interventions capable of solving its financial and industrial problems. This was the only reason why the Prefect upheld the appeal and set the requisition decree aside.

14. *The delay of the Prefect's decision.*

One of the charges made by the Government of the United States against the Prefect's decision is that it was delayed. It was in fact delivered 16 months after the appeal taken by ELSI. The claimant Government contends that this delay was quite unusual for normal Italian practice and that at the time the requisition was declared illegitimate, it had already irremediably produced its effects ([70]).

With regard to Italian practice the Government of the United States relies on an affidavit by the legal counsel of Raytheon ([71]), to the effect that the average time taken by prefects to decide upon appeals against requisition orders issued by mayors is about one month. The Chief of Staff of the Italian Ministry of the Interior has instead declared that the average time is about one year ([72]).

Quite apart from this, three significant circumstances must be pointed out. In the first place, it must be recalled that, in accordance with Article 5, paragraph 5, of the Consolidated Law N. 383 of 3 March 1934 (Municipal and Provincial Law), « [a]fter 120 days from the date of the filing of the appeal without the authority with which the appeal has been filed having ruled on the said appeal, the appellant may request the authority, after notifying it by means of a petition, that the appeal be ruled upon ([73]). In the case in hand a request was made to the Prefect only on 9 July 1969 and the appeal was decided upon about a month and a half later. In the second place it should be pointed out that the requisition had already ceased to have any effect on 30 September 1968, i.e. at the date of expiry of its normal term of six months. By this date the effects of the requisition and those of the bankruptcy, declared on 16 May 1969, had already long overlapped as far as the availability of the plant and its equipment were concerned. Therefore even if the Prefect had decided on the appeal against the requisition within a month, ELSI would not have anyway been able to make free use of the requisitioned property. Furthermore, if the requisition was to be regarded as the cause of the bankruptcy, as the claimant Government contends, the relevant delay in the Prefect's decision did not go beyond the seven days elapsing between the presentation of the appeal to the Prefect (18 April) and the date when the bankruptcy petition was filed (25 April). In fact, from the point of view of the availability of the plant it would have obviously been of no use to succeed in an appeal to the Prefect after the bankruptcy petition had been filed.

Lastly, it must be emphasized that the Prefect's decision had the only effect that it was actually capable of producing, i.e. it created the preliminary conditions needed for the receiver in the bankruptcy proceedings to take action against the Ministry of the Interior before the Tribunal of Palermo for the purpose of claiming damages for unlawful requisition. This claim was brought four months later, on 29 December 1969, and, as has already been mentioned, was successful ([74]).

([70]) See Memorial, p. 53.
([71]) See Memorial, p. 21.
([72]) See Document N. 30.
([73]) See Document N. 20.
([74]) See Memorial, Annexes 79-82.

15. *The episodes characterizing the bankruptcy proceedings: 1968–1969.*

Let us now examine the episodes characterizing the bankruptcy, which opened, as we have seen, with the decision of the Tribunal of Palermo of 16 May 1968 upholding the petition filed by ELSI on 25 April.

By way of introduction, it is to be recalled that, under Italian law, the judicial authorities concerned with bankruptcy proceedings (i.e. the bankruptcy court and the delegated judge) have the statutory aim of ensuring the best possible satisfaction of the interests of all the creditors through the liquidation of the bankrupt's assets. For his part, the receiver, in his capacity of public official, acts as a close collaborator of the delegated judge.

The Government of the United States casts some doubts about the objectivity of the authorities dealing with the ELSI bankruptcy. It further contends that the Italian Government « discouraged private bidders, boycotted the auctions itself, and worked out special arrangements for a piecemeal take–over directly with the bankruptcy authorities » ([75]).

In actual fact, three of the auctions called by the delegated judge (held on 18 January 1969, 22 March 1969 and 3 May 1969, respectively) were unattended and only at the fourth auction (held on 12 July 1969) did ELTEL, a new company of the IRI–STET group, make a bid, which was accepted in the absence of any other bidders. This in no way implies that irregularities were committed by Italian authorities. Any bidders interested were invited to participate as is shown by the fact that extensive publicity was given to individual sales announcements published also in the foreign press (see the advertisements in *Corriere della Sera*, *Sole–24 Ore*, *Il Globo*, *Financial Times*, *The New York Times*, *Frankfurter Allgemeine Zeitung*, *Le Monde*, *Le Soir*, *De Telegraaf*, *Nihoneiza Shimbun* ([76]).

At the beginning of April 1969, that is between the second and the third auction, the delegated judge of the bankruptcy court, at the request of the receiver and with the support of the majority of members of the creditors committee, authorized the lease of the ELSI plant to ELTEL for a period of eighteen months. Raytheon contended that the lease represented a prejudice to the creditors because it made in fact impossible a sale to third parties other than ELTEL of the plant or of individual separate lines ([77]). However, the Tribunal of Palermo, in rejecting this contention, did not fail to point out that the lease was actually advantageous for the creditors since, far from making the sale of the plant impossible, it actually made the sale easier, in that ELTEL was under obligation to maintain the plant in perfect efficiency and to carry out all the repairs and replacements due to normal wear and tear ([78]). No appeal against this decision of the Tribunal of Palermo was taken by Raytheon.

16. *The sale of the supplies and of the ELSI plant.*

On 5 May 1969 the bankruptcy judge authorized the sale to ELTEL of the material existing on the production lines at the price of Lire 105 million. The Government of the United States now describes this operation as a sell–out, by arguing that the price paid by ELTEL amounted to barely 48 % of the inventory value of the material in question ([79]). However, it fails to consider that while judicial valuator Mr. Di Benedetto had indeed assigned an inventory value of Lire 217 million to the material in question, ELSI itself had previously valued it at only Lire 193 million ([80]). Furthermore, it must not be overlooked that the receiver himself, in his request for sale authorization, pointed out that the material was more than one year old and therefore hard to market, and that its removal from the production line would further reduce its value ([81]). Lastly, if the operation was truly so suspect, why did Raytheon merely express

([75]) See Memorial, p. 41.
([76]) See « The Claim », Exhibit III–19, not attached to the Memorial.
([77]) See Memorial, Annex 62.
([78]) See Memorial, Annex 64, p. 3.
([79]) See Memorial, pp. 19 and 42.
([80]) See « The Claim », p. 57.
([81]) See Memorial, Annex 69.

its reservations at the meeting of the creditors' committee and not appeal to the court against the authorization given by the delegated judge?

On 12 July 1969 the fourth auction for the sale of the ELSI plant was held. The plant and equipment were put up for sale at the starting price of Lire 3,200 million, and the supplies, excluding raw materials and finished products, together with the semi-finished products for semiconductor production, at the starting price of Lire 800 million.

The only bidder at the auction was ELTEL, to whom the whole lot was adjudicated for a total price of Lire 4,006 million. According to the claimant Government this was a ridiculously low price that ELTEL allegedly managed to impose by virtue of the fact that it was already in renting of the plant. Allegedly, the Italian Government thus achieved its aim of having IRI purchase the ELSI assets « without paying a freely market-determined price » ([82]). In this connection, it is necessary to clarify a gross misunderstanding. At the stage that matters had reached (as this was the fourth auction after the first three had been unattended) it was out of the question that the sale of the plant could take place according to a « freely market-determined price »: the question is therefore not to see whether ELTEL had purchased « at less than fair market price » or at a « reduced price » ([83]) but only whether the price paid could be considered reasonable in the circumstances.

17. *The value of the property in question and the price paid by ELTEL.*

The first thing to establish is the value of the property in question, according to the various previous estimates. The claimant Government refers to an alleged « book value » of Lire 12,000 million ([84]), although this is a totally unreliable figure. This value is based on the last balance sheet drawn up by ELSI more than one year earlier (31 March 1968) and without the support of regular accounting. Furthermore, it refers, in addition to the plant and equipment, to all the supplies existing at the time, while the supplies acquired by ELTEL at the auction were very limited, as many articles had been previously sold by the receiver and also the remainder was exclusive of all raw materials and finished products, as well as semi-finished products for semiconductors. Only two estimated can be taken into consideration with reference to the value of the assets in question: the quicksale value, worked out by the ELSI management itself before deciding to wind up the company and the judicial evaluation carried out by Ing. Puglisi on 12 October 1968 ([85]).

If we take either of these two estimates as a reference, the value of the assets actually purchased by ELTEL basically corresponds to the price adjudicated at the auction.

All that remain to be done at this point is to examine the prices set in the various individual auctions and to see how the final figures were arrived at. The starting price set for the first auction was Lire 4,650 million (for plant and equipment alone). For the second auction the starting price was fixed at Lire 6,223 million (Lire 4,000 million for the plant, and Lire 2,223 million for the supplies). A few days earlier, ELTEL had sent the bankruptcy judge a documented valuation made by the Siemens technical office, giving the current value of the ELSI plant and equipment as not exceeding Lire 2,770 million ([86]). The judge maintained the previously fixed price and the auction was unattended. The starting price for the third auction was fixed at Lire 5,000 million (Lire 3,200 million for the plant and Lire 1,800 for the supplies). ELTEL made it known that it was willing to pay the requested price for the plant, but that in no case was it willing to bid for the supplies, which it considered quite useless ([87]). The delegated judge nevertheless remained firm in his decision to auction off plant and supplies. The third auction

([82]) Memorial, p. 20.
([83]) Memorial, respectively pp. 41 and 43.
([84]) Memorial, pp. 50–51.
([85]) See « The Claim », Exhibit II–41, not attached to the Memorial.
([86]) See Considerations by SIT–Siemens of 5 March, 1969, contained in « The Claim », Exhibit III–32, omitted in the annexes to the Memorial.
([87]) See the petition of 16 April 1969 annexed to « The Claim », Exhibit III–33, omitted in the annexes to the Memorial.

was also unattended. ELTEL relented and, on 27 May 1969, informed the delegated judge that it would be prepared to purchase the entire lot at a price of Lire 4,000 million ([88]). After requesting and obtaining the approval of the receiver and the creditors (among the latter, only the Raytheon representative expressed strong reservations), the delegated judge set the starting price for the fourth auction at Lire 4,000 million (Lire 3,200 for the plant and Lire 800 for the supplies). It should be noted that this price only apparently coincided with that offered by ELTEL, as the latter referred to all the supplies contained in the stores, while the lot auctioned by the judge excluded all the raw materials and finished products, as well as semi-finished products for semiconductors. Nevertheless Raytheon appealed to the Court against the delegated judge's order, but its appeal was rejected by the Court on 20 June 1969 ([89]).

In view of the above considerations it can be concluded that the price paid by ELTEL at the bankruptcy auction was perfectly reasonable. In this context, it may be recalled that, in the 1974 Claim put forward against the Italian Government by the applicant Government on behalf of Raytheon and Machlett, it was contended that the price paid by ELTEL was only 300, or at most 500, million Lire less than the estimated realization value of the property in question ([90]). This is an understandable difference considering that ELTEL was purchasing at a fourth bankruptcy auction, after three auctions had been unattended!

18. *The role played by IRI from 1967 to March 1968.*

It may be useful to add some explanations concerning the role played on several occasions by IRI in the attempt to rescue ELSI.

A fact of considerable interest for a correct understanding of the matter is that IRI (Istituto per la Ricostruzione Industriale) is a public enterprise which has numerous interests in private companies. By law it must act in accordance with the principle of profitability (see Article 3 of Law N. 1589 of 22 December 1956) and enjoys full managerial freedom. Naturally, its legal personality is distinct from that of the State. Only in exceptional circumstances, when it is a matter of protecting general interests such as the safeguarding of employment, can the Government give IRI some directives (e.g. the purchase of unprofitable companies). However, even in such cases the decisions made by IRI are attributable to IRI itself and not to the State.

In the case in hand, the suggestion that IRI should intervene was first made by Raytheon. It should be recalled in this connection that, bacause of the serious crisis affecting its Palermo subsidiary, as early as Spring 1967 Raytheon had requested that IRI should purchase an interest in ELSI and thus help to improve its situation. The request was rejected for a very simple reason. According to the reorganization plan drawn up at that time by the new ELSI management, the company was to expand mainly in the telecommunications sector, that is, in a sector in which several companies belonging to the IRI group were already operating. ELSI would therefore have become a direct competitor ([91]). IRI's response in early 1968 was to take a firm stance: « IRI and Finmeccanica point out that in this new ELSI report there seems to be little justification for modifying the opinion on the ELSI situation which they expressed at the previous meeting with Raytheon. The financial support to be provided by the proposed new capital of 6 billion Lire is not in itself sufficient to improve significantly the basic operating position of the company, which remains in an extremely serious condition notwithstanding the praiseworthy efforts made by Raytheon to achieve a sound basis of operations (...) IRI and Finmeccanica point out that within the IRI Group there were no concrete possibilities of ensuring a direct market

([88]) See Memorial, Annex 70.
([89]) See copy of « The Claim » and decree annexed to « The Claim » as Exhibit 38, but later omitted.
([90]) « The Claim », p. 66.
([91]) See « 1967 Report », which expressly states, at p. 25: « The third possible group, which would certainly represent the major build up of new products, could come from government-owned agencies in Italy (...). As an example, a large part of the communications equipment for the Italian PTT and the concessionary companies is manufactured by IRI Companies (...). There is certainly every reason why future telephone switching and other communications equipment for use in Sicily and Southern Italy could and should be made in Sicily in Raytheon Elsi ».

outlet for Raytheon–Elsi's production. The only exceptions to this statement concern areas of marginal interest, or areas in which other IRI companies, which already have substantial problems of their own to be solved, are currently operating (...) » ([92]). It is true that IRI did not exclude the possibility of a reappraisal some time in the future. « However, IRI desires to point out that, even though — with great regret — it cannot accept Raytheon's request at this time, it remains possibile that a later request by Raytheon might receive more favorable consideration (...) » ([93]). Nevertheless, this was said out of pure courtesy, and is explained by the excellent relations till then prevailing between IRI and Raytheon.

At the time, the Italian Government refrained from putting pressure on IRI to obtain its involvement. The situation changed considerably after ELSI's decision to cease its activity and to liquidate its assets. ELSI's desperate financial straits clearly indicated that only a large–scale intervention could avoid collapse with the consequent loss of more than one thousand jobs Since the Sicilian Region had immediately stated the condition that any financial aid on its part would be dependent on IRI participation in the rescue operation, the central Government now made it clear that it would do everything to convince IRI to accept.

It should be noted, however, that if the Italian Government had really intended to have IRI buy up the ELSI factory cheaply, the easiest way to do so would have been to reject Raytheon's desperate requests for funds and to let ELSI's financial conditions to deteriorate until bankruptcy became inevitable. And if, as was actually to happen, the shareholders of the company refused to come to terms with reality, bankruptcy could easily have been requested by one of the creditor banks.

Instead, the behaviour of the Italian Government was quite the opposite: it immediately declared its availability to come to ELSI's help and even when the ELSI shareholders tried to force its hand, ignoring the company's longstanding insolvency, and pretending to carry out an orderly liquidation, it continued to seek a solution which would be acceptable for all concerned. This would indeed have been a peculiar attitude to adopt for someone pursuing the diabolical aim of trying to take property for the benefit of IRI! Nor could it be claimed that the first step in this direction was the order to requisition the factory, which was alleged to have caused ELSI's bankruptcy and all the ensuing events. The first reason for this is, as already said, that it was not the requisition order which caused ELSI to go bankrupt as the company was already insolvent. In the second place the requisition was evidently a simple emergency measure, taken mainly for the purpose of avoiding any possible disorders due to the dismissal of ELSI employees decided by the company management on the previous day. Moreover, the fact that all parties concerned considered it to be little more than a temporary nuisance is shown by the fact that negotiations for the public rescue of ELSI continued without slackening even afterwards and that ELSI itself allowed 19 days to go by before lodging an appeal against the Mayor's decree.

The truth is that the impossibility of reaching an agreement concerning the timing and procedure of IRI action in favour of ELSI, which was then recommended by all concerned, was not the fault of the Italian authorities but of Raytheon. Raytheon was perfectly aware that the Italian authorities would never accept that ELSI's activities ceased overnight, leaving more than one thousand employees jobless. Taking advantage of this fact, Raytheon continued to act as though the ELSI crisis was none of its business and as though it was the concern of the Italian authorities to provide for the company and its creditors.

19. *The Italian authorities' proposal for a settlement in March and April 1968.*

At the end of March 1968, i.e. after ELSI's decision to cease its activity and to proceed to an « orderly » liquidation, but before the requisition decree, the Italian authorities asked Raytheon to reopen the factory and not to send the dismissal letters as announced. In return the Government would pay the wages and shoulder most of the operating losses, until such time

([92]) See Memorial, Annex 15, Exhibit C, containing the Summary of the Talks held at IRI on January 4, 1968, between IRI Management, the Chairman of Finmeccanica and Mr. John D. CLARE.

([93]) *Ibidem.*

as a public company could open negotiations with ELSI for the purchase or lease or its assets. Raytheon refused (94).

The same proposal was renewed to the company one month later, but Raytheon again refused. This time, however, its acceptance would have entailed the immediate revocation of the requisition order, which the Mayor of Palermo had in the meantime issued, as well as the pledge of the Italian authorities that, once productive activity would have been resumed, by means of a special management company to be set up together with the Sicilian Region and IRI, « everybody, including the Region and IRI, shall be ready to help Raytheon and in the meantime to liquidate ELSI through a useful sale in the shortest possible time » (95). In an attempt to justify the undue intransigence of Raytheon, the applicant Government now claims that, by means of this proposal, « [a]fter having requisitioned ELSI's plant and other tangible assets, Italian authorities pressured Raytheon to reopen ELSI at Raytheon's own expense » (96). In actual fact, the establishment of the new operating company would have required not the paying-up of any new capital, but merely Raytheon's willingness to cover 40 % of the probable operating losses, while the remaining 60 % would be covered by the Region and IRI.

However, the crucial point was a different one: Raytheon, although it had made out that it intended to proceed with the « orderly » liquidation of ELSI, knew very well that only an agreement with the banks would allow it to avoid having to honour the guarantees extended to ELSI. And since, up to that time, the banks had shown little inclination to come to terms with Raytheon, it may be concluded that the latter had every interest in allowing the situation to worsen in the hope that, faced with the prospect of losing everything, the banks would soften their attitude. These appear to be the real reasons why Raytheon refused the proposals made by the Italian Government. The fact that, six days later, ELSI filed for bankruptcy with the Tribunal of Palermo, also appeared as an attempt to force the hand of the banks, which had previously seemed reluctant to accept a negotiated solution. Nevertheless the Italian authorities continued their efforts to find a satisfactory solution for all concerned.

During the same period, the President of the Sicilian Region, Mr. Vincenzo Carollo, again according to the Government of the United States (97), threatened the Raytheon management because of their refusal to reopen the plant. In fact, in the attempt to save jobs, President Carollo merely made a few reasonable predictions and several personal remarks. So when he stated that « [n]obody in Italy shall purchase, that is, IRI shall not purchase neither for a low nor for a high price, the Region shall not purchase, private enterprises shall not purchase (...) the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favor any sale while the plant is closed », he announced perhaps somewhat undiplomatically something that was really quite obvious: namely that the Italian administrative authorities would not view with favour liquidation plans such as those envisaged by ELSI, as they were incompatible with any realistic reorganization plan. But also the further « threat » that « [t]he banks which have outstanding credits for approximately 16 billion Lire, cannot and will not accept any settlement even at the cost of dragging the Company into litigation on an international level (...). It is obvious that every attempt will be made (even at the cost of long litigation) to obtain from Raytheon what is owed by ELSI (...) » is not at all strange. In fact, it is only to be expected that the banks would attempt to recover their loans to ELSI also from Raytheon seeing that the latter held 99 % of the equity. All the banks actually claimed payment of the ELSI debts from Raytheon, but those claims were rejected by the Italian courts (98). This despite the existence of a number of authoritative doctrine and decisions which

(94) See Memorial, Annex 14, Exhibit G, p. 2.
(95) See Memorial, Annex 38, p. 2; see also Memorial, Annex 37.
(96) See Memorial, Annex 47.
(97) Cf. Memorial, p. 14.
(98) See, in particular, Court of Cassation, decision N. 5143 of 7 October 1982 (final judgment against the Cassa Centrale di Risparmio Vittorio Emanuele); Court of Cassation, decision N. 6712 of 9 December 1982 (final judgment against the Banca Commerciale Italiana); Court of Cassation, decision N. 2879 of 9 May 1985 (final judgment against the Credito Italiano). The texts of the three decisions are attached as documents N. 41-43 to the present Counter-Memorial.

claim that the principle embodied in Articles 2362 of the Civil Code, according to which a sole shareholder is liable for the company's debts in the case of insolvency ([99]), equally applies whenever an insignificant number of shares is being held by figureheads or controlled companies ([100]). Then there is the final remark by President Carollo that « [i]n the event that the plant shall be kept closed (...) the requisition shall be maintained at least until the courts will have resolved the case. Months shall go by (...) ». Despite the efforts by the United States Government ([101]) to show that this was a threat to maintain the requisition for an indefinite period, it was actually a prediction of what could have happened, but in fact did not occur as the effects of the requisition decree expired after six months.

20. *The attitude of the Italian authorities in the following months.*

On 25 July 1968 the Minister for Industry and Trade announced in Parliament that two measures had been adopted in favour of ELSI. The first, of a temporary nature, consisted in the pledge by the Sicilian Region to continue to pay the employees' wages for two months after the company would have resumed activity; a total of Lire 700 million were appropriated for this purpose ([102]). The second consisted of the establishment of a management company by the Region and other public agencies which would allow productive activities to be resumed until such time as the financial problems of ELSI could be finally resolved, if possible through settlement out of court ([103]).

The true objective of the Italian authorities thus remained negotiated settlement. For this purpose contact was resumed with Raytheon and, after a number of meetings held during the Summer, it seemed that an agreement was just round the corner: an IRI Group company would purchase the plant as it was, without the supplies (i.e. only the fixed assets) for the price of Lire 4,000 million. These funds, plus the revenue from the sale of the remaining company assets, would be used to pay the costs of bankruptcy and the secured creditors in full, as well as 40 % or even 50 % of the claims of the unsecured creditors, while Raytheon would not have to honour the guarantees extended to ELSI. However, on 14 October, after an eventful meeting held in Rome at the Ministry of the Budget and Planning, the parties separated whithout reaching an agreement.

The United States Government now claims, on the basis of evidence given by Raytheon's counsel ([104]), that the Italian Government was entirely responsible for the breakdown in negotiations since, for unspecified « political reasons », it « had decided to allow IRI to take over ELSI's assets without a creditor settlement ». This is completely untrue. The negotiation of the above-mentioned agreement came to grief not because of the Italian Government (which had no cause to do so) but because of the creditor banks, for a very simple reason: the banks, who might have been willing to accept 50 % or even 40 % and to free Raytheon from its guarantee obligations, realized that the ELSI assets were not enough to pay such a percentage. The assurances to the contrary given by the Raytheon management ([105]) did nothing to change this. In fact, the Raytheon estimates were based on the quick-sale value of the ELSI assets according to the valuation made by the company management itself six months earlier. Already dubious at the time they were made, these estimates were even less reliable six months later, in full bankruptcy proceedings.

On 13 November 1968 the Italian Government issued a special press communiqué that « [w]hile the STET Group remains committed to build a new plant in Palermo for the production of telecommunication products, the IRI-STET Group, urged by the Government, after the examination of alternative solutions which proved unfeasible, stated its willingness to intervene

([99]) Document N. 18.
([100]) See, among others, BIGIAVI, *L'imprenditore occulto*, Padova 1964, p. 185 *et seq.*; ASCARELLI, *Foro Italiano* (1950), I, 1114; FERRI, *Le Società*, Torino 1985, p. 390 *et seq.*
([101]) See Memorial, p. 14.
([102]) See Documents N. 37-39.
([103]) See Memorial, Annex 46.
([104]) See Memorial, Annex 29, p. 6.
([105]) See Memorial, p. 16.

in the take–over of the [ELSI] plant in the organization of new lines of production » ([106]). The United States Government contends that the Italian Government thus interfered unduly in the ongoing bankruptcy proceedings; by publicly announcing its intention to take over the ELSI assets at all costs, it was allegedly discouraging other possible bidders from competing at the later auctions ([107]).

However, this allegation is totally unfounded. The announcement in question was made when it was clear that there was no other way out and for the sole purpose of reassuring public opinion in Palermo, which was understandably exasperated after months of vainly waiting for a possible solution to the dramatic ELSI crisis. A perusal of the announcement reveals that IRI was actually only following a definite Government directive and that the Government itself was perfectly aware that the acquisition of the plant was a very poor bargain. This is the only possible explanation for the initial assurance that the purchase of ELSI's plant would in no way have jeopardized the implementation of the original STET project to build a new plant, also in Palermo, and for the final mention of the commitment to start up new production lines in ELSI's plant. There was therefore no danger of discouraging other possible buyers from bidding for the factory. After all, six months after ELSI had filed for bankruptcy (and eight months after the announcement that it was being wound up) only two enterprises — General Instruments and Compagnie Sans–Fil — had come forward and both were interested solely in leasing the plant once it had been purchased by others. Therefore, the announcement of 13 November 1968 merely gave those concerned the certainty that the solution to the crisis was close at hand. In fact, the above–mentioned four auctions for the sale of the ELSI factory were held by the receiver the following year (18 January, 22 March, 3 May, 12 July 1969) and led to the final purchase of the plant by ELTEL.

([106]) See Memorial, Annex 47.
([107]) See Memorial, Annex 29, Exhibit 4A.

PART II

THE JURISDICTION OF THE COURT

In view of Article XXVI of the 1948 Treaty of Friendship, Commerce and Navigation (the « Treaty ») between Italy and the United States, the Italian Government fully recognizes the Court's jurisdiction over the dispute in so far as it relates to the interpretation and application of the 1948 Treaty and the 1951 Supplementary Agreement.

The Italian Government respectfully calls the Court's attention to the fact that, under Article XXVI of the Treaty, jurisdiction only exists with regard to « any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy ». The provision appears to require, as a condition for submitting a dispute unilaterally to the Court, that the basic contentions concerning the interpretation or the application of the Treaty should have first been put forward in diplomatic negotiations. A dispute between the Parties with regard to the principal legal issues (1) could not otherwise be held to exist.

In the « Memorandum of Law in Support of the Claim of Raytheon Company and the Machlett Laboratories Incorporated, Against the Government of Italy in Connection with Raytheon–Elsi S.p.A. » (2), submitted by the claimant Government, the « Summary of Legal Arguments » (pp. 73–75) referred to Articles V, paragraph 2, VI and VII of the Treaty, Article I and/or paragraph 2 of the Protocol and Articles I and V of the Supplementary Agreement. In the conclusions to its Memorial, the claimant Government no longer alleges violations of Article VI of the Treaty, Article I and/or paragraph 2 of the Proctool and Article V of the Supplementary Agreement; on the other hand, violations of Articles III, paragraph 2, and V, paragraphs 1 and 3, of the Treaty are also maintained. The latter provisions had only been referred to during the course of the argument in the aerlier « Memorandum ».

This lack of consistency on the part of the Government of the United States with regard to the treaty provisions which have allegedly been infringed hardly corroborates the claimant Government's contentions based on these provisions. In respect of the Court's jurisdiction, the Italian Government could request the Court to declare that the conditions set forth in Article XXVI of the Treaty have not been fulfilled, at least with reference to part of the claim. However, in the interests of a complete settlement of the present dispute, the defendant Government refrains from putting forward any such request.

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(1) *Right of Passage* Case, *I.C.J. Reports* 1957, p. 149.
(2) Unnumbered Document.

PART III

THE ADMISSIBILITY OF THE CLAIM

The Italian Government respectfully submits that the United States Government's claim is inadmissible in view of the fact that local remedies were not exhausted by the two United States corporations on behalf of which the claim is put forward.

In the well-known *Ambatielos case*, which concerned a claim made by the Greek Government against the United Kingdom Government on the basis of the bilateral Treaty of Commerce and Navigation of 1886, the United Kingdom Government invoked the local remedies rule and the Commission of Arbitration:

« The rule thus invoked by the United Kingdom Government is well established in international law. Nor is its existence contested by the Greek Government. It means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals (1) ».

The local remedies rule was authoritatively defined by the Court in the *Interhandel* case in the following terms:

« The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system » (2).

Italy was therefore entitled to have an opportunity to redress the alleged violations of the 1948 Treaty and the 1951 Supplementary Agreement within the framework of the Italian domestic system.

In applying the local remedies rule, it is necessary to assume that the contentions with regard to law and to fact, which have been put forward by the applicant Government on the merits of the case, are correct. In the words of the arbitral award in the *Finnish Shipowners* case:

« According to the principles approved by the Arbitrator, every relevant contention, whether it is well founded or not, brought forward by the claimant Government in the international procedure, must under the local remedies rule have been investigated and adjudicated upon by the highest competent municipal court. ... The contentions to be taken into account must be considered well founded because otherwise the rule that where recourse is futile, recourse is not required would lead to the consequence, pointed out by the British Government, that unmeritorious international claims would be taken out of the rule that municipal remedies must be exhausted. But, as previously said, every relevant contention brought forward by the claimant

(1) 12 *Reports of International Arbitral Awards*, pp. 118–119.
(2) *I.C.J. Reports* 1959, p. 27.

Gouvernment in the international procedure — whether erroneous or not — must, according to the opinion expressed by the Arbitrator, under the local remedies rule have been examined by the municipal courts, ere the respondent State is bound to enter into further international proceedings » (3).

The same approach was taken by the Commission of Arbitration in the *Ambatielos* case:

« If the rule of exhaustion of local remedies is relied upon against the action of the claimant State, what is the test to be applied by an international tribunal for the purpose of determining the applicability of the rule? As the arbitrator ruled in the *Finnish Shipowners* case of 9th May, 1934, the only possible test is to assume the truth of the fact on which the claimant State bases its claim » (4).

The two United States corporations on behalf of which the claim is put forward never made use of any local remedy. The applicant Government contends that no suit for damages « could... have been brought under Italian law, on behalf of ELSI's shareholders, Raytheon and Machlett » (5).

However, the only support given to this assertion is a corresponding paragraph in an affidavit by Mr. Giuseppe Bisconti, Raytheon's Counsel (« Annex 26 para. 28 » to the Memorial).

In the present case no provision of the Treaty or the Supplementary Agreement was ever invoked before Italian courts. There is no doubt that the two US corporations could have done so. Enabling legislation had been enacted in Italy: Law N. 385 of 18 June 1949 (*Gazzetta Ufficiale*, N. 157 of 12 July 1949, supplement) and Law N. 910 of 1 August 1960 (*Gazzetta Ufficiale*, N. 213 of 1 September 1960), the latter with regard to the 1951 Supplementary Agreement Provisions of the Treaty had been regarded by the Italian Court of Cassation as self-executing and applied to the benefit of United States parties which invoked them. See, for instance, decision N. 2228 of 30 July 1960, *The Durst Manufacturing Co. v. Banca Commerciale Italiana*, with reference to Article V, paragraphe 4, of the Treaty (6).

In the Italian Government's view, the fact that the two United States corporations never resorted to Italian courts, when they could have based a claim against the Italian State on the alleged facts and on the alleged infringements of the Treaty and the Supplementary Agreement, leads to the conclusion that the applicant Government's claim is inadmissible because local remedies were not exhausted.

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(3) *Reports of International Arbitral Awards*, p. 1503-4.

(4) 12 *Reports of International Arbitral Awards*, p. 119. In the *van Oosterwijck* case the European Court of Human Rights similarly held:

« The only remedies which Article 26 of the Convention requires to be exercised are those that relate to the breaches alleged and at the same time are available and sufficient (see the Beweer judgment of 27 February 1980, Series A N. 35, p. 16, para. 29). In order to determine whether a remedy satisfies these various conditions and is on that account to be regarded as likely to provide redress for the complaints of the persons concerned, the Court does not have to assess whether the complaints are well-founded: it must assume this to be so, but on a strictly provisional basis and purely as a working hypothesis (see the arbitrationa ward of 9 May 1934 in matter of the « Finnish Shipowners », United Nations Collection of Arbitration Awards, vol. III, pp. 1503-1054, also citedb y the Commission in its decision of 17 January 1963 on the admissibility of application n. 1661 62, X and Y v. Belgium, Yearbook of the Convention, vol. 6, p. 366). *Publications of the European Court of Human Rights*, Series A, vol. 40, p. 13-14 (1981).

(5) Memorial, p. 22, note 11.

(6) 64 *Rivista di Diritto Internationale* (1961) p. 117-118 and 84 *Il Foro Italiano* (1961), I-304. A similar view appears to have been taken by United States courts. In *Spiess v. Itoh & Company* the US Court of Appeals for the Fifth Circuit held that « (t)he FCN treaties, including the Japanese Treaty, are self-executing treaties, that is they are binding domestic law of their own accord, without the need for implementing legislation ». 643 *Federal Reporter*, 2d Series, p. 354 at p. 356 (1961).

PART IV

THE INTERPRETATION AND APPLICATION OF THE 1948 TREATY AND THE 1951 SUPPLEMENTARY AGREEMENT

1. *The legal terms of the dispute : the claimant and the defendant Government's positions.*

The Government of the United States, at the beginning of its Memorial of 15 May 1987, asserts that the case « concerns the failure of the Government of Italy to afford to United States investors in Italy the protections and guarantees established by the 1948 Treaty of Friendship Commerce and Navigation between the United States of America and the Italian Republic (the « Treaty ») and its 1951 Supplement » (1).

This claim is subsequently developed with reference, in particular, to Articles III, V and VII of the 1948 Treaty, and to Article I of the 1951 Supplementary Agreement. More precisely, the Government of the United States claims that « the requisition and subsequent conduct were both arbitrary and discriminatory, prevented Raytheon and Machlett from managing and controlling an Italian corporation whose shares they had lawfully acquired, and resulted in the impairment of their legally acquired rights and interests — in violation of Articles III and VII of the Treaty and Article I of the Supplement. In addition, the requisition constituted a taking of Raytheon's and Machlett's interests in property without due process and without adequate compensation, in violation of Article V of the Treaty. Italian autorities also failed to comply with the obligation under Article V to afford the protection and security, by the unwarranted delay in ruling on the challenge to the requisition order and by failing to afford protection to ELSI's plant and premises » (2).

On the contrary, the Italian Government considers the charges concerning the behaviour of the Italian authorities to be unfounded, because they are based not only on an inaccurate and biased reconstruction of the facts (as has been clarified in Part I), but also on an incorrect interpretation of international law. It will be shown how the provisions on which the United States Government's claim is based should be properly understood and applied to the case in question. Before doing so, however, a few considerations need to be made concerning the nature, content and general features of the two Treaties that the United States Government claims have been violated by Italy.

2. *The rules of interpretation to be applied with reference to the 1948 and 1951 Treaties between United States and Italy.*

Although the 1969 Vienna Convention on the Law of Treaties does not apply to the interpretation of the Treaty and its Supplementary Agreement, the rules on interpretation included in the Convention are to be considered as corresponding to those applicable under general international law. As the Inter-American Court of Human Rights stated in its Advisory Opinion OC-3/83:

« ... the rules of interpretation set out in the Vienna Convention ... may be deemend to state the relevant international law principles applicable to this subject » (3). Similarly, the Arbitration

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(1) Memorial, p. 3.
(2) Memorial, pp. 3-4.
(3) Advisory Opinion OC-3/83 of September 8, 1983, *Annual Report of the Inter-American Court of Human Rights* 1984, p. 28-29.

Tribunal in the dispute concerning the *Delimitation of the Maritime Boundary* between Guinea and Guinea–Bissau considered that Articles 31 and 32 of the Vienna Convention provided the « revelant rules of international law governing the interpretation » of an 1886 treaty. The Tribunal referred to the « Parties' agreement on this point » and to « the practice of international tribunals concerning the applicability of the provisions of the Convention on the Law of Treaties by virtue of an international custom recognized by States (see in particular the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, *I.C.J. Reports 1971*, p. 47,. paragraph 94; *Fisheries Jurisdiction* case, I.C.J. Reports 1973, p. 18 and 63, paragraph 36) » (4)

It should be noted that, in accordance with the general rules of interpretation set out in Article 31 of the above Convention « [a] treaty shall be interpreted in good faith, in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object* and *purpose* » (5). This provision is expressed in such terms as to allow one to conclude that, out of the various possible methods of interpretation, priority is given to the *textual method.* This method has the advantage of being objective, precisely because it is based on the normal, ordinary meaning of the words. The Convention gives less weight to the intention of the parties as it appears from the preparatory works. The value of these works, according to Article 32 of the Convention, depends on the results of the objective method (6).

Further elements which can be drawn from the above–mentioned Article 31 include the requirement that each clause of a treaty shall be interpreted in its context, taking into account the aims pursued by the parties through the treaty as a whole. Both of the above indications strongly emphasize the unitary character of each treaty. Therefore, it is necessary to rule out the possibility of artificially combining individual clauses which may suit the specific and occasional interest of one interpreter in a particular case. Likewise, one must also refrain from representing, as the « object and purpose » of the whole treaty, an aim which is partial with respect to the overall aim of a treaty, and which, moreover, is not explicitly stated, but is, at most, pursupə only indirectly in the treaty (in the present case, the protection of investments).

3. *The Treaty of Friendship, Commerce and Navigation of 2 February 1948; its impact on the problem of investments.*

The Treaty of Friendship, Commerce and Navigation signed in Rome on 2 February 1948 between the United States of America and Italy belongs to a well–known category of bilateral agreements governing the treatment of aliens. Agreements of this kind aim essentially at regulating the status of nationals of each party, as well as of legal entities and companies which have the « nationality » of one of the parties, by assigning to them a number of advantages and guarantees in the other party's territory.

One of the main features of these agreements is their broad scope, which is due to the great variety of the objectives pursued. The matters regulated include, in the first instance, a wide range of questions referring to the establishment, in the territory of either Party, of nationals and legal entities belonging to the other party, for the purpose of carrying on not only commercial and industrial activities, but also professional, cultural, scientific, religious or philanthropic activities. It should also be noted that the benefits granted to individuals and legal entities are not restricted to the recognition of rights with economic implications; also personal rights and even certain civil rights and freedoms are covered.

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(4) See translation published in 25 *International Legal Materials*, p. 271–272 (1986). The original French text refers to « La pratique des tribunaux internationaux quant à l'applicabilité des dispositions de la convention sur le droit des traités au titre d'une coutume internationale reconnue entre Etats (....) ». See 68 *Rivista di Diritto Internazionale*, p. 609 (1985).

(5) Emphasis added.

(6) However, the Italian Government finds it useful to complete the set of preparatory works (Documents N. 3 to 17) concerning the parliamentary debates relating to the 1948 Treaty and the 1951 Supplementary Agreement — as the claimant Government exhibited only part of the relevant documentation — both for Italy and the United States.

Within the framework of these agreements, the provisions governing establishment are followed by those concerning international trade and related problems of a fiscal, customs, and currency nature; a further set of provisions refer to navigation (7).

The treaty of 2 February 1948 between Italy and the United States corresponds to the above model and is extremely complex. It lies beyond our present scope to go into its content in detail. We shall merely point out in passing that it is over twenty pages long and comprises twenty-seven articles, many of which containing several paragraphs. The object and purpose of such a Treaty (in the light of which it must be interpreted, in accordance with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties cited above) are given an appropriate overall description in the Preamble: « strengthening the bonds of peace and the traditional ties of friendship between the two countries and (...) promoting closer intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of their peoples ».

In consideration of all this, one cannot agree with the Government of the United States when it claims that « the parties' fundamental intention » was « to provide a framework which would foster a favorable climate for investment » (8). In our view, the aim of creating legal conditions suitable for investiment was only one of the numerous aims pursued in the 1948 Treaty (9). It is useful to insist on this point, in order to oppose from the outset the tendency emerging from the Memorial of the claimant Government, namely to interpret all the provisions of the 1948 Treaty as being intended to protect the investors of each party in the territory of the other party. This tendency does not conform to an objective interpretation of the said provisions. Furthermore, it would also have the result of greatly accentuating the imbalance between the two parties in view of the overwhelming predominance of United States investments in Italy over Italian investments in the United States.

In this connection it should be noted that numerous other Treaties of Friendship, Commerce and Navigation concluded between the Government of the United States and Western European countries after World War II contain an explicit reference to the fostering of investment as one of the aims pursued. This applies to the treaties with Greece, of 3 August 1951, with Denmark, of 1 October 1951, with West Germany, of 29 October 1954, with the Netherlands, of 22 March 1956, with Belgium, of 21 February 1961, and with Luxembourg, of 23 February 1962. The expression most frequently used refers to the possible contribution to the development of closer economic and cultural relations « by arrangements ... promoting mutually advantageous commercial intercourse and investments ». It is noteworthy that wording of this kind was not included in the Preamble to the treaty signed by the United States and Italy on 2 February 1948.

Our remarks concerning the object and purpose of the 1948 Treaty are indirectly confirmed by the subsequent signing of the Supplementary Agreement (Washington, 26 September 1951). As can be seen from its Preamble, this Agreement actually aims at « giving added encouragement to investments of the one country in useful undertakings in the other country »; the contribution it makes to this end consists in the « amplification of the principles of equitable treatment set forth in the Treaty of Friendship, Commerce and Navigation signed at Rome on February 2, 1948 ». Clearly, there would have been no need to negotiate and sign a Supplementary Agreement had the preceding fundamental Treaty given sufficient weight to the specific problems of investment.

4. *Recent tendencies of the United States policy for the protection of foreign investments.*

A significant development needs to be recalled here. In recent years, particularly since 1982, United States policy, which had previously tended to encourage the stipulation of further

(7) In general, BLUMENWITZ, « Treaties of Friendship, Commerce and Navigation », in *Encyclopaedia of Public International Law*, Inst. 7, 1984, p. 484 *et seq.*

(8) Memorial, p. 27.

(9) In this regard, WALKER « Treaties for the Encouragement and Protection of Foreign Investment: Present US Practice », in *American Journal of Comparative Law*, 1956, p. 239) says that « the FNC Treaty is not a special-interest vehicle, but rather one into which investor requirements, with scarcely an express reference to investments, are fitted as integral parts for a larger regulation of private affairs in international relations ».

Treaties of Friendship, Commerce and Navigation (many of which were negotiated after World War II), underwent a change. Preference began to be given to a more limited, but more effective, instrument for regulating relations with countries with heavy United States investments, namely bilateral Investment Treaties. This new type of agreement had already been tried out in the seventies with reference to relations between a number of European countries and several developing countries. The United States ultimately saw the merits of the new approach and followed it in the case of a number of countries (starting with Egypt and Panama). An attempt was made by the Investments Bureau of the State Department to draft a model investment treaty ([10]).

Two remarks need to be made in this connection. Firstly, the change in the United States attitude and the reasons for such a change are indicative of the objective limitations of the suitability of Treaties of Friendship, Commerce and Navigation as a means for protecting investments. It has been rightly said that these treaties were « intended to protect American citizens abroad, rather than private foreign investments » ([11]). In our opinion, when doubts arise as to the scope of certain provisions contained in the 1948 Treaty between Italy and the United States, this factor should not be underrated. It should also be noted, again in connection with Treaties of Friendship, Commerce and Navigation, that « the attempt to address very complex issues in the context of a broad spectrum of relations detracted from the utility of the FCN (treaties) as an investment protection device » ([12]).

This accurate remark can hardly be reconciled with the attempt by the claimant Government to make out that Treaties of Friendship, Commerce and Navigation are basically the equivalent of investment treaties ([13]).

Secondly, the differences between the two types of agreement we are comparing must necessarily have repercussions on their interpretation. From the point of view of the Government of the United States, each of the provisions in the 1948 Treaty to which it refers is merely a part of a complex regulatory design aimed at protecting investments. This view must bec hallenged. The approach chosen by the claimant Government distorts the global nature of the Treaty.

5. *The principles on which the 1948 Treaty is based.*

One of the fundamental characteristics of the 1948 Treaty, which is rightly emphasized in its Preamble, is the fact that it is « based in general upon the principles of national and of most–favored–nation treatment in the unconditional form ». Perusal of the individual provisions of the Treaty reveals that the two standards are both referred to in some articles (e.g. Article I, paragraphs 2 and 3), while reference to only one standard is made in others (e.g. Article IV, which merely provides for the most–favored–nation treatment in the case of exploitation of mineral resources).

When the Treaty was signed, the liberal spirit with which the principle of national treatment had been adopted was hailed by a distinguished member of the United States administration. During the hearing of 30 April 1948 before a subcommittee of the Committee on Foreign Relations of the US Senate, Mr. Thomas Blaisdell, assistant to the Secretary of Commerce for International Trade, made the following declaration: « The Treaty represents acceptance by republican Italy of a number of democratic principles in trade and navigation. The national treatment accorded to corporations, for example, is the most liberal ever specified in any treaty entered into by the United States » ([14]).

([10]) BLUMENWITZ, *op. cit.*, p. 489, mentions a « declining relevance » of the Treaties of Friendship, Commerce and Navigation ».

([11]) BERGMAN, « Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the US Prototype Treaty », *New York Journal of International Law and Politics*, 1982, p. 7.

([12]) BERGMAN, *op. cit., loc. cit.*

([13]) Memorial, pp.27–28, notes.

([14]) See Document N. 15.

([15]) BERGMAN, *op. cit.*, page 20.

Clearly, both the national treatment and the most–favored nation standards take on a concrete and precise meaning through the ascertainment respectively of the conditions applying to the citizens (and thus of the municipal legislation governing them) and of those applying to third countries and their citizens (under the agreements concluded with those countries) with regard to a given matter. Therefore both clauses have been called « relative » ([15]). Everything depends on the point of view adopted in a single case, that of one or other of the contracting States, and on the type of treatment referred to. In this connection it should be noted that, when speaking of « treatment » one cannot take into account only the advantages that are implied; in all matters, the overall treatment of aliens is an inseparable whole made up of advantages and disadvantages. If one considers, in particular, the concept of « national treatment » on the basis of this standard, one cannot avoid recognizing that an alien possesses certain rights and related obligations which are commensurate with the rights and obligations pertaining to the local State's nationals in the matter in question. Although the most–favored–nation treatment implies the more favorable treatment between those enjoyed and enjoyable by a third Country (or by one of its nationals), it is necessary to compare the several legal systems *in their entirety* even for the purpose of assessing the applicable treatment.

6. *The formula « in conformity with the laws and regulations in force » in the 1948 Treaty.*

Analysis of the 1948 Treaty also shows, that in regulating a given matter, the principle of national treatment, or that of the most–favored nation, is often accompanied by a specific provision according to which the enjoyment or the exercise of rights by citizens of each party are ensured « in conformity with the applicable laws and regulations ». When such a clause is included in the text of a provision granting national treatment, it reinforces the concept defined above according to which foreigners do enjoy rights but are also bound to respect the duties imposed on the citizens by the laws of the country. In other words, the respect of the set of local laws and regulations is a limit that cannot be overstepped by virtue of a condition granted to foreigners « protected » by a Treaty of Friendship, Commerce and Navigation.

This appears quite reasonable and corresponds to a situation in which the alien benefiting from national treatment finds himself, quite apart from the specification of conformity with the applicable laws and regulations. A foreigner cannot be considered to have a privileged position vis–a–vis a citizen of the local State when the national–treatment principle is applied. When the above–mentioned specification is contained in a provision which grants the most–favored–nation treatment, the limitation set on the treatment of the foreigner consists in not granting him the favorable condition ensured to the citizens of a third country, should this not be compatible with the municipal legislation or regulations ([16]).

With regard to the principles laid down in the 1948 Treaty, it must be observed that the claimant Government makes occasional references to a notion of fair treatment, to which the status of an autonomous principle seems to be attributed. In fact, it is in the Preamble to the 1951 Supplementary Agreement that the « principles » (and not the principle) of « equitable treatment » stated in the 1948 Treaty are mentioned, and it is asserted that their amplification should contribute to encouraging investments further. But when Article I to XIII of the 1948 Treaty, i.e. the only clauses dealing with establishment and the only ones partially applicable also to questions of investments, are examined thoroughly, the only principles repeatedly used appear to be those of national treatment and of most–favored–nation treatment. The fact is that *no fair–treatment principle is actually stated* in the 1948 Treaty.

([16]) According to an author quoted in the US Government Memorial (p. 29, note 3) whose opinion seems therefore to be shared by the claimant Government, the phrase'in conformity with applicable laws and regulations' as it occurs in this Treaty, « is framed in such a manner as to imply that it does not constitute a reservation detracting from the Treaty right », (WALKER, « Provision on Companies in United States Commercial Treaties », in *American Journal of International Law*, 1956, p. 784, note 53). The above–mentioned phrase is not altogether clear. In our opinion the question is not that of the detraction of something from a treaty right. What happens is simply that the Treaty acknowledges some rights only to the extent to which they are in conformity with the laws and regulations of the local State.

This becomes all the more significant in view of the fact that an obligation to ensure « equitable treatment » (to the persons, property, enterprises and other interests of nationals and companies of the other party) is laid down explicity in the Treaties of Friendship, Commerce and Navigation entered into by the United States with Ireland, Denmark, Greece, Belgium and Luxemburg. Some other treaties, particularly those concluded with Germany and the Netherlands, speak of « fair and equitable treatment » to be accorded by the parties to the above–mentioned beneficiaries.

Therefore, the reference to the « principles of equitable treatment » contained in the Preamble to the 1951 Supplementary Agreement can only mean that the parties thereto wished to express their intention to go beyond the two principles contained in the basic 1948 Treaty, the value and function of which have been expressed in the « equitable treatment » formula. In other words, the principles of national and of most–favored–nation treatment are both considered to be « principles of equitable treatment ». However, there is no separate fair treatment principle to which the other two are added. At most it may be claimed that Article I of the Supplementary Agreement implicitly grants equitable treatment to its beneficiaries insofar as it forbids subjecting the citizens and legal entities of either party to arbitrary and discriminatory measures within the territory of the other party.

7. *The Status of corporations, in the same Treaty* (*Article II, paragraph 2*).

Another general problem solved by the 1948 Treaty, and the solution of which of course retains its validity in relation to the 1951 Supplementary Agreement, is that of the status of legal entities. It is a well known fact that, in all Treaties of Friendship,Commerce and Navigation, the category of persons who are entitled to benefit from the protection provided by every treaty consists, in the first instance, of individuals who are nationals of either party to the agreement. These individuals are protected insofar as they are present or carry on activities within the territory of the party other than the one of which they are citizens. A second category consists of legal entities; with regard to the latter, each treaty establishes the criteria according to which they are said to belong to one or other of the parties to the agreement, and consequently recognizes the right of legal entities belonging to one State to enjoy the advantages granted under the treaty within the territory of the other State.

Article II, paragraph 1, of the Treaty signed between Italy and the United States on 2 February 1948 gives a broad definition of the term « corporations and associations ». In particular, it includes among the latter all « corporations, companies, partnerships and other associations, whether or not with limited liability and whether or not for pecuniary profit, which may have been or may hereafter be created under the applicable laws and regulations ». Paragraph 2 goes on to lay down that « [c]orporations and associations created or organized under the applicable laws and regulations within the territories of either High Contracting Party shall be deemed to be corporations and associations of such High Contracting Party and shall have their juridical status recognized within the territories of the other High Contracting Party whether or not they have a permanent establishment, branch or agency therein ».

In order to belong to either party, according to Article II, paragraph 2, of the 1948 Treaty, what is therefore required is that the creation (or organization) of a legal entity takes place in accordance with the applicable legislation in the respective territories. The Treaty has adopted the criterion of nationality (if one intends to use this term) which is based on the place of origin of each legal entity.

There is no provisions either in the Treaty or in its Supplementary Agreement to the effect that a High Contracting Party may claim that a corporation which was not « created or organized under the applicable laws and regulations » within its territory is nevertheless a company of the same party. As was stated in the brief for the United States as Amicus Curiae in *Sumitomo v. Avigliano* with regard to the similar wording of the Treaty of Friendship and Commerce between the United States and Japan, the treaty « provision makes clear that a company has the nationality of its place of incorporation » ([17]). The brief ran as follows: « The simple place–of–incorporation

([17]) 21 *International Legal Materials*, p. 630 (1982).

standard in the FCN treaties was a deliberate departure from other tests of corporate nationality — including a control test of the sort adopted by the court of appeals — that were followed or suggested in other situations during the proceeding several decades (WALKER, *supra*, 50 *American Journal of International Law* at 381). Moreover, the intent of the parties that a company's nationality would not be determined by the nationality of its owners is reinforced by other provisions of the treaty that distinguish between nationals and companies of a party and enterprises owned or controlled by such nationals and companies » ([18]).

This argument was accepted by the Supreme Court of the United States, which applied it to the case in hand in the following terms: « Sumitomo is ' constituted under the applicable laws and regulations ' of New York; based on Article XXII, para. 3, it is a company of the United States, not a company of Japan. As a company of the United States operating in the United States, under the literal language of Article XXII, para. 3 of the treaty, Sumitomo cannot invoke the rights provided in Article VIII, para. 1, which are available only to companies of Japan operating in the United States and to companies of the United States operating in Japan » ([19]).

From the above–mentioned Article II, paragraph 2, in the case in hand it may be inferred that Raytheon and Machlett, which are companies of the United States, are beneficiaries of the protection afforded under the Treaty with regard to their activities in Italy (or, more in general, to the situations having arisen in Italy and which concern them directly), while ELSI, which without any doubt a company of Italy, is not included among the beneficiaries of protection under the Treaty with regard to its activities in Italy, or in situations relating to them which have occurred in Italy (e.g. the requisition of its plant, the result of a decree which was addressed to ELSI).

8. *Provisions of the Treaty protecting activities and goods which formally belong to persons of the local State.*

As a general rule, the Treaty and the Supplementary Agreement protect the physical persons and legal entities of one contracting State solely as far as activities carried on and property *directly* held in the other contracting State are concerned. However, there are a few provisions which, as well as according protection to such activities and property, also provide protection for certain property that, although formally belonging to a physical person or legal entity of the local State, are *substantially* activities and proprety belonging to persons of the other State. For example, Article V, paragraph 3, of the Treaty, after granting the nationals, corporations and associations of one contracting party both national and the most–favored–nation treatments within the territory of the other contracting State for the purposes of the matters enumerated in paragraphs 1 and 2 of the same article, makes the following further provision: « Moreover in all matters relating to the taking of privately owned enterprises into public ownership and the, placing of such enterprises under public control, enterprises in which nationals, corporations and associations of either High Contracting Party have a substantial interest, shall be accorded, within the territories of the other High Contracting Party, treatment no less favorable than that which is or may hereafter be accorded to similar entreprises in which nationals, corporations and associations of such other High Contracting Party have a substantial interest, and no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of any third country have a substantial interest ».

The structures of Article III, paragraph 1, second sentence, and Article III, paragraph 2, second sentence are quite similar.

The existence of the above–mentioned provisions can be explained by recalling that there are frequent cases in present–day economic life of companies set up in one country and in accord-

([18]) *Ibidem.*, at p. 634.

([19]) 102 *Supreme Court Reporter* 2374 (1982); 21 *International Legal Materials*, p. 791 *et seq.*, p. 794 (1982). Article XXII, para. 3 of the Treaty between the United States and Japan, which corresponds to Article II, para. 2 of the Treaty with Italy, reads as follows: « Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof ». Article VIII, para. 1 confers rights on « nationals and companies of either Party ... within the territories of the other Party ».

ance with its laws expanding their activities to other countries, different from that of their origin, by means of other companies controlled by them. The latter can be set up by the « parent » company, or companies may become « parent » companies by buying up the majority of the foreign company's share (these occurred in the case of Raytheon and ELSI).

Legally, it must be observed that, in any case, the controlling and the controlled company remain two distinct entities, i.e. two subjects which can, and in the present case actually do, have different nationalities.

The phenomenon described as the subordination of one company to another may lead to various consequences in Treaties of Friendship, Commerce and Navigation. Theoretically, the Contracting States could solve the question of the nationality of a controlled company by means of a clause in which the latter is deemed to belong to the national State of the controlling company (or « parent » company). However, this type of solution is not envisaged in the 1948 Treaty between Italy and the United States. It was decided instead to make the nationality depend on the State of origin and to include *ad hoc* provisions in order to give a certain limited importance to the fact of the control being exerted by a company belonging to the other contracting State. However, this has three consequences, about which there seems to be no doubt: *firstly*, the controlled company retains its nationality, in accordance with Article II, and this must be taken into account when applying all the provisions of the Treaty which do not have the special nature of the above mentioned provisions contained in Articles III and V; *secondly*, the link between parent company and controlled company, which certainly exists at the level of economic interests, does not allow of any identification between the two when it comes to interpreting the Treaty; *thirdly*, the avobe mentioned provisions must be given a restrictive interpretatation because any exceptional rule must be interpreted narrowly; it is therefore not possible to expect that the phenomenon of control by a foreign company over a national company has any impact beyond the situations provided for specifically in Articles III and V.

9. *Alleged violations of Article V of the 1948 Treaty...*

Let us examine the individual provisions of the 1948 Treaty and the 1951 Supplementary Agreement on which the United States has based its claim. It will be shown that, in the first place, Articles V and VII of the Treaty are almost entirely irrelevant to the case in hand, and, in the second place, Article III of the Treaty, and Article I of the Supplementary Agreement, when interpreted correctly, do not support the contentions of the claimant Government.

Article V concerns the « protection and security » of the persons and property belonging to nationals of each contracting party within the territory of the other party. Paragraph 1 makes it clear that the term « nationals » is to be understood as including corporations and associations insofar as the provision set out in the same paragraph is « applicable in relation to property ». Paragraph 2, which deals with a particular aspect of the protection and security of property, lays down that « [t]he property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation ». The same provisions give those receiving such compensation the right to withdraw it « without interference », with entitlement to foreign currency and with exemption from any tax for transfer or remittance. Lastly, paragraph 3 ensures that treatment no less favorable than national or most-favored nation treatment will be extended to enterprises in which nationals and corporations of each contracting party have a substantial interest whenever, within the territories of the other contracting party, the enterprise is transferred from private to public ownership or the enterprise is transferred to public control.

The Government of the United States contends that Article V, paragraph 2, was violated by the Italian Government when it requisitioned the ELSI plant. In its opinion, the « guarantee of compensation » is extended by the Protocol attached to the Treaty « to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party » (« in other words », it is claimed at p. 41 of the Memorial submitted by the Government of the United States, « the Treaty unambiguously protects the investment interests of United States shareholders in

Italian companies whose property is taken by the Italian Government »). Lastly, Article V, paragraph 1, is alleged to have been violated because the Italian Government supposedly did not protect the ELSI plant after the requisition; furthermore, paragraphs 1 and 3 of the same Article are deemed to have been violated at the same time owing to the delay with which the Prefect decided on the appeal against the requisition.

Let us begin from the last two points. The preliminary remark to be made on the claimant Government's contention is that the problem of the protection of the ELSI plant, as well as that of the delayed decision by the Prefect, do not directly concern the United States companies, which the Government of the United States seeks to protect. Article V, paragraphs 1 and 3, guarantees the protection and security of property belonging to United States companies in Italy, while the plant that according to the Government of the United States should have been protected under the Treaty belonged to the *Italian* company ELSI. Moreover, also the Prefect's decision on the appeal against the requisition, together with the Mayor's decree were actually addressed to ELSI. The statement expressed on page 41 of the Memorial submitted by the United States Government, according to which assets were « owned through ELSI » by Raytheon and Machlett is totally unacceptable ([20]).

In addition to this preliminary observation, a number of facts can also be challenged. In Part I of the present Counter-Memorial it was clarified that the occupation of the ELSI plant by the employees began before the requisition, and not after it, as the claimant Government would have it, and that the attitude of the workers entailed no risk for the plant after the decree issued by the Mayor of Palermo, especially as the Mayor had appointed two representatives to ensure that the orders issued with a view to the management of the factory were respected. Adequate clarifications have been given with regard to the causes and effects of the delay with which the Prefect decided upon the appeal. In any case it must absolutely be ruled out that this delay has any connection with the alleged violation of paragraphs 1 and 3 of Article V.

10. ... *and of the Protocol annexed to the Treaty.*

With regard to the alleged violation of Article V, paragraph 2, it must be pointed out that this provision accords, in the local State, protection against the taking of property and provides for compensation to be paid for property belonging to nationals, corporations or associations of the other contracting party. It is true that paragraph 1 of the Protocol specifies that this protection is afforded also to « interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party ». However, this does not mean that the same protection is to be generally granted as for property belonging to nationals of the other contracting party also to property pertaining to a company which belongs, under the terms of the Treaty, to the local State and is controlled by a company belonging to the other State. Only exceptionally are some Treaty provisions intended to this effect (*supra*, paragraph 8) and a different language is used.

Furthermore, under paragraph 1 of the Protocol, protection is accorded only to rights to property. While the Italian text refers only to « rights » (*diritti*) the term used in the English text is « interests ». According to Article 33, paragraph 4 of the Vienna Convention on the Law of Treaties, the provisions drawn up in two equally authentic languages are to be interpreted in such a way as to reconcile the meaning of the two texts and therefore, in this case, in the more restrictive sense of the Italian text.

A further observation, which is decisive in itself, amounts to denying the applicability of both the Protocol and Article V, paragraph 2, in the present case, for the simple reason that no expropriation or « taking of property » occurred. A temporary requisition decree was issued with the effect of blocking the availability of the ELSI plant for six months and therefore of partially suspending the company's management functions, but only as far as that particular plant was concerned. On the other hand, the Municipality of Palermo gained nothing at the company's

([20]) Memorial, p. 44.

expense. Thus, it must be ruled out completely that the requisition decreed by the Mayor of Palermo can be considered an expropriation measure. The Italian text expressly refers to expropriated property (*beni espropriati*). In fact, Article V of the Treaty covers completely different situations from that which actually occurred ([21]).

11. *Interpretation and application of Article VII of the Treaty.*

We shall now examine the problems raised by the interpretation and application of Article VII of the 1948 Treaty. In paragraph 1, which seems to be the one to have mainly attracted the attention of the United States Government, this Article accords to the nationals, corporations and associations of each contracting party, the right to « acquire, own and dispose of » immovable property or interests therein within the territories of the other contracting party; for corporations of United States nationality the conditions are commensurate with the treatment accorded to Italian corporations in the United States state of origin, and in any case do not imply more extensive rights than those granted to legal persons in Italy. The fact that this provision includes a principle of the free availability of immovable property is interpreted by the Government of the United States in the sense that the Italian Government should have been under an obligations to respect the decisions of the ELSI management concerning the voluntary liquidation of the company and should not have requisitioned the ELSI plant, since the requisition allegedly prevented « the owners » from disposing of the plant; in any case, the requisition should have been followed by the payment of compensation.

Once again the first objection is that the plant belonged to ELSI, that is to an Italian company. The above mentioned Article VII applied to the situation to which the dispute relates, could only ensure the free availability to Raytheon and Machlett of the ELSI shares which belonged to them (an availability about which nobody has cast any doubts). Supposing the two United States companies were truly the owners of the plant requisitioned, the decree of the Mayor of Palermo would not have had any effect since it was addressed to ELSI.

There are, moreover, other objections to be made. It is hard to see how the respect of a company's decision concerning its own liquidation can be confused with the only rights which unquestionably pertained to Raytheon and Machlett: their rights as shareholders of ELSI. It is hard to see how, in order to leave a company free to implement its own voluntary winding up, the Italian authorities should have refrained from requisitioning its plant: without doubt, such an argument would be inconceivable with reference to an Italian company, since a requisition decree referring to certain company property can legitimately be enforced even if the company is being wound up. In this connection it is worth pointing out that the above-mentioned Article VII, paragraph 1, explicitly excludes the possibility of United States companies having more extensive rights than those accorded by the Italian legislation to national companies in Italy. Lastly, it is worth repeating what has already been noted with regard to the requisition, i.e. that it only temporarily blocked the availability of part of ELSI property. Compensation was not eventually paid simply because it was replaced by the damages paid to the requisitioned party ([22]), as was explained in Part I.

([21]) In note 4 at p. 45, the United States Government's Memorial quotes a number of awards delivered by the Iran-United States Claims Tribunal during the years 1981-1986 and tries to demonstrate that interference with an alien's property may amount to expropriation, even though the local State denies to have adopted such a measure, and notwithstanding the fact that the legal title to the property formally remains with the owner, the essential condition being that the foreign investor « has no reasonable prospect of regaining management and control ». The application of this doctrine to our case depends on the assumption that « the Government of Italy physically seized ELSI's property with the object and effect of ending Raytheon and Machlett's management and control, in order to prevent them from conducting the planned liquidation ». Furthermore, according to the alleged indications of « Italian officials » the requisition was going to be extended beyond its six-month term, while IRI was completing its arrangements for acquiring ELSI's assets: that is why Raytheon and Machlett had no reasonable prospect of ever recovering management and control of ELSI. Whatever the merits of the claimant Government's contentions in law, the assumption mentioned above is firmly denied by the Italian Government: ELSI's property was partially requisitioned for the reasons stated in Part I of this Counter-Memorial, with no intention of *ending Raytheon* and Machlett management and control. Their end was actually the result of the bankruptcy proceedings, open at the request of the ELSI management.

([22]) In this explicit sense, see Court of Appeal of Palermo, Memorial, Annex 81.

12. *Evaluation of the problems raised by Article III of the Treaty.*

The provisions of the 1948 Treaty and the 1951 Supplementary Agreement on which the Government of the United States seems mainly to have based its case are Article III of the Treaty and Article I of the Supplementary Agreement. Attention will now be addressed to these provisions.

The content of Article III is rather complex. The first paragraph begins by guaranteeing that the nationals, corporations and associations of each contracting State will have « rights and privileges with respect to the organization of and participation in corporations and associations » within the territory of the other contracting State, in accordance with the applicable laws and regulations of the local State and benefiting from the most–favored–nation treatment. In the case in point nobody has challenged the right of Raytheon and Machlett to have a right of participation in the Italian company ELSI. There is no disagreement on this between the Parties in the present proceedings. Article III, paragraph 1, then goes on to acknowledge that the corporations and associations of each contracting Party in which nationals, corporations and associations of the other Party participate and which are controlled by the latter subjects, « shall be permitted to exercise the functions for which they are created or organized in conformity with the applicable laws and regulations », enjoying the most–favored–nation treatment.

The claimant Government contends that the first sentence of paragraph 2 of Article III has been violated. This provision ensures the right of nationals, corporations and associations of each contracting party to « organize, control and manage » corporations and associations of the other contracting party « in conformity with the applicable laws and regulations » within the territories of the latter party. According to the Government of the United States the provision summarized above gives the United States shareholders, in a position to control an Italian company, « a guarantee of non–interference with management and control » ([23]). Furthermore, the Italian Government is accused of having exerted undue influence on the management through the requisition decree.

Both these contentions have to be challenged. In the first place, the requisition decree in no way affected control by the shareholders over the company. It merely concerned the management by the company of some property belonging to the said company. The right to control and manage certain « local » companies is not subject to unlimited guarantee, as the powers granted by law to the local authorities are thereby unaffected.

More exactly, with reference to the case in hand, it should be noted that there can be no violation of the Treaty in the case of a requisition decree based on a Law (law N. 2248 of 20 March 1865, Annex E, Article 7, previously cited in Part I). This represents the logical consequence of the principle of « conformity with the applicable laws and regulations », which is explicitly asserted in Article III, paragraph 2. The possibility of requisitioning private property « because of grave public necessity » is, in fact, one of the cases provided for in Italian legislation concerning the unavailability of a plant for reasons of public interest. Moreover, it should not be overlooked that the Mayor's decree had the effect of determining only *temporary* unavailability of the ELSI plant.

Moreover, the fact that the requisition decree issued in the case in point was subsequently declared to be invalid does not transform it into a manifestation of undue interference by the Italian authorities. Until it expires or is overruled, a decree is to be considered legitimate and effective. In this connection, it should be recalled that the Prefect acknowledged as a point of law that was « undisputed, in case–law and legal doctrine, that the Public Administration is empowered under the above mentioned Article 7 to dispose of the private property whenever necessity exists to face a situation of actual and imminent danger for the public interest (public health, public order, etc...) ... ». The Prefect likewise acknowledged the Mayor's power to issue requisition decree on his own initiative.

One point which deserves special attention is related to the nature of the consequences of the requisition decree. It transferred in no way the ownership of the ELSI plant to the Mu-

([23]) Memorial, p. 30.

nicipality of Palermo. It only partially suspended the exercise of control and management by the company, with reference to the requisitioned property alone. In fact, by 1 April 1968, the ELSI Board of Directors had already decided in complete freedom to cease production and to liquidate the assets. Furthermore, after the requisition, the Company was able to take an extremely important decision for its future, namely to file for bankruptcy. Only after this decision and because of it, did ELSI management definitely lose control and management of the company assets.

13. *Article I of the 1951 Supplementary Agreement: was the requisition and « arbitrary » measure?*

Let us now examine Article I of the 1951 Supplementary Agreement. It prohibits subjecting the nationals, corporations and associations of each contracting party, in the territories of the other party, to « arbitrary or discriminatory measures » having, in particular, one of the following effects: « (a) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein, or (b) impairing their other legally acquired rights or interests in such entreprises or in the investments which they have made » in various forms, including in particular the contribution of funds through loans or shares.

In the present case, the Government of the United States claims that the requisition of the ELSI plant decreed by the Mayor of Palermo represented an arbitrary and discriminatory measure such as to prevent the United States companies Raytheon and Machlett from maintaining the effective control and management of ELSI. Inasmuch as it is responsible for the requisition decree, the Italian Government is thus alleged to have violated the above mentioned Article I of the 1951 Agreement.

The first objection to be raised to this contention is related to our previous remarks concerning Article V, paragraph 2, of the 1948 Treaty. In the present connection, it must be said again that the requisition decree was addressed to the Italian company ELSI; the United States companies Raytheon and Machlett were not actually subjected to any measures affecting their property. It is also worth repeating that the above-mentioned two United States companies, which were shareholders of ELSI, never actually lost control or management of the company: the company organs, through which this control and management were performed, were able to function freely also during the period of the requisition, as they were merely deprived (for six months) of the availability of the plant. One may refer in this context to the decision to file for bankruptcy, already mentioned above, which was taken after the requisition.

There is a second objection, which would still be valid even on the assumption that the decree of the Mayor of Palermo directly affected Raytheon and Machlett: the requisition of the ELSI plant cannot be defined either as an arbitrary measure or as a discriminatory measure.

In general, an « arbitrary » measure is defined as a measure which is completely lacking in justification, and which can be explained only as a tool used by the public authorities to damage and oppress a private citizen. In most Treaties of Friendship, Commerce and Navigation entered into by the United States after World War II, a prohibition similar to the one contained in the above mentioned Article I of the 1951 Supplementary Agreement is placed on any « unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals and companies of the other Party in the enterprises which they have established » ([24]). Each party is therefore prohibited from taking measures detrimental to the rights or interests of the citizens and companies of the other party, whenever those measures can be defined as unreasonable; in other words, whenever no possibility exists of identifying an admissible reason on the basis of which public authorities have the power to limit those rights or interests.

Indeed, the way in which the Government of the United States represents the requisition decreed by the Mayor of Palermo against the ELSI company appears similar to an act corresponding to the model of arbitrary or unreasonable measures described above: suffice it to mention

([24]) See article V of the Treaty with Ireland (21 January 1950) and likewise Article VIII of the Treaty with Greece (3 August 1951), V of the Treaty with the Federal Republic of Germany (29 October 1954), VII of the Treaty with the Netherlands (22 March 1956), IV of the Treaty with Belgium (21 February 1961), IV of the Treaty with Luxembourg (23 February 1962).

that, on page 33 of the Memorial submitted by the United States Government, it is claimed, among other things, that the purpose of the requisition was « to prevent Raytheon and Machlett from protecting their investment ». But a perusal of the requisition decree issued on 1 April 1968 reveals that it was based on two undeniable facts: ELSI, having decided to close down its plant and dismiss about one thousand of its employees, had create a serious social and economic problem, and the reactions by the employees and the trade unions, with the backing of public opinion, were such as to create fears of « disturbances of public order ». In the light of these facts — the exact analysis of which has been carried out in the preceding pages containing a correct reconstruction of events (Part I) — the Mayor of Palermo was of the opinion that the « features of serious public necessity and urgency » required by law in order to proceed with a requisition actually existed. His decree can therefore in no way be said to be arbitrary.

The Memorial bases its argument on the decision of the Prefect of Palermo to set aside the Mayor's decree and merely quotes a passage taken from that decision in which the requisition is held to be «destitute of any juridical cause which may justify it or make it enforceable» ([25]). The Prefect in fact stated: « Therefore, the order is destitute of any juridical cause which may justify it and make it enforceable » ([26]). However, this passage is only the conclusion of an argument, as can be seen from the following words: «There is no doubt that the goal to which the requisition was directed could not be actually achieved by the order, even though — in theory — in the case in point, the grounds of the grave public necessity and of the emergency and urgency which caused the issuance of the order may be held to be existing. This is proved by the fact that the activity of the company was neither resumed, neither might it be resumed ». In other words, the requisition decree was deemed illegitimate and set aside, certainly not because it was arbitrary — indeed, the Prefect acknowledged that, « in theory », the decree respected the conditions of necessity and urgency — but because the purpose of the resumption of activity by the company « could not be actually achieved » in this way. The Prefect's decision went on to criticize the Mayor for not having taken account of the fact that « the state of the company was such, for reasons of an economic and functional nature, as well as for market reasons, that its activity could be continued only after action by the management to solve the company's financial and industrial problems ».

The decision to set aside the requisition decree therefore contained no statement that it was « arbitrary », as the claimant Government is attempting to make out in the present case. What was stated, essentially, is that the decree was not suitable for achieving its purpose of getting the ELSI plant to function. Therefore the requisition decree was cancelled because the concrete goal the Mayor was trying to achieve was unattainable (and he had therefore wrongfully exercised his powers). Clearly such a situation has nothing to do with an alleged « arbitrary measure » under the above mentioned Article I of the 1951 Supplementary Agreement.

14. *Was it « discriminatory »?*

It is now necessary to ascertain whether the requisition in question was a « discriminatory » measure according to the terms of the same Article. By adopting the thesis that the requisition decree was aimed at giving IRI the time to expropriate the property of ELSI, the Government of the United States contends that it was: the purpose is alleged to be discriminatory insofar as it aimed at favoring a public enterprise controlled by the Italian Government ([27]).

This thesis, however, is not only groundless, but is also the result of an obvious misinterpretation of the concept of discriminatory measure set out in Article I of the 1951 Supplementary Agreement.

It is possible to speak of discrimination only when two comparable situations are treated in different ways to the detriment of the interests of one of the parties concerned. Within the framework of a Treaty of Friendship, Commerce and Navigation which is essentially based on

([25]) Memorial, p. 36.
([26]) See Memorial, Annex 76, pp. 10–11.
([27]) Memorial, p. 36.

the standard of national treatment, the situations to be compared for the purpose of ascertaining whether the principle of the equality of treatment has been respected or not, are those of a foreign investor and of the corresponding national investor. In the case in hand, it would therefore be necessary to prove that Raytheon and Machlett, assuming that the requisition decree was addressed to them, had been discriminated against with respect to possible Italian investors. In other words, that the requisition concerned them *as United States companies*, while the Italian investors, if any, would not have suffered any damage. This must be ruled out entirely: not even the Government of the United States has ever claimed that the requisition in question was decided out of bias against United States companies. In fact, during the same years, requisition was frequently used with regard to plants belonging to companies, the majority shareholders of which were Italians (Part I, paragraph 9).

Furthermore, the fact that IRI is considered by the Government of the United States to be the beneficiary of the requisition is quite irrelevant. The claimant Government has contended that the alleged favors extended to IRI by the Italian Government were one aspect of the unfavorable treatment meted out to United States investors. But what is the logic behind this assumption of a discrimination against the Raytheon and Machlett companies? With respect to what other subject in a similar situation were the two United States companies discriminated against? It should not be overlooked that, according to the highly imaginative presentation of the facts made by the Government of the United States, IRI is equated to the Italian Government, which is accused of having « discriminated » against the two United States companies.

With reference to what actually happened, we shall limit ourselves to repeating what has been said above, namely that at the time of the requisition IRI had no intention of taking the place of Raytheon and Machlett in controlling ELSI, not only in view of this company's extremely poor technical and economic conditions, but also, and more simply, because, according to IRI's industrial policy, it was not considered advisable to intervene on a larger scale in the sector of ELSI's activities. Besides, the purposes of the decree of the Mayor of Palermo were those stated in the text of the requisition order and nothing else.

It remains to be seen whether the decision related to the requisition the ELSI plant resulted in damage to « other rights and interests » of Raytheon and Machlett or to investments made by them in the form of financial contributions, i.e. loans or shares. In this connection it should be emphasized from the outset that, in order to speak of damage resulting from violation of Article I of the 1951 Supplementary Agreement, the basic assumption must always be that the requisition decree was arbitrary or discriminatory; and we consider we have already refuted such an assumption. We also wish to point out that the company subjected to the decree in question was an Italian and not a United States company; moreover, loans and shares were not directly affected. It is in any case important to recall that the interests of the Raytheon and Machlett companies, and the ultimate destiny of their investments, were jeopardized by events occurring prior to the requisition, e.g. the proven incapacity of ELSI management to make a profit, and its increasing insolvency, as well as by a subsequent fact, which was the consequence of the above mentioned circumstances and in any case of the will of ELSI itself, namely the declaration of bankruptcy. As has been amply illustrated in Part I, the requisition decree was in practice a parenthesis in the life of ELSI. The only damage caused by the decree was that of the temporary unavailability of a plant whose activities had already ceased without there being any intention of resuming them. Therefore the Italian Government completely rejects the accusation of having violated Article I of the 1951 Supplementary Agreement.

PART V

ISSUES RELATING TO THE CLAIM FOR REPARATION

1. *Subsidiary nature of the comments concerning the United States claim for reparation.*

In the preceding parts of this Counter-Memorial, the Italian Government has shown that the claim of the Government of the United States on behalf of Raytheon and Machlett is inadmissible and, on a subsidiary basis, that the alleged infringements of the Treaty and the Supplementary Agreement have not taken place. As the Government of the United States claims reparation on the basis of wrongful acts that habe not occurred, it is not strictly necessary to deal in this Counter-Memorial with issues relating to reparation. However, on a further subsidiary basis, the Italian Government addresses some remarks on the claim for reparation in order to point out that even in this respect the claimant Government resorts to dubious contentions of law and to distortions of fact — all designed to maximize the amount of damages for which compensation is requested.

Given the entirely subsidiary character of the comments expressed in this part, it seems appropriate to make only a few general remarks. However, the Italian Government expressly notes that the fact that some assertions by the claimant Government are not specifically contested by no means implies that the same assertions are recognized as accurate or supported by sufficient evidence. In fact, the claimant Government heavily relies on documents originating from ELSI or Raytheon or on affidavits of persons closely connected with Raytheon. The claim essentially rests on the book valuation of ELSI's assets, while no analysis is offered of experts ' valuations which were given during the bankruptcy proceedings or of Raytheon's own pre-bankruptcy « quick-sale valuation [1] ». As was shown (see Part I, paragraphs 7 and 17), the book valuation in no way corresponded to the actual prospects of the sale of the assets.

Under the circumstances, the Italian Government notes that the claimant Government is far from having discharged its burden of proof also with regard to the alleged damages.

2. *Links between the alleged violations of the Treaty and the alleged damages.*

A claim for reparation may only be put forward for losses for which « in legal contemplation » the alleged acts were « the efficient and proximate cause and source from which they flowed » [2]. This characteristic of being the efficient and proximate cause must pertain to the alleged wrongful act or acts which is, or are, considered to have occurred. There must be a close connection between the infringement that has *ex hypothesi* occurred and the losses for which reparation is claimed [3].

In the claimant Government's Memorial the links existing between each alleged infringement of a Treaty provision and the alleged losses are not explored. For example, the applicant Government's contention that ELSI's bankruptcy was « the direct and foreseeable consequence

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(1) Memorial, p. 60 et seq.

(2) Thus the Administrative decision N. II given by the United States-Germany Mixed Claims Commission, 7 *Reports of International Arbitral Awards*, p. 30.

(3) Strictly speaking, the loss suffered by nationals cannot be identified with the loss suffered by the State as a consequence of the infringement of an obligation under international law. See AGO, *Scritti sulla responsabilità internazionale degli Stati*, II, 2 (1986), p. 981.

of the requisition order » (4) is totally unacceptable. As was shown above (Part I, paragraph 11), bankruptcy was rather the consequence of ELSI's state of financial affairs and of Raytheon's declared unwillingness to make any further investments in its subsidiary. Nor could the delay in the Prefect's decision over the appeal be considered as a cause of the bankruptcy since ELSI's filing its application for bankruptcy came only seven days after the appeal (Part I, paragraph 14). Thus, even if the requisition decree and/or the delay in the decision over the appeal were taken to be infringements of Treaty provisions, no obligation to make good the alleged losses in the bankruptcy proceedings could be justified.

3. *Considerations on the sums paid by Raytheon as a guarantor of ELSI's loans, or claimed by the United States in relation to Raytheon's credits towards ELSI.*

The Government of the United States also seeks to recover sums that Raytheon had to pay in the bankruptcy proceedings because it had guaranteed some loans taken by ELSI. These guarantees were not an investment, but only a security covering 50 % of the loans which were given to ELSI by some Italian banks and which were otherwise unsecured. The banks lost 50 % of the money borrowed by ELSI. This money had contributed to ELSI'S assets. By claiming the money which Raytheon later paid as guarantor for the other 50 %, the government of the United States attempts to shift on to the Italian Government the loss of money which was borrowed and actually used by ELSI and never paid back to the lenders. It would be an extraordinary Treaty provision indeed that which would imply that the Italian Government should make good a financial loss of a United States company for money that had been freely used by that company's Italian subsidiary.

Substantial sums are claimed in relation to credits that Raytheon or other companies of the same group had towards ELSI. These sums do not necessarily correspond to investments. No claim had been made with regard to these credits in the bankruptcy proceedings (5). Given the fact that all these credits exist towards companies all belonging to the same multinational group, their assessment would require particular care in evaluating the services actually rendered and the goods provided — both with regard to ELSI's need for these services and goods, and their prices in relation to fair–market prices.

4. *The issue of the legal expenses incurred by Raytheon.*

Legal expenses incurred by Raytheon can hardly find their « proximate cause » in the alleged infringement of a treaty provision. « Legal and related expenses » incurred by Raytheon « in pursuing its claim against the Government of Italy for its actions against ELSI » (6) are at best part of the costs relating to the present proceedings. Most of the alleged legal expenses concerned lawsuits initiated by five Italian banks — all independent entities — which are grossly misdescribed as « government banks acting pursuant to a government plan » (7) when they were only seeking to recover their financial losses over money borrowed by ELSI with a guarantee covering only 50 % of the sums (8). These lawsuits are clearly unrelated to any alleged infringement of the Treaty. Even the claimant Government's contention that, had there been an « orderly » liquidation, the banks « would have settled their debts (*sic*) with ELSI » (9) is sheer

(4) Memorial, p. 60.
(5) Cf. Memorial, Annex 26, p. 9.
(6) Memorial, p. 62.
(7) Memorial, pp. 61-62.
(8) The banks invoked Article 2362 of the Italian Civil Code and contended that, since Raytheon was in substance the sole stockholder of ELSI, the corporate veil should be lifted against the United States company. The acquisition of a small part of shares by Machlett appears to have been a device for avoiding the application of the said provision against Raytheon. Italian courts accepted Raytheon's argument that Machlett was in fact a separate entity, although fully owned by Raytheon.
(9) Memorial, p. 62.

speculation. Moreover, costs were awarded to Raytheon by Italian courts in the same litigations ([10]): the awards cover normal legal expenses, including fees corresponding to lawyers' tariffs; any further legal expense possibly incurred into by Raytheon cannot be considered to be reasonable under the circumnstances.

5. *The claim relating to interests.*

With regard to interests the Italian Government recalls that in the *Lighthouses* case the Arbitral Tribunal stated as follows:

« (...) no strict rules of law of a general character exist which prescribe or forbid the award of interest. The Arbitral Tribunal cannot accept the views expressed thereon by the two Agents, with opposing results. Also in this respect the solution largely depends on the character of each particular case » ([11]).

No interests were awarded by the Court in the *Corfu Channel* case. The Government of the United Kingdom had not claimed interests but the Court did not refer to this circumstance and said:

« The Court considers the true measure of compensation in the present case to be the replacement cost of the *Saumarez* at time of its loss » ([12]).

Among the circumstances to be considered in the present case is that the application to the Court could well have been made many years earlier. As the Government of the United States stated in its Memorandum of Law of 1974: « In none of the outstanding proceedings is it possible for Raytheon and Machlett to recover any compensation which resulted from the acts and omissions of the Government of Italy on which this claims is based » ([13]). Thus, if one considers the claim to be admissible contrary to the contention of the Italian Government, the claim would have been equally admissible in 1974.

The applicant Government's claim for coumpound interests finds little support in practice. The following quotation from the arbitral award in the *British Property in the Spanish Zone of Morocco* case appears to be particularly relevant in this context:

« With regard to the choice between simple interests and compound interests, the Arbitrator must first of all state that arbitral jurisprudence concerning compensation that a State should grant to another for damages suffered by nationals of the latter—although it is particularly rich — is unanimous, as far as the Arbitrator knows, in denying compound interests » ([14]).

([10]) Documents Ns. 41–42.

([11]) 12 *Reports of International Arbitral Awards*, p. 252. In the original French the text reads as follows: « ... il n'existe de règles de droit rigides d'ordre général qui prescrivent ou interdisent l'allocation d'intêrets. Le Tribunal ne saurait admettre les thèses des deux Agences qui s'y réfèrent, d'ailleurs en des sens opposés. Ici encore la sollution dépend largement des caractéristiques de chaque cas particulier ».

([12]) *I.C.J. Reports 1949*, p. 249.

([13]) « The Claim », p. 56.

([14]) 2 *Reports of International Arbitral Awards*, p. 650. In the original French the text reads as follows:

« En ce qui concerne le choix entre les intérêts simples et les intérêts composés, le Rapporteur doit tout d'abord constater que la jurisprudence arbitrale en matière de compensation à accorder par un Etat à un autre pour dommages subis par les ressortissants de celui-ci sur le territoire de celui-là — jurisprudence pourtant particulièrement riche — est unamine, pour autant que le rapporteur le sache, pour écarter les intérêts composés ».

SUBMISSIONS

The Italian Government makes the following submissions:

« May it please the Court,

To adjudge and declare that the Application filed on 6 February 1987 by the United States Government is inadmissible because local remedies have not been exhausted.

If not, to adjudge and declare:

(1) That Article III (2) of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;

(2) That Article V (1) and (3) of the Treaty has not been violated;

(3) That Article V (2) of the Treaty has not been violated;

(4) That Article VII of the Treaty has not been violated;

(5) That Article I of the Supplementary Agreement of 26 September 1951 has not been violated;

and accordingly, to dismiss the claim ».

16 *November* 1987.

Professor LUIGI FERRARI BRAVO
Agent of Italy

DOCUMENTS

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17. – Hearing before the Subcommitee of the Committee on Foreign Relations, United States Senate, Eighty–Third Congress, First Session, Executives R, (82d Cong., 2d Sess.) F (82d Cong., 2d Sess.) H (82d Cong., 2d Sess.), I (82d Cong., 2d Sess.), J (82d Cong., 2d Sess.), C (83d Cong., 1st Sess.), N (83d Cong., 1st Sess.), O (83d Cong., 1st Sess.); Treaties of Friendship, Commerce and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan, respectively.
18. – Article 2362 of the Italian Civil Code.
19. – Article 2446 of the Italian Civil Code.
20. – Article 5 of the Unified Text 3 March 1934, N. 383 of the Municipal and Provincial Law, modified by the Law 27 June 1942, N. 851 and by the Law 9 June 1947, No. 530.
21. – Articles 6, 160, 216 and 217 of the Italian Bankruptcy Law, Royal Decree of 16 March 1942, N. 267.
22. – Articles 1, 2 and 3 of the Law 22 December 1956, N. 1589 « Institution of the Ministry of State Participation in Industry ».
23. – Decision N. 3086 of the Court of Cassation dated 23 October 1974, N. 3086, *Foro Italiano* (1976), I, 1166.
24. – Decision N. 198 of Abruzzo Regional Administrative Tribunal, dated 30 December 1974, *Foro amministrativo* (1976), I–2, 453.
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26. – Decision N. 208 of the Italian Council of State, Section IV, 25 February 1975, *Consiglio di Stato*, 1975, I, 110.
27. – Decision N. 210 of Lombardy Regional Administrative Tribunal, dated July 1975, *Rassegna dei T.A.R.*, 1975, I, 3076.
28. – Decision N. 21 of the Italian Council of State, Section IV, dated 18 January 1977, *Consiglio di Stato*, 1977, I, 67.
29. – Decision N. 72 of the Italian Council of State, IV Section, dated 7 February 1978, *Consiglio di Stato*, 1978, I, 169.
30. – Certificate of the Italian Ministry of the Interior concerning the average time taken to examine appeals.
31. – Excerpts from the decision of the Board of Directors regarding the merger of ELSI S.p.A. with SELIT (1965).
32. – Notes and comments concerning the books and the documents attached to the petition in bankrupcty.
33. – Telex N. 570/2 of 6 April 1968 from the Mayor of Palermo to Avvocato Nicolò Maggio and Dr. Armando Celone.
34. – Telex N. 568/2 of 6 April 1968 from the Mayor of Palermo to Ing. Profumo.
35. – Letter from the Mayor of Palermo entrusting Ing. Laurin with the management of the plant, 16 April 1968.
36. – Court of Palermo – Bankrupcty Division – Technical accounting consultancy of Raytheon – ELSI S.p.A.
37. – Sicilian Regional Law N. 12 of 13 May 1968, (« Special Benefits for employees of ELSI of Palermo and SATS of Messina »).
38. – Sicilian Regional Law N. 23 of 6 August 1968 (« Further Special Benefits for employees of ELSI of Palermo »).
39. – Sicilian Regional Law No. 31 of 23 November 1968 (« Integrative provisions to Regional Law N. 23 (2) of 8 August 1968, concerning further special benefits for employees of ELSI of Palermo »).
40. – Report of the bankrupcty Receiver, Avvocato Siracusa, 6 March 1970.

41. – Decision N. 5143 of the Court of Cassation, I Section, 7 October 1982.
42. – Decision N. 6712 of the Court of Cassation, I Section, 9 December 1982.
43. – Decision N. 2879 of the Court of Cassation, 9 May 1985, *Giurisprudenza Commerciale* (1986), II, pages 537–564.
44. – Affidavit of Ing. Busacca, dated 30 October 1987.

UNNUMBERED DOCUMENTS

- Verbal notes of the Embassy of the United States of America, Rome, 7 February 1974.
- The Claim of Raytheon Company and the Machlett Laboratories, Incorporated, against the Government of Italy in connection with Raytheon–Elsi S.p.A. (same date as the verbal notes).

  Volume 1 – Statement of facts
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REPLY

SUBMITTED BY THE

UNITED STATES OF AMERICA

(CASE CONCERNING ELETTRONICA SICULA S.P.A. – ELSI)

18 MARCH 1988

PART I

INTRODUCTION

This Reply addresses the numerous unsubstantiated, irrelevant, or incorrect assertions made by the Respondent in its Counter-Memorial, filed 16 November 1987. The Respondent both illegally requisitioned Elettronica-Sicula, S.p.A. (« ELSI »), frustrating Raytheon's and Machlett's planned orderly liquidation of ELSI, and interfered in the subsequent bankruptcy proceedings. Yet the Respondent denies that its acts violated various provisions of the Treaty of Friendship, Commerce and Navigation between the United States and the Italian Republic (the « Treaty »), which entered into force in 1949, and its Supplement, which entered into force in 1961. This Reply is filed in accordance with the Court's Order of 17 November 1987.

From 1956 to 1967, Raytheon and Machlett invested substantial amounts of capital and other assistance in their Italian electronics subsidiary, ELSI, with the expectation that ELSI would become self-sufficient in the Italian market. Despite its reputation for quality products and its sizeable volume of sales, ELSI never became a self-sufficient, let alone profitable, enterprise. Contrary to Italy's assertions, Raytheon and Machlett did nothing to create ELSI's financial problems.

In early 1967, Raytheon and Machlett initiated a comprehensive effort to determine the reasons for ELSI's financial difficulties. They determined that ELSI could survive in the Italian market only with a substantial improvement in its competitive environment: specifically, by partnership with an Italian corporation or substantial cooperation by the Italian Government. In early 1967, Raytheon and Machlett decided that unless they could secure a plan to improve ELSI's competitive environment, they would proceed with an orderly liquidation of ELSI's assets within a year. This decision was communicated to the Respondent.

Although the Respondent made broad proposals for ELSI's continued operation, these proposals required that Raytheon and Machlett make substantial additional investments in ELSI with no prospect of recovering that investment, while continuing to cover ELSI's losses. Raytheon and Machlett reluctantly decided in March of 1968 to proceed with the orderly liquidation as planned. Under that plan, Raytheon and Machlett would advance all funds necessary to allow ELSI to be sold as a going concern.

Instead of allowing Raytheon and Machlett to liquidate ELSI in an orderly fashion, the Respondent, in violation of Italian law, requisitioned ELSI's plant and assets on 1 April 1968 allegedly because the orderly liquidation of ELSI would cause « social unrest ». At no time, however, did the Respondent ever resume the operation of the plant or re-employ ELSI's workforce. This unjustified and illegal requisition prevented Raytheon and Machlett from selling ELSI's assets and thus proceeding with the orderly liquidation as planned. Although Raytheon and Machlett immediately took all possible steps to have the requisition rescinded, the Respondent refused to quash the order and indeed told Raytheon that it would continue indefinitely. Since ELSI was deprived of the revenue with which to meet continuing financial obligations, Raytheon and Machlett directed ELSI to file a petition in bankruptcy on 26 April 1968 in accordance with Italian law.

Following the filing of ELSI's petition in bankruptcy, the Respondent continued to exploit the situation in which the requisition had placed ELSI's assets, eventually acquiring ELSI for itself. Only after ELSI had been purchased by the Respondent, the Respondent's administrative and judicial organs ruled that the Respondent's requisition of ELSI was unlawful as a matter of Italian law. Unfortunately, the Respondent was required by its courts to pay only

a small fraction of the compensation it should have paid to remedy the damage the Respondent caused. Accordingly, Raytheon and Machlett incurred substantial losses as a direct result of the Respondent's actions.

These actions of the Respondent violated several provisions of the Treaty. The Treaty violations in this case are clear from the ordinary meaning of the articles cited by the United States. The Respondent's broad assertions about the application of the Treaty and what interests it protects are unfounded; the Treaty provisions cited by the United States protect United States shareholders of companies incorporated in Italy. The requisition and other conduct by the Respondent were both arbitrary and discriminatory, prevented Raytheon and Machlett from managing and controlling an Italian corporation whose shares they had lawfully acquired, and resulted in the impairment of their legally acquired rights and interests — in violation of Articles III and VII of the Treaty and Article I of the Supplement. In addition, the requisition constituted a taking of Raytheon's and Machlett's interests in property without due process and without adequate compensation, in violation of Article V of the Treaty. The Respondent also failed to comply with the obligation under Article V to afford protection and security, by the unwarranted delay in ruling on the challenge to the requisition order and by failing to afford protection to ELSI's plant and premises. These violations, singly and in combination, entitle the United States to receive full compensation for the damages suffered by Raytheon and Machlett.

Italy does not contest the jurisdiction of this Court. Italy does assert that the claims of the United States are inadmissible because local remedies, in the form of a suit in Italian courts based on the Treaty, were not exhausted. The principle that local remedies be exhausted was followed in this case. All reasonable steps were taken to obtain compensation from the Respondent for the unlawful requisition of ELSI. Further resort to Italian courts on the basis of the Treaty is unavailable or unreasonable. In any event, the Respondent is estopped from insisting on such action at this time. Consequently these claims are properly before the Court.

PART II

STATEMENT OF FACTS

CHAPTER I

THE DECISION TO LIQUIDATE ELSI

SECTION 1. – *ELSI Received Extensive Financial and Managerial Assistance from Raytheon and Machlett but Could Not Become Economically Self-sufficient.*

By 1967 ELSI had become a respected manufacturer of sophisticated electronic components and equipment with a modern, fully-equipped plant in Palermo, a reputation for quality products, and a significant volume of sales and export earnings (1). It had been Raytheon's and Machlett's expectation from the outset that ELSI would gain access to Italian markets, develop new products, and continue to become more efficient in its operations. ELSI, however, was never able to achieve the financial self-sufficiency that Raytheon and Machlett had anticipated (2).

John Clare, chairman of the Board of Directors of ELSI, and other qualified technical experts under his supervision, prepared an in-depth study of ELSI's potential for survival in the Italian market (3). They determined that ELSI could operate effectively in Italy only with the addition of an Italian partner, infusion of capital, introduction of new products, and greater access to Italian markets (4). These conclusions, previously communicated to the Respondent, were summarized in a report which was distributed to senior officials of the Italian Government, the Sicilian Government, IRI (5), Italian banks, and other members of the Italian establishment (6).

The Counter-Memorial presents additional factors that allegedly contributed to ELSI's inability to become financially self-sufficient, including ELSI's geographic location, the quality and prices of ELSI's products, and the obsolescence of some of ELSI's production lines (7).

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(1) For a discussion of ELSI's product lines and markets, *see* Memorial, pp. 6-7.

(2) For a discussion of ELSI's financial performance, *see* Memorial, p. 7; Affidavit of Arthur Schene, Former Vice President-Controller of Raytheon Company, 17 Apr. 1987 (Annex 13).

(3) In 1967 Raytheon and Machlett designated John Clare, Raytheon Vice President and General Manager of its European management subsidiary, Raytheon Europe International Company, to be ELSI's chairman. They also appointed several other highly qualified persons to assist ELSI. Memorial, p. 7.

(4) Memorial, p. 8; Affidavit of John D. Clare, Former Chairman, Raytheon Europe International Company, 10 Jan. 1987, para. 18 (Annex 15).

(5) Istituto per la Ricostruzione Industriale (« IRI ») is a holding company owned and controlled by the Respondent. It has extensive and wide-ranging commercial and banking interests dominating, among other things, the telecommunications, electronics, and engineering markets. Memorial, pp. 8-9. IRI's actions are thus attributable to the Respondent. Memorial, p. 41.

(6) Memorial, Annex 15, para. 20; Memorial, « Project for the Financing and Reorganisation of the Company », 1967 Report prepared by Raytheon-Elsi, S.p.A. (Annex 22).

(7) Counter-Memorial, pp. 77-78.

The Respondent itself engaged in sustained efforts to attract commerce to the *Mezzogiorno* region by publicized incentives ([8]); thus it is ironic that Respondent now attempts to question Raytheon's and Machlett's decision to invest in the region. Despite numerous inquiries to, and promises of, appropriate Italian authorities, these benefits never materialized ([9]). Receipt of these benefits would have improved ELSI's financial condition and enhanced its attractiveness to prospective buyers.

Further, ELSI had developed a reputation for the manufacture of high quality and highly sophisticated electronics ([10]). In preparation for the introduction of color television in Europe, ELSI had constructed a modern, up–to–date facility for color television research and development pending the decision by Italy and other European countries as to the type of television system they would adopt ([11]). In addition, by 1967 ELSI had already moved from production of germanium transistors, which had become technologically obsolete, to the production of silicon rectifiers ([12]).

Of course, the reasons for ELSI's financial problems are not relevant to the dispute before this Court and were merely presented as background information in the United States Memorial. Whatever the reasons for ELSI's inability to become a profitable enterprise, Raytheon and Machlett were still entitled to put ELSI through an orderly liquidation under their own control. The critical questions is whether the Respondent wrongfully requisitioned the plant, prevented its orderly liquidation, permitted the plant to be occupied, and subsequently manipulated the bankruptcy process to its own advantage.

SECTION 2. – *Raytheon's and Machlett's Good Faith Efforts to Negotiate a Solution to ELSI's Problems Were Frustrated by the Respondent*

Beginning in early 1967 Raytheon made it clear to the Respondent that ELSI could not operate effectively in Italy and that Raytheon would not make additional capital contributions to keep ELSI operating without greater cooperation by the Respondent. In approximately 70 meetings with cabinet level officials of the national and Sicilian governments, John Clare and other Raytheon officials presented numerous specific proposals for government partnership in ELSI and government support for ELSI's development of new products and markets ([13]).

Raytheon proposed that ELSI find an Italian partner. IRI, for example, dominated the Italian electronics industry at this time and controlled important segments of it, such as the manufacture of telephone components ([14]). At first, the Respondent made encouraging statements,

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([8]) Memorial, p. 3.

([9]) The Respondent's argument that ELSI's distance from its suppliers of glass tubes in northern Italy is relevant, if at all, only to one of ELSI's product lines, cathode ray tubes. Of course, the transportation subsidy would have removed any disadvantage in this regard, had the Respondent put this program into effect as it had promised. Memorial, pp. 8–11. The Respondent's argument with respect to semiconductors is also misplaced as transportation costs of these items is negligible relative to total cost.

([10]) Memorial, pp. 6–7.

([11]) Respondent's suggestion that ELSI's products lacked reliable markets is also misplaced. Counter–Memorial, pp. 77–78. ELSI was poised to enter the market for color television. Furthermore, ELSI's sales to NATO, while irregular by nature, were hardly « dwindling to nothing ». *See* Memorial, Annex 22, Appendix B4. Nonetheless, ELSI recognized that military sales could not form an exclusive operating basis and for that reason sought to develop new products and markets. Memorial, Annex 22, p. 9.

([12]) Memorial, Annex 22, p. 14.

([13]) Memorial, p. 9.

([14]) Memorial, pp. 8–9; Affidavit of Charles F. Adams, Finance Committee Chairman and Director of Raytheon Company, 17 Apr. 1987, para. 30 (Annex 9); *see* Annex 15, para. 31.

but the Respondent was unwilling in the end to agree to a concrete, viable solution to ELSI's problems ([15]). Under the Respondent's proposals, Raytheon and Machlett would continue to bear the operating losses of ELSI without itself committing to take specific actions to improve ELSI's ability to compete. Raytheon, however, could not agree to incur continuing losses or to defer any longer its plan for the orderly liquidation of ELSI.

SECTION 3. – *As is Permitted under Italian Law, Raytheon and Machlett Decided to Place ELSI through an Orderly Liquidation rather than through Bankruptcy Proceedings.*

Under Italian law, shareholders are entitled to liquidate a company's assets voluntarily, by their own resolution ([16]). Therefore on 28 March 1968, having decided that the orderly liquidation of ELSI's assets was prudent in view of ELSI's financial situation, Raytheon and Machlett voted in accordance with Italian law to proceed with the plan for orderly liquidation prepared by ELSI's management.

ELSI's management made preparations to sell ELSI as a going concern, with an established name and reputation, customer and supplier relationships, and the necessary patent and trademark licenses. ELSI would maintain a limited operation to complete work–in–process, and ELSI's management took all possible steps to maintain good relationships with ELSI's customers and suppliers. Raytheon and Machlett planned to offer ELSI's six product lines either as a total package or individually to maximize the realizable price ([17]), and made it known that they were willing to enter into technical assistance agreements with the ultimate purchasers of ELSI.

Raytheon also made the commitment to advance any funds to provide the necessary liquidity for the orderly liquidation. Raytheon established a US $1.25 million line of credit to cover payment of the small creditors, and ELSI began making payments to them in March of 1968 ([18]). In addition, Raytheon was willing to pay all creditors whose claims were not satsified by the sale of ELSI's assets ([19]).

It was clear to Raytheon and Machlett that an orderly liquidation would generate far greater revenue from the sale of ELSI's assets than would a bankruptcy process. In the first place, Raytheon would have used its knowledge of the electronics industry to locate buyers on a worldwide basis and to negotiate the terms for the sale of ELSI's six product lines, maximizing the return for both creditors and shareholders. Further, Raytheon and Machlett would have realized the substantial value of ELSI's intangible assets, including the technical assistance agreements that could be negotiated with each purchaser. Finally, with Raytheon and Machlett

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([15]) Respondent initially made encouraging statements that IRI would agree to participation in ELSI. *See, e.g.*, Minutes of Meeting with Hon. Vincenzo Carollo, President of the Sicilian Region (20 Feb. 1968) (the alleged discrepancies in the minutes to this meeting are refuted in the letter from Timothy E. Ramish, Deputy–Agent of the United States, to the Registrar of the Court, dated 13 Jan. 1988). Respondent's encouragement never materialized in a specific or written proposal for ELSI's future operations. *See, e.g.*, Memorial, Annex 15, Exhibit G, p. 3.

([16]) Article 2448, N. 5 of the Italian Civil Code provides that a joint stock company may be dissolved by resolution of the shareholders at a meeting called by the directors. M. BELTRAMO, G. LONGO, and J. MERRYMAN (trans.), *The Italian Civil Code* (1969), p. 611. *See also Statement by Professor Franco Bonelli*, 2 Mar. 1988 (Annex 1 to this Reply).

([17]) Each product line could be sold as a separate package, including the respective technology, contracts customer and supplier bases, and established name and reputation to buyers elsewhere in Italy, Europe, or Japan. *See* Affidavit of Joseph A. Scopelliti, Memorial, para. 12 (Annex 17).

([18]) Memorial, Annex 15, para. 53.

([19]) Memorial, Annex 13, para. 18. Although the Respondent fails to so distinguish, Counter–Memorial, p. 82, Raytheon's and Machlett's commitment to fund the orderly liquidation in order to maximize the return on its investment must be distinguished from Raytheon's and Machlett's refusal to continue to capitalize ELSI with no prospect of a return on their investment.

in control of ELSI's liquidation, Raytheon could ensure that the plant, equipment, and inventory would be well-maintained and protected.

A trustee in bankruptcy, by contrast, lacked the commercial and technical expertise and the financial incentive to market ELSI or its product lines effectively on a worldwide basis to appropriate buyers ([20]). Further, the bankruptcy process did not afford a vehicle for the marketing and sale of the intangible value of ELSI as a going concern, including the premium that would be placed on Raytheon's willingness to enter technical assistance and license agreements with the ultimate purchasers. Moreover, Raytheon and Machlett recognized that the bankruptcy process would not result in the sale of ELSI's assets quickly. Deterioration in the assets caused by delay in the sale would, of course, diminish the return to ELSI's creditors and shareholders. Finally, Raytheon and Machlett sought to avoid the substantial administrative costs associated with the bankruptcy process, costs which would not have been incurred under the orderly liquidation.

Sale of ELSI's assets on a going concern basis ([21]) would have been sufficient to pay all of ELSI's liabilities in full, including amounts owed to Raytheon, and return lire 391 million to Raytheon and Machlett as a small return on their large investments they had made in ELSI ([22]). Of course, Raytheon had good reason to believe that the bank creditors would settle their unsecured, unguaranteed claims at no more than 50 percent ([23]).

SECTION 4. – *At No Time Prior to 1 April 1968 Was it Required by Italian Law that ELSI Be Placed in Bankruptcy.*

Prior to the requisition, ELSI was never in jeopardy of bankruptcy or compulsory dissolution. Italian law would have required ELSI to file a petition in bankruptcy if it was impossible for ELSI to fulfill regularly its financial obligations ([24]). Alternatively, ELSI could have been considered dissolved as a matter of Italian law only if its capital were depleted below a statutory minimum amount (at the relevant time the statutory minimum amount was one million lire) ([25]).

ELSI never contravened these laws. Until ELSI was deprived of its revenue by the requisition, ELSI consistently met and was in a position to meet all of its financial obligations ([26]). ELSI's capital, even after taking into account losses, was always well above the statutory minimum ([27]). Thus, contrary to the Respondent's unsubstantiated assertions, ELSI had no obligation to file a petition in bankruptcy, nor was it subject to compulsory dissolution. Raytheon and Machlett were fully entitled to proceed with the orderly liquidation of ELSI's assets under Italian law.

([20]) Reply, Annex 1, para. 2.

([21]) In this case, book value is the closest available approximation of going concern value. *See infra*, Part VI, Chapter III.

([22]) Memorial, pp. 11, 60.

([23]) Memorial, p. 11. Willingness of the banks to settle their claims with ELSI at 40 to 50 percent of their value is further evidenced by the banks' agreement to settle for 50 percent or less of their claims in the fall of 1968. Counter-Memorial, pp. 93–94; *see also* Reply, Annex 1, para. 3.

([24]) Reply, Annex 1, para. 4; Italian Bankruptcy Act, Article 5 (Annex 1).

([25]) Article 2447 of the Italian Civil Code states:

« If, by reason of the loss ... [exceeding] over one-third of the capital, [the capital] falls below the minimum established by article 2327, the directors (2380) shall without delay call the meeting (2365) to decide on the reduction of the capital and the concurrent increase thereof to an amount not less than said minimum, or on the reorganization of the company ».

Italian Civil Code, op. cit., pp. 610–11; *see also* Reply, Annex 1, para. 5.

([26]) In addition, the Respondent seems to overlook the fact that the book value of ELSI's assets was consistently greater than ELSI's liabilities. *See* Counter-Memorial, pp. 86–87; Memorial, Annex 13, Schedule B1; Reply, Annex 1, para. 5.

([27]) Memorial, p. 12, note 19; Reply, Annex 1, para. 5.

The Respondent also maintains that ELSI was in violation of Article 2446 of the Italian Civil Code with respect to the size of its losses and in violation of the Italian Bankruptcy Act due to its bookkeeping practices. These assertions, like many of those found in the Counter-Memorial, are irrelevant to the claims before this Court. In the interest of accuracy, however, it must be noted that ELSI was fully in compliance with Italian law, both with regard to capitalization requirements ([28]) and with regard to bookkeeping practices ([29]).

([28]) Article 2446 of the Italian Civil Code provides that when a company's losses exceed one-third of its capital, the shareholders — after a one-year grace period from the date they are or should be aware of such losses (typically at the time they review the balance sheets) — must either reduce the company's capital in proportion to the losses to correct the imbalance or make alternative arrangements for the disposition of the company. *Italian Civil Code, op. cit.*, p. 610. Following the review of the balance sheets for the fiscal year ending 30 September 1966, ELSI reduced the value of its stock, thereby diminishing its losses. Raytheon and Machlett invested an additional lire 2,500 million in ELSI, thereby bringing the company's capital to lire 4,000 million. Memorial Annex 13, Schedule B1. Notwithstanding these efforts, ELSI's losses once again exceeded one-third of its capital in the fiscal year ending 30 September 1967. This time, however, ELSI's shareholders voted within the one-year grace period, to liquidate the company rather than adjust its capital. *See* Memorial, Annex 32. This decision was in complete compliance with Article 2446. Reply, Annex 1, para. 6.

([29]) There is also no merit to the Respondent's assertion that ELSI's books were not properly kept. Counter-Memorial, p. 81. From the time Raytheon acquired a majority interest in ELSI, Coopers & Lybrand, an internationally respected accounting firm, audited ELSI's books. To allow time for its foreign operations to close their year-end books and to transmit their accounting data to Raytheon, Raytheon's foreign operations typically closed their books three months prior to Raytheon's consolidated report of December of each year. Under this system, Coopers & Lybrand audited ELSI's books and prepared a year-end report for the year ending 30 September 1967. The books for the period through 31 December 1967, were kept on a normal basis at Palermo and a complete management report for that period, consistent with the closing of 30 September 1967, was transmitted to Raytheon in the first quarter of 1968. The balance sheet at 31 March 1968 was prepared on a basis consistent with the valuations in the Coopers & Lybrand audit report of 30 September 1967 and a conservative extrapolation to 31 March 1968. Memorial, Annex 13, p. 8. Any abnormal delay in the preparation of ELSI's books was due solely to earthquakes in Sicily and strikes at the plant in early 1968; these were brief and unavoidable interruptions in ELSI's bookkeeping operations and did not constitute violations of Italian law. Reply, Annex 1, para. 7.

CHAPTER II

THE REQUISITION AND RESULTING BANKRUPTCY

SECTION 1. – *Rather than Allow Raytheon and Machlett to Place ELSI through a Lawful, Orderly Liquidation, the Respondent Requisitioned ELSI.*

By March of 1968, Raytheon's and Machlett's plan for the orderly liquidation was in place and the first steps of implementing it had begun. Raytheon and Machlett had extended the line of credit for payment of the small creditors and was engaged in discussions with the Italian banks for settlement of the large unsecured, unguaranteed debts.

One event alone prevented the orderly liquidation of ELSI's assets: the unlawful requisition by the Respondent of ELSI's plant and equipment on 1 April 1968. The requisition deprived ELSI of control of the plant and physical assets. It prevented Raytheon and Machlett from proceeding with the sale of ELSI's assets and prohibited ELSI's management from continuing as planned with limited production and sale of inventory at full value to waiting customers ([30]).

As discussed in Part V, below, the requisition was a deliberate act by the Respondent to prevent Raytheon and Machlett from proceeding with the orderly liquidation of ELSI's assets. The requisition was purportedly for the purpose of protecting « the economic public interest » that was threatened by the proposed liquidation ([31]). However, during the requisition the Respondent never re–opened the plant, otherwise resumed production, or re–employed the plant's workers ([32]).

Raytheon immediately tried to get the requisition rescinded. On 9 April Raytheon petitioned the Mayor to lift the requisition order, but received no response. On 19 April Raytheon appealed the requisition to the Prefect of Palermo, and again received no response ([33]). Determined not to foreclose any possibility of re–opening the plant, officers of Raytheon and ELSI continued to meet with Italian officials even after the requisition of ELSI. The Respondent, however, was still unwilling to come forward with any real proposals to improve ELSI's competitive position ([34]). The Counter–Memorial seeks to portray the Respondent as eager to enter into a negotiated settlement by these proposals ([35]), but these proposals are irrelevant to the question whether the requisition and subsequent interference with the bankruptcy process violate the Treaty. In addition, the Respondent's admitted use of the requisition to coerce Raytheon and Machlett into carrying indefinitely operating losses of ELSI is precisely the type of governmental action which the Treaty condemns.

([30]) Memorial, pp. 27–29. Although the requisition deprived Raytheon and Machlett of management of ELSI's operations, Raytheon and Machlett directed Mr. Rico Merluzzo to remain in the plant to protect the security of the plant. Mr. Merluzzo remained in the plant until ELSI was forced to file its petition in bankruptcy. Memorial, Affidavit of Rico A. Merluzzo, Former Director of Planning, Raytheon–Elsi, 17 Apr. 1987 (Annex 21).

([31]) Memorial, Requisition Decree, Mayor of the Municipality of Palermo, 1 Apr. 1968 (Annex 33); Minutes of Meeting in Palermo between Messrs. Joseph Oppenheim, Howard Hensleigh, Stanley Hillyer, and President Carollo of Sicily, 19/20 Apr. 1968 (Annex 37); Memorandum from the President of the Sicilian Region, 20 Apr. 1968 (Annex 38).

([32]) Memorial, Annex 21, para. 19.

([33]) Memorial, pp. 32–33.

([34]) In April of 1968 Italy proposed to lift the requisition order following the establishment of a special management team of officials from ELSI, the Sicilian Region, and IRI to liquidate ELSI. However, this plan required Raytheon to make additional capital contributions to fund ELSI's continued operation, an option Raytheon and Machlett had determined they could no longer pursue. In the summer of 1968 the Sicilian Region also proposed a plan that would have required Raytheon and Machlett to advance all costs of ELSI's operations without any commitment on the part of the Respondent as to the exact arrangements the Respondent would make for the sale of ELSI's assets.

Although the requisition was on its face limited to six months, the President of the Sicilian Region stated to ELSI's stockholders on 19 April, and confirmed in writing on 20 April, that the requisition would continue as long as necessary to achieve the Respondent's objectives regarding ELSI ([36]). With regard to Raytheon's and Machlett's ability to sell ELSI, President Carollo stated that:

> « Nobody in Italy shall purchase, that is to say IRI shall not purchase neither for a low nor for a high price, the Region shall not purchase, private enterprise shall not purchase. Let me add that the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favor any sale while the plant is closed.... In the event that the plant shall be kept closed, waiting for Italian buyers who will never materialize, the requisition shall be maintained at least until the courts will have resolved the case. Months shall go by ([37]) ».

Hence ELSI was deprived of income from the sale of its assets and was therefore no longer able to meet its financial obligations as they became due. Without any hope for a change in this situation by the Respondent, Raytheon and Machlett certainly could no longer advance funds to ELSI for its continued operations. ELSI therefore was required under Italian law to file a petition in bankruptcy on 26 April 1968. The bankruptcy petition explicitly and accurately stated that the reason for the bankruptcy was the requisition of the plant on 1 April 1968 ([38]).

SECTION 2. – *By Its Acts Subsequent to the Requisition, the Respondent Also Interfered with the Bankruptcy Process to Its Own Advantage.*

Following the filing of ELSI's petition in bankruptcy, the Respondent continued to exploit the situation in which the requisition had placed ELSI, thereby substantially aggravating the financial injury to Raytheon and Machlett. As a legal matter, the requisition prevented the Trustee once he was appointed on 16 May by the bankruptcy court from selling the plant and assets or otherwise protecting the property. Moreover, following the filing of the bankruptcy petition the Respondent allowed the local workforce to occupy the plant, which undoubtedly discouraged prospective buyers and certainly made it difficult to show to interested buyers the company's plant and other assets ([39]). Even after the requisition period ended, the bank-

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([35]) Counter-Memorial, p. 92. The Respondent also speculates that the failure to reach an agreement between Raytheon and the Respondent was « an attempt [by Raytheon] to force the hand of the banks, which had previously seemed reluctant to accept a negotiated solution ». Counter-Memorial, p. 92. This unsubstantiated assertion must be rejected. Had the Respondent and IRI at any point made a concrete offer to acquire ELSI as a going concern or share ownership with Raytheon and Machlett, Raytheon and Machlett would have acceded to the plan. The failure to reach agreement was due not to the reluctance of Raytheon to reach a negotiated solution to ELSI's problem. Raytheon had worked for more than a year for just such a resolution. Failure instead was due to the Respondent's inability — or unwillingness — to commit to such a solution. *See generally* Memorial, Annex 22. Indeed, the Respondent's unsubstantiated assertion that it « did everything it could » to help ELSI must be rejected for similar reasons. Counter-Memorial, p. 92.

([36]) *See generally* Memorial, Annexes 37, 38. The continued negotiations with the Respondent and the fact that the appeal of the requisition was brought on 19 April — only eighteen days after the requisition — did not indicate that Raytheon considered the requisition « to be little more than a temporary nuisance ». Counter-Memorial, p. 92. On the contrary until the oral and written statements by the President of the Sicilian Region, Raytheon believed that the order would soon be quashed. Although Raytheon and Machlett had been frustrated by the Respondent's refusal to engage in meaningful cooperation, until 19 April there were no indications that the Respondent would sanction the continuance of illegal actions in its treatment of ELSI.

([37]) Memorial, Annex 38.

([38]) Memorial, p. 15.

([39]) The occupation should be distinguished from the pre-requisition strikes and sporadic sit-ins, a point which the Respondent confuses. Counter-Memorial, pp. 80, 83, 87. First, the strikes were directed at the Respon-

ruptcy court's lease of the plant by IRI (40) had the same effect. The Respondent proceeded to obtain ELSI's work-in-process for a price below the value assigned by even the judicial valuator (41).

In addition, the Respondent repeatedly and publicly announced its intention to take over ELSI's plant through one of IRI's subsidiaries (42). Given the extensive power and dominance of the Respondent in the commercial environment of Italy, there can be little doubt that these announcements deterred other buyers from bidding on ELSI's assets when the four auctions were held by the bankruptcy court (43). Notwithstanding its announced intentions, however, Elettronica Telecomunicazioni, S.p.A. (« ELTEL »), the IRI subsidiary created to take over ELSI boycotted the first three bankruptcy auctions, seeking to buy only some of the assets at a lower price. Through a series of maneuvers which had the effect of controlling the sale of ELSI's assets, the Respondent, through ELTEL, systematically acquired ELSI's operations on a piecemeal basis, at the expense of ELSI's shareholders and creditors (44). Taking advantage of the situation which it has created, IRI's subsidiary, Italtel, S.p.A., now uses ELSI's plant to manufacture telephone equipment — one of the new products proposed by ELSI in its « 1967 Report » to Italian officials (45).

On 11 August 1969, more than sixteen months after the appeal was filed, but only 40 days after ELTEL had completed its acquisition of ELSI's assets, the Prefect ruled that the requisition was illegal under Italian law.

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dent, to persuade it to take action with respect to ELSI. Memorial, Annex 21, para. 22. They were limited to brief interruptions of production operations and did not result in the closure of the plant for an indefinite amount of time. Only after Mr. Merluzzo left the premises following the filing of the bankruptcy petition did the workers actually occupy the plant for a sustained period.

(40) Memorial, pp. 18–19.

(41) Memorial, pp. 19–20.

(42) Memorial, Annexes 37, 38, 46.

(43) That IRI's announcement was at the direction of the Respondent is confirmed in the Counter-Memorial, p. 94.

(44) For a complete discussion of the bankruptcy process and ELTEL's systematic methods acquiring ELSI at a price favorable to itself, *see* Memorial, pp. 16–20.

(45) Memorial, p. 20.

PART III

JURISDICTION

Jurisdiction in this case is based on Article 36(1) of the Statute of the Court, as read in conjunction with Article XXVI of the 1948 Treaty of Friendship, Commerce and Navigation (the « Treaty ») between the United States and Italy (1). Although acceptance by the Respondent of the Court's jurisdiction on this basis is not necessary, the Respondent « fully recognizes » the Court's jurisdiction over this dispute as it relates to the interpretation and application of the FCN Treaty and its Supplement (2).

The Respondent declines to object to the Court's jurisdiction. Since Rule 79 of the Rules of the Court requires that any objection to the jurisdiction of the Court be made within the time limit fixed for the delivery of the Counter-Memorial, the Respondent is now barred from raising an objection. The Counter-Memorial speculates, however, that jurisdiction with respect to Articles V(1) and (3) of the Treaty is in doubt because the United States has not put forward these provisions previously in diplomatic negotiations, in accordance with Article XXVI (3). The Respondent's view appears based on the fact that while these provisions were discussed throughout the Memorandum of Law accompanying the 1974 Claim, they were not specifically cited in the Memorandum's « Summary of Legal Arguments ».

The Respondent's view is wholly unjustified. The United States has repeatedly raised with the Respondent since 1972 the legal claims now before this Court. Each Treaty claim argued before this Court was presented to the Respondent in the Legal Memorandum submitted to the Respondent in 1974 (4). Since the Respondent has consistently refused to pay compensation for the damages suffered by the United States, the dispute has not been satisfactorily adjusted by diplomacy and is now properly before this Court pursuant to Article XXVI of the Treaty.

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(1) Memorial, p. 25.

(2) Counter-Memorial, p. 95.

(3) Article XXVI of the Treaty states that disputes « which the High Contracting Parties shall not satisfactorily adjust by diplomacy » may be submitted to the Court.

(4) The claim presented to the Respondent in 1972 and again in 1974 appears in Volume I of the « Unnumbered Documents », annex to the Counter-Memorial. The Memorandum of Law in Support of the Claim of Raytheon Company and the Machlett Laboratories, Inc. Against the Government of Italy in Connection with Raytheon-Elsi S.p.A. appears as Volume II of the 1972/74 claim. *See* pp. 5, 21 (Article III(2)); pp. 6, 23 (Article V(1)); pp. 5, 14, 51, and 73, (Article V(2)); pp. 21, 23, and 51 (Article V(3)); pp. 6, 25, and 74 (Article VII); pp. 6, 74 (Treaty Protocol paragraph 2); pp. 6, 10, 52, 74 (Treaty Supplement Article 1); pp. 7, 74 (Treaty Supplement Article V) (these page numbers refer to pages as originally numbered in the Claim).

PART IV

ADMISSIBILITY OF THE CLAIMS

The Respondent contends that the United States claim is inadmissible because Raytheon and Machlett failed to exhaust available remedies in Italian courts. Raytheon and Machlett, however, have exhausted in Italy all remedies available under Italian law. Consequently the United States claim is admissible before this Court.

In the *Interhandel Case* (1) this Court stated that in cases involving injury to a foreign national, the principle of exhaustion of local remedies provides that the respondent State be given the opportunity to redress the injury within its internal system. The Court explained that:

> « Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system (2) ».

In this case, the Respondent was accorded every opportunity within its own legal system to pay compensation for the injury caused by its actions. Subsequent to the requisition, Raytheon and Machlett directed ELSI officials to petition formally the Mayor to lift his order. When this produced no result, Raytheon and Machlett directed ELSI officials to appeal the Mayor's order to the Prefect of Palermo. While the decision by the Prefect was pending, Raytheon and Machlett directed its representative on the creditors' committee to appeal decisions of the bankruptcy judge, such as the decisions to lease the plant to ELTEL and to sell the plant, equipment, and supplies to ELTEL. Unfortunately these appeals were denied by Italian courts (3).

Eventually the Prefect declared the requisition to be unlawful (4). When the Mayor appealed the Prefect's decision to the Italian Council of State and the President of Italy, the appeal was dismissed and the Prefect's decision upheld (5).

Raytheon's and Machlett's interests as creditors of ELSI were represented in the bankruptcy process by the Trustee, Giuseppe Siracusa. Following the decision of the Prefect that the requisition was illegal, the Trustee brought suit against the Respondent seeking damages for the unlawful requisition. After extensive consideration of the facts and law underlying the injury to ELSI, the Court of Palermo refused to award damages (6). Subsequently the Court of Appeals of Palermo reversed the lower court in part and found that damages were due for the six-month « use » of the plant, but not for the injury caused in preventing Raytheon and Machlett from placing ELSI through an orderly requisition (7). The Supreme Court of Appeals,

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(1) *Interhandel Case, Preliminary Objections, I.C.J. Reports* 1959, p. 27 (« Interhandel Case »).

(2) *Interhandel Case*, p. 27; *see also Ambatielos Claim*, 12 *Reports of International Arbitral Awards*, pp. 118–120 (1956) (« Ambatielos Claim »); *Finnish Shipowners Case*, 2 *Reports of International Arbitral Awards*, pp.1503–1504 (1934).

(3) Memorial, Decree of the Civil and Criminal Tribunal of Palermo, 9 May 1969 (Annex 64); Transcript of Bankruptcy Hearing, Civil and Criminal Court of Palermo, 13 Jul. 1969 (Annex 74).

(4) Memorial, p. 13.

(5) Memorial, p. 21.

(6) Memorial, Judgment of the Court of Palermo, decided 2 Feb. 1973, filed 29 Mar. 1973, registered 4 Apr. 1973, pp. 10–11 (Annex 80).

(7) Memorial, Judgment of the Court of Appeals of Palermo, registered 24 Jan. 1974, p. 14 (Annex 81).

after extensive consideration as to the facts and law of the case, upheld the decision of the Court of Appeals of Palermo (8).

The Respondent asserts that after all these efforts to seek redress from the Respondent, Raytheon and Machlett should also have brought suit in Italian courts based on the Treaty (9). The Respondent, however, does not describe the statutory basis on which such a suit could be brought, undoubtedly because there is no basis for a suit under Italian law for compensation based on Respondent's violation of the Treaty. Raytheon and Machlett should not be required to pursue an unavailable local remedy prior to presentation of their claim by the United States before this Court.

Treaties only can have effect within Italy if they are incorporated into an Italian legislative act (10). Even then, the treaty is only effective as a matter of Italian law for those provisions which are complete in their essential elements; those provisions which lack completeness remain ineffective (11). Although the Treaty and Supplement at issue here were incorporated into Italian legislative acts (12), the provisions argued before this Court are not complete enough to permit a suit for compensation by a United States national against the Government of Italy in Italian courts (13). Indeed, although there is provision in Article V for indemnification by the Government of Italy of those individuals or corporations who have been deprived of their property, that Article is still not sufficiently complete. For example, there is no indication whether such indemnification would be viewed as « diritto soggettivo » (subjective right), and therefore enforceable in the ordinary courts, or « interesse legittimo » (legal interest), and therefore enforceable in the administrative courts. The other articles of the Treaty pleaded by the United States are similarly not enforceable (14). Further, since Raytheon's and Machlett's claims are those of shareholders, Italian law would prevent a suit seeking compensation based on the illegal requisition because Italian law reserves such a right to ELSI alone, despite the existence of the Treaty (15). As stated by Elio Fazzalari, an esteemed Professor of Civil Procedure at the University of Rome, « The Respondent's claim is groundless (16) ».

Professor Antonio La Pergola, then Professor of Law at the University of Bologna and subsequently President of the Italian Constitutional Court, considered in 1971 whether Raytheon could sue based on the Treaty and concluded that further local remedies were not available. Professor La Pergola stated that:

> « ... I believe that I must conclude that in a situation of this kind, all the requirements appear to be satisfied for the U.S. citizens who are members of Raytheon–Elsi S.p.A. to be protected at the international level, without any internal remedies being explored before the filing of a possible claim against the Italian Government (17) ».

The only Italian case cited by the Respondent in support of its argument is the 1961 case of *The Durst Manufacturing Co. v. Banca Commerciale Italiana* (18). *Durst*, however, merely

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(8) Memorial, Judgment of the Supreme Court of Appeals, 26 Apr. 1975 (Annex 82). The Supreme Court of Appeals is not capable of reviewing *de novo* the facts as found by the lower courts.

(9) Counter–Memorial, p. 100.

(10) « Implementation of Treaties and Community Law », V *Italian Yearbook of International Law*, p. 265 (1980–81).

(11) « Implementation of the Peace Treaty with Italy », II *Italian Yearbook of International Law*, pp. 364–365 (1976).

(12) Counter–Memorial, p. 100.

(13) Statement by Professor Elio Fazzalari, University of Rome, 29 Feb. 1988, p. 4 (Annex 2 to this Reply).

(14) *Ibid.*, pp. 5–6.

(15) *Ibid.*, pp. 6–7.

(16) *Ibid.*, p. 4.

(17) Letter from Antonio La Pergola, Professor at the University of Bologna, to Raytheon Company, 9 Dec. 1971 (Annex 3 to this Reply). Raytheon also sought the advice of its Italian counsel, Giuseppe Bisconti, who informed Raytheon on 6 Nov. 1971 that « there is no remedy under Italian law available to the shareholders of ELSI in relation to the damage suffered by them as a consequence of the requisition by the Mayor of Palermo and the subsequent events ». Letter from Avv. Giuseppe Bisconti, Studio Legal Bisconti, Rome, to Raytheon Company, 6 Nov. 1971 (Annex 4 to this Reply).

(18) 64 *Rivista di Diritto Internazionale* (1961), pp. 117–118.

holds that another provision of the Treaty — the « access to justice » clause — relieves a party who files a petition for review by the Italian Supreme Court of the need for an authentication of the signature of the Italian consul in New York by the Minister of Foreign Affairs. There were no damages awarded in that case and it did not involve the Government of Italy.

Even if the Court believes that there was some possibility that a suit by Raytheon and Machlett in Italian courts based on the Treaty would have succeeded, the principle of exhaustion of local remedies does not require an injured national to pursue a highly speculative and unlikely means of redress. The principle is satisfied if there is no effective local remedy « as a matter of reasonable possibility [19] ». Indeed, the burden is on the Respondent to prove the existence of a further remedy in Italian courts [20]. In this case, local counsel advised Raytheon that a suit based on the Treaty could not succeed [21]. Further, the Supreme Court of Appeals in Italy had already decided the amount of compensation owed by the Respondent for its unlawful actions [22]. Therefore, obtaining compensation through a suit based on the Treaty was so unlikely that it could not be considered a remedy available as a matter of reasonable possibility.

In any event, the Respondent is estopped from asserting that there exists any requirement to further exhaust local remedies [23]. Although for 15 years the Respondent entertained diplomatic representations by the United States on the basis of the Treaty (including the formal presentation of a diplomatic claim in 1974), at no time until the filing of its Counter-Memorial did the Respondent suggest or request that Raytheon and Machlett enter Italian courts and sue on the basis of the Treaty. Instead the Respondent made statements that it was willing to go to arbitration with the United States [24], which discouraged further resort to Italian courts. The United States has relied on the Respondent's representations in good faith to the United States detriment because — assuming for the sake of argument that an action based on the Treaty could be brought — the statute of limitations on that action has now expired [25]. Therefore, the Respondent is now estopped from assering that there should have been further resort to local remedies by Raytheon and Machlett.

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[19] *Norwegian Loans Case, I.C.J. Reports* 1957, p. 39 (separate opinion of Judge Lauterpacht); *Barcelona Traction Case, Second Phase, I.C.J. Reports* 1970, pp. 144–145, and 284 (separate opinion of Judge Gros).

[20] *Ambatielos Claim*, p. 119.

[21] Reply, Annex 3.

[22] Memorial, Annex 82. Although the opinion of the Supreme Court is not binding outside the case in which it is rendered, it is highly persuasive authority in subsequent cases in Italian courts. *The Italian Civil Code, op. cit.*, ix. No effective local remedy exists if further appeals to the courts are on issues previously decided by the highest court. *Panevezys v. Saldutiskis Railway, P.I.C.J., Series A/B, N.* 76; *X v. Austria*, 30 International Law Reports, p. 268.

[23] Estoppel is a general principle of international law which this Court has previously employed to qualify the rights of parties before the Court. *E.g. Arbitral Award Made by the King of Spain on 23 December 1906*, I.C.J. Reports p. 192, pp. 213–214 (where Nicaragua was not permitted to challenge the validity of an arbitral award in part because it had failed to raise any question with regard to the validity of the award over several years); H. LAUTERPACHT, *The Development of International Law by the International Court*, pp. 168–172 (1961) (« [Estoppel] may fairly be regarded as a general principle of law which, once more, is merely an affirmation of the moral duty to act in good faith »). As for the application of estoppel in the case of a bilateral treaty, a member of this Court has stated:

> « The primary foundation of [estoppel] is the good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith. Again I submit that such inconsistency is especially inadmissible when the dispute arises from bilateral treaty relations ».

Temple of Preah Vihear Case, I.C.J. Reports 1962, pp. 40, 42 (separate opinion of Judge Alfaro). For cogent discussions of the issue of estoppel, *see* Bowett, « Estoppel before International Tribunals and its Relation to Acquiescence », 33 *British Yearbook of International Law*, p. 176 (1957); MacGibbon, « Estoppel in International Law », 7 *International and Comparative Law Quarterly*, p. 468 (1958).

[24] In response to the claim espoused by the United States in 1974 on the basis of the Treaty and customary international law, the Respondent did not protest that local remedies had not been exhausted, but instead stated that « the claim is juridically groundless, both from the international and internal point of view ». Aide-Memoire of 1978 from the Italian Ministry of Foreign Affairs to the United States. For a summary of the diplomatic efforts made to resolve this dispute, *see* Application Instituting Proceedings Submitted by the Government of the United States of America, Attachment 2.

[25] The normal time period for filing of a suit in Italian courts seeking compensation for damages arising from unlawful acts is five years from the date on which the act occurred. *Italian Civil Code, op. cit.*, Article 2947.

PART V

THE CLAIMS OF THE UNITED STATES

CHAPTER I

INTRODUCTION

Respondent's Counter-Memorial attempts to obscure the violations of the Treaty by asserting inaccurate generalities about the Treaty and by attributing to the United States arguments that the United States does not make. The protections of the Treaty and the violations of it by the Respondent, however, are quite clear from the ordinary meaning of each article invoked by the United States.

The United States has shown that the Respondent, through the actions of its agents and officials, violated its legal obligations under the Treaty by: (1) unlawfully requisitioning the ELSI plant on 1 April 1968, (2) allowing ELSI workers to occupy the plant; (3) unreasonably delaying ruling on the lawfulness of the requisition for 18 months until immediately after the ELSI plant, equipment, and work-in-process had all been acquired by ELTEL; and (4) interfering with the ELSI bankruptcy proceedings, which allowed the Respondent to realize its previously expressed intention of acquiring ELSI, for a price far less than its fair market value.

All of these actions, singly and in combination, violated Articles III, V, and VII of the 1949 Treaty and Article I of its 1961 Supplement, which by its terms is an integral part of the Treaty. The protections provided under the Treaty relating to this dispute fall into four categories:

(*a*) protection from interference with Raytheon's and Machlett's management and control of ELSI;

(*b*) protection from impairment of Raytheon's and Machlett's investment rights;

(*c*) protection from the wrongful taking of Raytheon's and Machlett's property; and

(*d*) protection and security for Raytheon's and Machlett's investment.

Before addressing these four areas of protection under the Treaty, however, three general assertions by the Respondent in the Counter-Memorial must be addressed as a preliminary matter.

First, a specific object and purpose of this Treaty was to encourage investment by corporations of one party in the territory of the other party (1). The United States does not argue that the *sole* purpose of the Treaty is to encourage investment (2), but certainly the articles

(1) As noted in the Memorial, when the Respondent debated the merits of the Treaty, one factor that weighed in its favor was the « urgent need » of its economy for foreign capital. Memorial, p. 27.

(2) The Respondent itself agrees that the encouragement of investment was one of the aims of the Treaty. Counter-Memorial, p. 103. Some other treaties of Friendship, Commerce, and Navigation (« FCN ») entered into by the United States subsequent to this Treaty contain within their preamble a reference to the promotion of investment, but the object and purpose of all of these treaties are seen in their substantive provisions, which are largely identical and which all provide investment protections for corporations. Of course treaties create neither rights nor duties for third States. *See* 1969 Vienna Convention on the Law of Treaties, Article 34.

advanced before this Court show that both parties were concerned with the property and interests therein of each party's corporations in the territory of the other. The 1961 Supplement, which constitutes « an integral part » of the Treaty (3), states in its preamble that the United States and Italy were « desirous of giving *added* encouragement to investments of one country in useful undertakings in the other country (4) ». The use of the word « added » shows that the original Treaty envisioned protection of investment (5). To accept the Respondent's implied argument that the Treaty does not provide protection for United States investments in Italy would eviscerate large sections of the Treaty.

The emergence in recent years of bilateral investment treaties (« BITs ») between the United States and developing countries is not relevant when interpreting this Treaty's protections for investments. BITs specifically address just investment issues rather than establish a comprehensive network governing both investments and other matters (6). There is no reason why a later series of treaties with other countries dealing specifically with investment should weaken the provisions of this Treaty with Italy, which deals with investment and other matters.

Second, the Respondent incorrectly asserts that the only standards operating under this Treaty are a national treatment standard and a most-favored-nation standard. The ordinary meaning of the Treaty articles at issue in this dispute belies the Respondent's assertion. For instance, Article I of the Supplement establishes an unqualified rule prohibiting arbitrary and discriminatory conduct that prevents effective control and management by United States corporations of their subsidiaries in Italy or impairs their investments in those subsidiaries. Article V of the Treaty establishes an unqualified rule that property of United States corporations shall not be taken without due process of law and without just compensation. Article III of the Treaty also establishes a virtually unqualified rule permitting United States corporations to organize, manage, and control Italian corporations, subject only to certain guidelines under Italian law. In Article VII of the Treaty, there is a standard of reciprocity which requires the Respondent to allow United States corporations operating in Italy the same freedom to dispose of their immovable property or interests as is given to Italian corporations in the United States. The operative standard of treatment must be analyzed for each of the articles advanced by the United States.

Third, the Respondent is incorrect in implying that the United States' claim depends upon ELSI being a beneficiary under the Treaty. The Treaty provisions at issue specifically protect the rights, interests, and property of United States corporations such as Raytheon and Machlett, which invested in the Italian economy by means of an Italian subsidiary. The rights, interest,

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(3) Treaty Supplement, Article IX. The Vienna Convention on the Law of Treaties, Article 31(3), also provides that any subsequent agreement between the parties shall be taken into account when interpreting the Treaty.

(4) Treaty Supplement, Preamble (emphasis added). As stated in the ratification bill passed in Italy, « The Supplemental Agreement ... is designed above all to foster investment in Italy using private capital from the United States which is the most important, perhaps the only, country today which has such resources at its disposal ». Counter-Memorial, Annex 9, p. 10. (Materials from the Italian internal ratification proceedings are cited in this Reply to demonstrate that the two parties had a common understanding of the meaning and purpose of the Treaty. Standing alone, such internal ratification proceedings cannot, of course, bind another party).

This Court has previously used the preamble of a treaty to establish its object and purpose. *Case Concerning Rights of Nationals of the United States, judgment, I.C.J. Reports 1952*, p. 24.

(5) Application of the Treaty provisions will not accentuate an « imbalance » between the Parties. Counter-Memorial, p. 103. Even if it can be said that United States investments in Italy predominate the two parties' economic relationship, the Respondent agreed to this Treaty not just to protect the ability of Italians to invest in the United States, but to secure for the Italian economy the benefits of United States capital in Italy. In this sense, the Italian « gain » under the Treaty predominates that of the United States. Whether one party benefits at any given time more than the other party is irrelevant to the agreement of each party to abide by the provisions of the Treaty.

(6) The United States has negotiated BITs with Panama, Senegal, Haiti, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada. None of these treaties is yet in force. The BITs draw on concepts of protection which were developed in the FCN treaties subsequent to World War II. Any greater specificity of investment protections in the BITs are attributable to innovations that address concerns particular to investments in developing countries. P. GANN, « The US Bilateral Investment Treaty Program », 21 *Stanford journal of International Law*, pp. 373-374 (1985).

and property affected by the Respondent's actions belonged to Raytheon and Machlett, not ELSI (7). In the *Case Concerning the Barcelona Traction, Light, and Power Company, Limited,* the Court recognized that whether particular rights and interests of shareholders are protected as a matter of international law may be governed in a particular case by the rules of an applicable international instrument (8). The nature of the right, interest, or property at issue in this case is clear from the ordinary meaning of the Treaty provisions that apply within each category of protection. Those categories of protection are now discussed separately in light of the Counter-Memorial.

(7) The argument of the United States before the United States Supreme Court in *Sumitomo Shoji America, Inc. v. Avigliano,* cited in the Counter-Memorial p. 106, is not relevant to this case. In *Sumitomo* the United States argued that the United States *subsidiary* of a Japanese corporation was not capable under the particular language of Article VIII(1) of the United States-Japan FCN Treaty to avoid application of United States federal law. That case dealt with language particular to Article VIII(1) of that FCN Treaty. Further, *Sumitomo* did not discuss in any way the right of Japanese corporations to raise claims under that FCN Treaty in United States courts.

(8) *Judgment, Second Phase, ICj Reports 1970,* paras. 54, 61, 62.

CHAPTER II

INTERFERENCE WITH MANAGEMENT AND CONTROL OF ELSI

The Respondent requisitioned the ELSI plant, delayed its decision as to the lawfulness of the requisition, and thwarted the normal bankruptcy process, instead of allowing an orderly liquidation of ELSI. These acts constitute interference with Raytheon's and Machlett's management and control of their subsidiary. Articles III and VII of the Treaty and Article I of the Supplement bar the Respondent from engaging in such interference.

SECTION 1. – *Article III of the Treaty.*

Article III of the Treaty guarantees that United States corporations may participate in corporate enterprises organized under the laws of Italy. Article III(2) creates a broad right for United States corporations to « organize, control and manage » Italian corporations engaged in commerce and manufacturing in conformity with applicable Italian law and regulations (9). The facts of this case vividly show a denial of this right to control and manage. The Respondent, however, tries to avoid application of the ordinary meaning of Article III(2) by making several incorrect assertions.

First, the Respondent contends that the unlawful requisition of the ELSI plant in « no way affected control by the shareholders » over ELSI, but rather « merely concerned the management by [ELSI] of some property belonging to [ELSI] (10) ». Yet a fundamental right of shareholders in controlling and managing a non–public corporation is the right to decide to liquidate or « wind up » the business of that corporation. Under Article 17 of the By–Laws of ELSI, the right « of changing the legal nature of the Company, of winding up voluntarily the Company » was reserved exclusively to shareholders owning shares having an aggregate value of 90 percent of the capital of ELSI (11). After having made extensive investments in ELSI, Raytheon and Machlett alone had the right and the responsibility to decide to liquidate ELSI in an orderly fashion.

Second, the fact that the requisition did not transfer ownership of ELSI to the Respondent (12) does not make the requisition any less of an interference with management and control. The requisition deprived any potential buyer of access to ELSI's physical assets, thereby making

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(9) Article III(2) of the Treaty states in part:
« The nationals, corporations and associations of either High Contracting Party *shall be permitted*, in conformity with the applicable laws and regulations within the territories of the other High Contracting Party, *to organize, control and manage corporations* and associations of such other High Contracting Party for *engaging in commercial, manufacturing*, processing, mining, educational, philanthropic, religious and scientific *activities* » (Emphasis added).

(10) Counter–Memorial, p. 105. Contrary to the Respondent's assertion, the United States is not establishing an « autonomous principle of fair treatment ». Counter–Memorial, pp. 105–106. The United States simply points out that the Treaty as a whole seeks to assure investors that investments will be given fair or equitable treatment. Memorial, p. 30. The concern with equitable treatment is expressly stated in the Preamble to the Supplement, which of course constitutes an integral part of the Treaty. *See* Treaty Supplement, Article IX. The existence of other standards of treatment such as national treatment and most–favored–nation treatment does not preclude application of fair treatment.

(11) ELSI – Elettronica Sicula S.p.A., By–Laws (Articles of Incorporation), Approved by the Shareholders Extraordinary Meeting of 19 July 1961, Article 17 (Annex 5 to this Reply).

(12) Counter–Memorial, p. 111.

sale of ELSI as a going concern impossible. When President Carollo of Sicily informed Raytheon orally and in writing that the requisition would be prolonged indefinitely unless Raytheon abandoned its plan to wind up ELSI ([13]), it was clear that Raytheon and Machlett had completely lost their ability to manage and control ELSI, leaving them only the option of placing ELSI in bankruptcy as required by Italian law ([14]). Ultimately the interference by the Respondent in the bankruptcy process even diminished the right of Raytheon and Machlett to receive any of the benefits of a normal bankruptcy sale, thereby forcing Raytheon and Machlett to pay off a greater share of ELSI's guaranteed debts that went unpaid due to the low proceeds from the bankruptcy. Whether or not the requisition involved transfer of title, it obviously involved interference with management and control.

Third, the Respondent seeks to justify its conduct under the first sentence of Article III(2) by asserting that the requisition was based on an Italian law and therefore was in « conformity with the applicable laws and regulations ». Yet while that clause permits United States corporations to organize and control Italian corporations only within the guidelines established by local law, it does not call for United States corporations to receive treatment « no less favorable » than that accorded to corporations owned by local nationals, which is the clause used in the Treaty to trigger a national treatment standard ([15]). Consequently the « applicable laws and regulations » clause must be interpreted to mean that the way in which management and control may be exercised is subject to regulation under local law, but the right to manage and control may not be abrogated entirely, regardless of the treatment accorded to Italian nationals ([16]).

Subject only to this constraint, the guarantee of treatment in the first sentence of Article III(2) is unqualified. Unqualified or « absolute » rules are used in FCNs to protect vital rights and privileges of foreign corporations in any situation, whether or not a host government provides the same rights to its own population ([17]).

In any event, the « applicable laws and regulations » clause cannot excuse the Respondent's conduct in this case because the requisition of the plant by the Respondent was *not* in conformity with applicable laws and regulations. The Prefect of Palermo found the requisition to be illegal because it was not directed toward the goal stated by the Mayor of Palermo. The highest Italian court confirmed the Prefect's finding. To be in conformity with applicable laws and regulations, it is not enough that the Mayor of Palermo referenced certain laws when he requisitioned the plant. If mere reference to local laws satisfies Article III(2), then all acts of the Respondent could be excused in this way and the protection of Article III(2) would be rendered meaningless.

Even if the first sentence of Article III(2) is read as providing for treatment no less favorable than is provided to Italian corporations, the presumption must be that this Article was not meant to deprive United States corporations of advantages they would have otherwise enjoyed

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([13]) Memorial, pp. 13–14.

([14]) Memorial, pp. 14–15, 30–32.

([15]) The « no less favorable » clause appears in various parts of the Treaty where a national treatment standard is intended. The clause also appears in the second sentence of Article III(2), but this sentence applies to corporations controlled by corporations in the other party. Hence, Article III(2) applies a national treatment standard to the rights and privileges *of ELSI* to engage in activities in Italy, but not to the rights of Raytheon and Machlett to control and manage ELSI.

([16]) Herman Walker, a highly qualified writer in this area who was intimately involved in the negotiation of many FCNs, noted that the phrase « in conformity with applicable laws and regulations », as it occurs in this Treaty, « is framed in such a manner as to imply that it does not constitute a reservation detracting from the treaty right; and such phraseology has been omitted from subsequent treaties ». H. WALKER, « Provisions on Companies in United States Commercial Treaties », 50 *American journal of International Law*, p. 373 at p. 384, N. 53 (1956). In view of the possible ambiguity of this qualification, however, the Supplementary Agreement provided stronger protection by absolutely prohibiting arbitrary and discriminatory interference, whether or not in accordance with local law. *See infra*, Part V, Chapter II, Section 2.

([17]) H. WALKER, « Modern Treaties of Friendship, Commerce and Navigation », 42 *Minnesota Law Review*, p. 805 at pp. 811, 823 (1958). Mr. Walker states that in these situations foreign nationals are to receive « not only equal protection, but also a certain minimum degree of protection, as under international law, regardless of a Government's possible lapses with respect to its own citizens. » H. WALKER, « Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice », 5 *American journal of Comparative Law*, p. 229 at p. 232 (1956). Unqualified rules state the law of the treaty itself and may be assessed, as relevant, in accordance with principles of international law.

under international law ([18]). Hence Article III(2) includes certain minimum standards of protection under international law, including protection from unlawful interference with management and control ([19]).

Thus, under either the standard set forth in Article III(2) or even under a national treatment standard, unlawful interference in the management and control of a United States–owned subsidiary violates Article III(2) of the Treaty.

SECTION 2. – *Article I of the Supplement.*

Article I(*a*) of the Supplement guarantees that United States corporations shall not be subject to arbitrary or discriminatory measures in Italy resulting particularly in preventing their effective control and management of enterprises which they have been permitted to establish or acquire in Italy ([20]). This provision complements and reinforces the protections accorded to Raytheon and Machlett under Article III by establishing a completely unqualified rule ([21]) prohibiting interference with control and management by arbitrary and discriminatory conduct, regardless of Italian laws and regulations.

The Counter–Memorial strains to interpret the Respondent's actions as being directed only at ELSI and therefore as having no effect on Raytheon and Machlett's property ([22]). Yet Article I(*a*) of the Supplement does not refer to property at all; it refers to control and management of enterprises established or acquired in Italy, which is precisely what is at issue here. Raytheon and Machlett were most certainly « subjected to » measures in Italy « resulting in » the prevention of their effective control and management of ELSI. The Respondent pretends that « the company organs, through which this control and management were performed, were able to function freely also during the period of the requisition ([23]) ». The « company organs » could still function, but there was nothing left for them to control and manage. This is precisely what Article I(*a*) of the Supplement was designed to prevent ([24]).

([18]) H. P. CONNELL, « United States Protection of Private Foreign Investment through Treaties of Friendship, Commerce, and Navigation », 9 *Archiv des Volkerrechts*, p. 256 at p. 266 (1961–62) (quoting Schwarzenberger at note 49: « Even if the standard of national treatment is laid down in a treaty, the presumption is that it has been the intention of the parties to secure to their nationals in this manner additional advantages, but not to deprive them of such rights as in any case, they would be entitled to enjoy under international customary law or the general principles of law recognized by civilized nations »).

([19]) When a State admits into its territory foreign investments in the form of juristic persons, that State is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them. Such obligations include the obligation to refrain from acts that deprive investors of the right to exercise management and control of their investment. *See, e.g., Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation*, 56 *International Law Reports*, p. 258 at pp. 290–293, 295 (1980). The unlawful interference with Raytheon's and Machlett's management and control by the Respondent was a breach of its obligations under customary international law as preserved by the Treaty.

([20]) Article I(*a*) of the Supplement states:

« The nationals, corporations and associations of either High Contracting Party *shall not be subjected to arbitrary or discriminatory measures* within the territories of the other High Contracting Party resulting particularly in: (a) *preventing* their *effective control and management of enterprises* which they have been permitted to establish or acquire therein ... » (Emphasis added).

([21]) *See supra*, note 17 and accompanying text.

([22]) Counter–Memorial, p. 112. The Respondent's reading of this article runs counter to its asserted acceptance of the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Counter–Memorial, pp. 107–108. The United States agrees that the rules of the Vienna Convention apply to the interpretation of this Treaty. The ordinary meaning of Article I(*a*) as well as the other provisions cited by the United States establishes the Respondent's wrongful conduct. Further the ordinary meaning of these provisions is the proper meaning within the context of the Treaty as a whole and in light of its object and purpose, which includes the promotion and protection of foreign investment. If reference to supplementary means of interpretation is necessary, in accordance with Article 32, these too confirm the interpretation of the Treaty provisions advanced by the United States.

([23]) Counter–Memorial, p. 112.

([24]) At the time of the ratification of the bill introduced to implement the Supplement, the Respondent noted that « the first part of the [Supplement], which is certainly the most important, refers to the free transfer of capital and income by natural and corporate persons from the two contracting States, and their freedom to manage the companies which these natural or legal persons establish or procure ». Counter–Memorial, Annex 11, pp. 20–21.

The Counter-Memorial tries to avoid Article I(*a*) by arguing that the requisition was not arbitrary because « arbitrary » means the same as « unreasonable » and the requisition was a reasonable step to take to deal with an emergency. The requisition was *both* arbitrary and unreasonable regardless of the problems of « social unrest » alleged by the Mayor of Palermo and used as the pretext for the requisition (25). First, both the Prefect of Palermo and the Italian courts declared that the requisition was an unlawful act. An unlawful act is not a reasonable act under any system of legal obligations. Indeed the Prefect himself found that the law was « destitute of any juridical cause which may justify it or make it enforceable » and could not achieve the asserted objective of alleviating social unrest (26). Second, the subsequent fate of ELSI shows that once the Respondent requisitioned the plant, the Respondent took absolutely no steps to alleviate the « social unrest », such as by reopening the plant. The goal expressed in the requisition order was not obtainable by the act he took and was therefore arbitrary. Third, even if the Respondent's actions were reasonably related to the goal stated, requisitioning a plant for political reasons is not a legally permissible goal under the Treaty. Indeed, the Respondent was completely unresponsive to Raytheon's and Machlett's efforts to stabilize ELSI financially, precipitating the conditions which led to the « social unrest ». The real purpose of the requisition was not to stem « social unrest », but to wrest control of ELSI's plant, equipment, and assets from its rightful shareholders, Raytheon and Machlett. That purpose was arbitrary.

The existence of Italian laws which in some situations allow the Mayor of Palermo to requisition property does not make reasonable the improper and arbitrary application of those laws. Municipal legal systems, including those of Italy and the United States, and principles of international law, recognize that where the means employed do not fit the expressed goal, or are legally impermissible, then those means are arbitrary and unreasonable (27). Within the context of the Treaty itself, which has as an objective the promotion of investment, the actions of the Respondent in seizing Raytheon's and Machlett's investment are also unreasonable and arbitrary.

The Respondent contends that the requisition was not discriminatory because requisitions of this kind frequently have been used with regard to plants belonging to Italian-owned companies. The Treaty, however, envisions protection from not just discrimination against foreign companies, but also from discrimination in favor of Government-controlled enterprises (28). It is not sufficient to point to other requisitions where the Respondent also took over companies that were competitive with its own. Therefore at the time that Raytheon and Machlett invested in ELSI, and at the time this requisition occurred, Italian corporations apparently had never been treated in this fashion, and therefore the requisition may be said to be discriminatory.

SECTION 3. – *Article VII of the Treaty.*

Further protection against interference with management and control is given by Article VII of the Treaty. Article VII states that a United States corporation is entitled to acquire, own, and dispose of its immovable property or interests therein in Italy on terms no less favorable than those accorded to Italian corporations by the state of the United States under which the United States corporation is created (29).

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(25) Counter-Memorial, p. 83.

(26) Memorial, Judgment of Prefect of Palermo, 22 Aug. 1969, p. 11 (Annex 76). *See* Memorial, p. 21. The Prefect found that the requisition could not possibly have achieved its stated purposes, because the requisition could not result in the re-employment of the workers or in the continued operation of the plant.

(27) Memorial, pp. 34-36.

(28) *See, e.g.*, Article XVIII of the Treaty and Paragraph 2 of the Protocol.

(29) Article VII of the Treaty states in part:

« The nationals, corporations and associations of either High Contracting Party shall be permitted to .. dispose of immovable property or interests therein within the territories of the other High Contracting Party upon the following terms:

.....

(*b*) in the case of nationals, corporations and associations of the United States of America, the right to

The Respondent contends that since the plant and assets belonged to ELSI, the only property to which Article VII could apply is the shares in ELSI held by Raytheon and Machlett; since Raytheon and Machlett were free to dispose of their shares at all times, Article VII was not violated. Even if the protections of Article VII were limited to the shares, the value of Raytheon's and Machlett's shares was essentially reduced to nothing. Prior to the requisition, the shares had a value reflecting ELSI as a going concern, and the shareholders could control and manage fundamental changes in the status of ELSI, such as an orderly liquidation. After the requisition, however, Raytheon and Machlett were only « free » to dispose of their shares by declaring ELSI bankrupt and by paying portions of ELSI's guaranteed debts that would have been paid from proceeds of an orderly liquidation.

Yet Article VII is actually concerned with « immovable property or interests therein ». « Interests » in property is a phrase sufficiently broad to include indirect ownership of property rights held through a subsidiary that is not a United States corporation ([30]). Raytheon's and Machlett's interests in ELSI's plant, equipment, and work-in-process were obliterated by the unlawful requisition and subsequent treatment in the bankruptcy process. The fact that the requisition period was for six months is irrelevant since Raytheon and Machlett, facing no prospect of an orderly liquidation, were forced to have ELSI declared bankrupt within the first month of the requisition.

The standard of treatment operating in Article VII is one of reciprocity. A national treatment standard is applied only if the reciprocity standard is higher than the standard of national treatment. To establish the reciprocity standard of treatment, the United States has shown that under both Delaware and Connecticut law, corporations may be dissolved and their assets sold pursuant to determinations of their boards of directors and shareholders ([31]). If Delaware or Connecticut were to interfere substantially with a parent corporation's right to dissolve its subsidiary, even if for a lawful public use, it would be obligated to pay compensation for that property ([32]). The Respondent has not shown that this standard of treatment is higher than that accorded by the Respondent to its own corporations. Unless the Respondent can show that it may illegally requisition a wholly-owned subsidiary of an Italian corporation, without paying compensation to that corporation, then the standard of reciprocity applies.

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acquire, own and dispose of such property upon terms no less favorable than those which are or may hereafter be accorded by the states, territory or possession of the United States of America ... under the laws of which such corporation or association is created or organized, to ... corporations ... of the Italian Republic; provided that the Italian Republic shall not be obligated to accord to nationals, corporations and associations of the United States of America rights in this connection more extensive than those which are or may herafter be accorded within the territories of such Republic to nationals, corporations and associations of such Republic ».

([30]) *Starrett Housing Corp. et al. v. Islamic Republic of Iran*, Awd. N. 314-24-1, p. 124 (14 Aug. 1987); *Amoco International Finance Corp. v. Government of Iran*, Partial Awd. N. 310-56-3, p. 47-48 (14 July 1987); *Sedco Inc. v. National Iranian Oil Company*, Awd. N. 309-129-3, p. 22-23 n. 9 (7 July 1987) (« The term ' interests in property ' clearly is broad enough to encompass property owned indirectly through subsidiary corporations »).

([31]) Memorial, pp. 37-38.

([32]) The duty to compensate extends beyond property rights taken solely pursuant to a formal expropriation decree. Memorial, p. 38.

CHAPTER III

IMPAIRMENT OF INVESTMENT RIGHTS AND INTERESTS

The previous chapter concerned Treaty provisions that protected investors' rights in managing and controlling their investment. This chapter concerns an equally significant protection against measures that impair the value of that investment. Article I(*b*) of the Supplement provides that United States corporations shall not be subjected to arbitrary and discriminatory measures in Italy which result particularly in impairing either their legally acquired rights and interests in Italian enterprises or their investments ([33]). Specifically, the Supplement protects against impairment of rights, interests, and investments « in the form of funds (loans, shares, or otherwise) ».

This broad language envisions protection of *all* financial commitments made for the benefit of ELSI, whether in the form of direct capital contributions, loans, loan guarantees, or open accounts ([34]). Further, the financial loss incurred by Raytheon in defending the suits brought by Italian banks subsequent to the Respondent's arbitrary measures is also within the scope of the Supplement because that loss represents a burden on or impairment of Raytheon's legally acquired interests in ELSI ([35]). The requisition of the plant, which caused Raytheon and Machlett to place ELSI in bankruptcy, and the subsequent acquisition of the plant, assets, and work-in-process of ELSI, clearly impaired investment rights and interests in ELSI. The requisition prevented voluntary liquidation of ELSI and caused it to file for bankruptcy. The impairment continued with the subsequent conduct of Italian officials in a series of concerted actions to acquire for ELTEL the ELSI plant and assets at less than fair market value, leaving Raytheon to pay ELSI's outstanding guaranteed debts and to defend lawsuits brought by ELSI's unsecured, unguaranteed debtors ([36]).

Once again the Respondent argues that the property of Raytheon and Machlett was not actually affected by the requisition because it was addressed to ELSI ([37]). But Article I(*b*) of the Supplement does not protect against just direct seizure of tangible property belonging to United States investors; it prohibits arbitrary and discriminatory measures which « impair » United States corporation's rights and interests in and loans to Italian entities ([38]). Clearly Raytheon's and Machlett's rights and interests were impaired. Acceptance of the Respondent's argument would eviscerate the ordinary meaning of this article.

([33]) For a discussion of the arbitrary and discriminatory nature of the Respondent's acts, *see supra*, Part V. Chapter II, Section 2.

([34]) The Respondent seeks to differentiate between such financial commitments, Counter-Memorial, p. 114, but there is no basis in the language of the Treaty for doing so. Loan guarantees represent as much of a financial commitment as any direct loan, especially where, as in this case, the guarantor actually has to pay off the loan. The Respondent itself has recognized that investments which are eligible for protection include equity interests in the form of loan guarantees. *See Operational Regulations of the Multilateral Investment Guarantee Agency*, Article 1.04(vi), signed by Italy on 17 Feb. 1986.

([35]) Memorial, p. 40.

([36]) Memorial at pp. 41-43.

([37]) Counter-Memorial, p. 112.

([38]) The ordinary meaning of « impair » suggests a wide scope of protection. This interpretation comports with the desire of Italy in negotiating the Supplement « to remove any obstacles to the inflow of private American capital ... ». Italian Annex 9, p. 3.

CHAPTER IV

WRONGFUL TAKING OF INTERESTS IN PROPERTY

The Treaty also protects against government taking of property without compensation. Article V(2) of the Treaty provides that property of United States corporations within Italy shall not be taken without due process of law and without the prompt payment of just and effective compensation ([39]). Paragraph 1 of the Protocol to the Treaty provides that the provisions of Article V(2) shall « extend to interests held directly or indirectly » by United States corporations. Both the Respondent's act of requisitioning the ELSI plant and its subsequent acts in acquiring the plant, assets, and work-in-process singly and in combination constitute takings of property without due process of law or just compensation.

The Respondent agrees that Article V(2) accords protection to United States corporations against the taking of property and agrees that this protection was extended by the Protocol to interests held directly or indirectly by a United States company ([40]). Yet despite unambiguous language to the contrary, the Counter-Memorial implies that the standard of protection in the Protocol given to « interests held directly or indirectly » is somehow different than the standard of protection given to property in Article V(2) of the Treaty ([41]). This is contrary to the explicit language of the Protocol which states:

> « The provisions of paragraph 2 of Article V, providing for the payment of compensation, shall extent to interests held directly or indirectly by ... corporations ... of either High Contracting Party in property which is taken within the territories of the other High Contracting Party ».

There is no mention in the Protocol of any different standard of protection from that which exists in Article V; to the contrary, the Protocol « extends » Article V(2). The weakness of the Respondent's interpretation is further made evident in that the Respondent does not even try to establish what this different standard is or whether the standard was met in the treatment of Raytheon and Machlett.

The Counter-Memorial also asserts that Paragraph 1 of the Protocol accords protection « only to rights to property » because the Italian text of the Protocol uses the word « diritti » (which can be translated as « rights ») and Vienna Convention Article 33(4) requires application of the more restrictive meaning ([42]). Although « interests » properly reflects the meaning of « diritti » in the Protocol ([43]), it must be recognized that the Protocol extends Article V to interests (or under the Respondent's interpretation « rights ») « held directly or indirectly » by Raytheon and Machlett. Therefore it is clear that indirect rights to property are also protected ([44]).

The Respondent denies that the requisition of the ELSI plant can be considered an « expropriation » or « taking » of property, since it was simply a « requisition in use » for which the Muni-

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([39]) Article V(2) of the Treaty provides that:
« The *property* of nationals, corporations and associations of either High Contracting Party *shall not be taken* within the territories of the other High Contracting Party without due process of law and *without the prompt payment of just and effective compensation* » (Emphasis added).

([40]) Counter-Memorial, p. 109.

([41]) Counter-Memorial, p. 109.

([42]) Counter-Memorial, p. 109.

([43]) « Diritti » is also translated as « interests » in other parts of the Treaty, such as Article VII(1)(*a*).

([44]) The Respondent's reliance on Article 34(3) of the Vienna Convention on the Law of Treaties is also misplaced. By its terms Article 33(4) should not be used unless interpretation in accordance with Articles 31 and 32 does not resolve the difference of meaning. An analysis under Articles 31 and 32 of the meaning of « diritti » shows that the Protocol, placed in context as an extension of Article V, goes beyond the protection

cipality of Palermo received no financial benefit ([45]). Yet a « taking » is generally recognized as including not merely outright expropriation of property ([46]), but also unreasonable interference with its use, enjoyment, or disposal ([47]). The requisition of the plant prevented an orderly liquidation of ELSI, thereby causing Raytheon and Machlett to place ELSI in bankruptcy. The Respondent then proceeded through ELTEL to acquire the ELSI plant and assets for less than fair market value. Consequently the Respondent's acts so substantially interfered in the use and disposal of Raytheon's and Machlett's indirect interests in the ELSI property that a taking occurred. This taking gave rise to a right to compensation.

Whether the Municipality of Palermo ultimately gained from the action of its Mayor is irrelevant. The Treaty does not require that the Respondent benefit from its taking; it is sufficient that Raytheon and Machlett were deprived of the use and disposal of their interests in ELSI. In any event, the Respondent gained considerably from this requisition because it prevented an orderly liquidation of ELSI and led to ELTEL's acquisition of ELSI's plant, assets, and work-in-process for far less than ELTEL would have had to pay had there been no interference.

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accorded in Article V to direct property rights. Therefore the Protocol seeks to protect « interests » in property, not just « rights » in property, since « rights » in property are already protected by Article V. Even if resort to Article 33(4) of the Vienna Convention is necessary, that Article does not call for application of the most restrictive meaning, but rather the application of the meaning which best reconciles the two texts, having regard to the object and purpose of the Treaty. Both international courts, *e.g.*, *Wemhoff Case* [1968] Pub. Eur. Ct. of Human Rights, Ser. A (Judgment of 27 June 1968), and even Italian courts, *e.g.*, *Ministero della Difesa v. Società Rimorchiatori Napoletani*, Cassazione, 9 Dec. 1974, N. 4106, pp. 307–309, have rejected the approach taken here by the Respondent.

([45]) Counter-Memorial, pp. 83, 109.

([46]) The use of « beni espropriati » in the Italian text of the Treaty should not be read as a restriction on this protection. The Respondent itself recognized that the principle of expropriation was developed in Article V precisely for the purpose of protecting the investment of capital in a broad sense.

> « The advisability and importance of this clause is quite evident because of the peculiar economic and financial structure of our country, in which the accumulation of savings does not correspond to the productive needs or to any program of full employment. The influx of foreign capital represents an indispensable supplement for our country ».

Memorial, Chamber of Deputies, Parliamentary Proceedings Documents — Bills and Reports, N. 246-A, p. 4, presented to the Office of the President, 2 Mar. 1949, p. 2 (Annex 3). *See* Counter-Memorial, Annex 4, pp. 12–13.

([47]) For an extensive discussion of the concept of « taking » and « expropriation » in international law, *see* Memorial, pp. 44–47.

CHAPTER V

FAILURE TO PROVIDE PROTECTION AND SECURITY

A final area of protection under the Treaty denied to Raytheon and Machlett concerned the protection and security of their property. Article V(1) of the Treaty provides that United States corporations shall receive in Italy the most constant protection and security for their property, and shall enjoy in this respect the full protection and security required by international law ([48]). Article V(3) provides that United States corporations shall receive in Italy no less protection and security than that accorded to Italian corporations and other foreign corporations.

The delay in ruling on the challenge to the requisition order until immediately after the ELSI plant, equipment, and work-in-process had been acquired by ELTEL was a denial of the level of procedural justice accorded by international law ([49]). Normally the legality of the requisition would have been reviewed within 30 days after the date the ruling was sought, which in the case of ELSI was on 19 April 1968 ([50]).

A timely decision by the Prefect could have avoided the need to place ELSI in bankruptcy because while the voluntary petition in bankruptcy was filed on 26 April 1968, ELSI was not in fact declared bankrupt until 16 May 1968. Thus, if the requisition had been rescinded, the bankruptcy could have been avoided by ELSI asking the bankruptcy judge to deny the petition.

The occupation of the plant, which resulted in its deterioration and impeded the Trustee's efforts to dispose of it, occurred with the tacit approval of the local government authorities ([51]). It no doubt discouraged potential buyers from inspecting the plant and assets and generally chilled the process of selling ELSI for its full value. Therefore this action also constituted a denial of « constant protection and security », thereby violating Articles V(1) and (3) of the Treaty regardless of whether physical damage actually occurred from the occupation.

The Respondent implies that Article V only protects immovable property and any failure in ruling within a reasonable time or in protecting the plant was not a failure to protect immovable property of Raytheon and Machlett. This construction of Article V is unjustified. Article V(3) states:

> « The ... corporations ... of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 and 2 of this Article ».

Articles V(1) and (2) speak of protection and security for « persons » and « property », not « immovable property ». Property in it ordinary sense is not confined to immovable property ([52]),

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([48]) Article V(1) of the Treaty states in pertinent part:
« The nationals of each High Contracting Party *shall receive*, within the territories of the other High Contracting Party, the *most constant protection and security for their* persons and property, and shall enjoy in this respect *the full protection and security required by international law* » (Emphasis added).

([49]) Memorial, pp. 52–53.

([50]) Memorial, p. 21.

([51]) Memorial, pp. 53–55. The Respondent is incorrect saying that the occupation of the plant by the workers occurred prior to the requisition. Although some brief, intermittent rikes known in Italy as « hiccup » strikes occurred at the plant prior to 1 April 1968, there was no long-term, indefinite control of the plant by the workers. Memorial, Annex 21 paras. 16–17. Further, the Respondent did not do anything to keep the workers out of the plant nor to « preserve » the value of the plant.

([52]) For instance, under rules of customary international law, takings of property concern expropriation of all rights in the investment, not just in the right to possession of immovable plant and equipment. *See, e.g., Revere Copper and Brass, Inc. v. Overseas Private Investment Corporation*, 56 *International Law Reports*, pp. 258, 290–293.

and when the Treaty intends to cover immovable property, such as in Article VII, it expressly says so.

In this case, the property of Raytheon and Machlett in Italy was ELSI itself. The entire entity of ELSI — plant, equipment, receivables, inventories, goodwill, and other intangibles — was at stake when the requisition occurred. The Respondent was obligated to protect ELSI from the deleterious effects of the unlawful requisition. The failure to overturn the Mayor's order, and the failure to provide ELSI with any security from trespass, deprived Raytheon and Machlett of the security and protection for their investment to which they, as 100 percent owners of ELSI, were entitled.

PART VI

COMPENSATION

CHAPTER I

THE DUTY TO PAY AND MEASURE OF COMPENSATION

As set forth in the United States Memorial, the United States is entitled to compensation in the full amount of the losses resulting from the wrongful conduct of the Government of Italy ([53]). Compensation should be measured in this case by the injuries suffered by Raytheon and Machlett ([54]).

All of the injuries suffered by Raytheon and Machlett should be included in the measure of compensation. A State may discharge its duty to make reparation by implementing measures designed to re-establish the situation prior to the wrongful act, i.e., *restitutio in integrum* ([55]). Where it is not possible to restore the situation that would have existed if the wrongful act had not been committed, or restoration does not fully redress the injury caused by the State's unlawful act, damages should be awarded in lieu of restitution to compensate for all losses or injury caused by a State's wrongful acts ([56]).

([53]) For a complete discussion of Respondent's obligation to make full compensation, *see* Memorial, pp. 56–57.

([54]) The Respondent correctly notes that the losses suffered by nationals are not necessarily identical to those suffered by the State. Counter-Memorial, p. 115, n. 3. However, international tribunals and commentators have recognized that damage to the national as a result of a violation of a treaty or customary international law may serve as a measure of the compensation to the injured State, particularly where, as in this case, the treaty provision was designed to ptotect the parties' respective nationals and the violation of the treaty provision caused direct financial loss to the national. *See* Memorial, pp. 57–59.

([55]) Memorial, p. 58.

([56]) Memorial, pp. 58–59.

CHAPTER II

THE NATURE OF THE INJURY

SECTION 1. – *Raytheon and Machlett Suffered Financial Losses with Respect to Loan Guarantee Payments, Return of Investment and Open Accounts.*

The requisition directly prevented the orderly liquidation of ELSI. Had the Respondent not interfered with the liquidation, Raytheon and Machlett would have recovered the market value of ELSI as a going concern in 1968. The book value of ELSI — the closest available approximation of going concern value in this case ([57]) — was Lire 17,053.5 million as of 31 March 1968. This amount would have allowed payment of all of ELSI's creditors in full (including Raytheon) ([58]), payment of all administrative costs, and would have even returned Lire 391 million to Raytheon and Machlett as a small return of the large investments they had previously made in ELSI. This amount would have been insufficient to recoup Raytheon's and Machlett's investment in ELSI, since they still would have lost over US$11 million in investments made since 1956.

By contrast, the Trustee in bankruptcy recovered only Lire 6,373.8 million from the sale of ELSI's assets to ELTEL. Raytheon and Machlett, therefore, lost the full value of their open accounts with ELSI ([59]) and, more importantly, were required to pay all of the guaranteed loans ([60]), thus incurring some Lire 6,931.4 million in losses. The difference between Raytheon's and Machlett's position had they been permitted to proceed with the orderly liquidation (recovery of Lire 391 million) and the losses they sustained as the result of the Respondent's interference (net loss of Lire 6,931.4 million) is Lire 7,322.4 million (US$11,739,200) ([61]).

SECTION 2. – *Raytheon Incurred Substantial Legal Expenses.*

In addition, as a further direct consequence of the Respondent's actions in violation of the Treaty, Raytheon incurred more than US$939,800 in outside legal and related expenses in connection with the bankruptcy proceedings, in defending against suits brought by Italian

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([57]) *See infra*, Part VI, Chapter III.

([58]) The United States has declined to claim compensation based both on sale of ELSI's assets for book value *and* settlement with the large unsecured, unguaranteed creditors. The damages claimed in this case are based on the premise that had Raytheon and Machlett recovered book value or greater, all creditor claims could have been satisfied in full.

([59]) That Raytheon and Machlett declined to file a claim for their open accounts with ELSI in the bankruptcy process is irrelevant to the question whether they are entitled to recover the losses associated with the open accounts as a result of the Respondent's violations of the Treaty. However, it should be noted that the principal reason Raytheon did not seek recovery for the open accounts in the bankruptcy process was the inescapable fact that due to the requisition and Respondent's subsequent interference in the bankruptcy process, Raytheon and Machlett would not have recovered sufficient compensation in the bankruptcy process to justify the cost of filing a claim for their open accounts.

([60]) The Court should reject the Respondent's assertion that the Respondent is not responsible for payments of the guaranteed loans. First, as demonstrated *supra* Part V, Chapter III, guaranteed loans are a type of investment specifically protected by the Treaty. Equally important, Raytheon's out-of-pocket expenses associated with payment of the guaranteed loans would not have been incurred but for the Respondent's requisition of ELSI's plant and assets, and are therefore a direct loss compensable under international law. *See* Memorial, pp. 60–61.

([61]) For a complete discussion of Raytheon's and Machlett's actual financial losses as compared to the planned orderly liquidation, *see* Memorial, pp. 60–61.

bank creditors in Italian courts, and in pursuing its claim against the Respondent for its actions against ELSI ([62]). The Respondent's allegation that the legal expenses incurred by Raytheon were not proximately caused by the infringement of the Treaty must be rejected. As a factual matter, had the Respondent permitted Raytheon and Machlett to proceed with the orderly liquidation plan, Raytheon would not have incurred these costs since the banks would have been paid in full or in settlement. Furthermore, reimbursement for legal costs arising from an unlawful act is widely recognized by international tribunals ([63]).

SECTION 3. – *Compensation Received by the Trustee for the Unlawful Requisition was Inadequate.*

The only « compensation » paid for the requisition was limited to Lire 114 million, considered to be the rental value of ELSI during the requisition period. The Court of Appeals of Palermo rejected the claim by the Trustee for the diminution of the value of ELSI's assets and for ELSI's inability to dispose of its plant and assets during the same period ([64]). The amount of the judgment was paid to the Trustee who, after deducting costs and expenses, distributed the proceeds to ELSI's creditors ([65]). This amount has been taken into account in the calculation of compensation requested in this case.

([62]) For a complete discussion of the legal and related expenses incurred by Raytheon, *see* Memorial, pp. 61–62. The Counter–Memorial asserts that Raytheon was awarded costs by Italian legal courts, which include « fees corresponding to lawyers tariffs ». Counter–Memorial, p. 117. Raytheon did receive nominal court costs, but this amount was not sufficient to cover all legal expenses.

([63]) Memorial, p. 62. *See* M. WHITEMAN, Vol. III, *Damages in International Law*, pp. 1998, 2005, 2020–2021 (1943), discussing the cases of *Thomas W. Mather* (United States v. Mexico) (award included amount for legal expenses incurred by claimants to procure the return of gold seized by Mexican troops) and the *Louisa* (United States v. Mexico) (award included amount for legal expenses incurred in prosecution of claim relating to seizure of cargo); L. Sohn and R. Baxter, « Convention on the International Responsibility of States for Injuries to Aliens » (« revised Harvard Draft Convention »), *reprinted in* F. V. GARCIA–AMADOR, L. SOHN and R. BAXTER, *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, p. 133 (1974) (Article 36 states that a « claimant shall be reimbursed for those expenses incurred by him in the local and international prosecution of his claim which are reasonable in amount and the ncurrence of which was inecessary to obtain reparation on the international plane »).

([64]) Memorial, Annex 81.

([65]) Memorial, Annex 26, Attachment.

CHAPTER III

ENTITLEMENT TO THE VALUE OF ELSI AS A GOING CONCERN

The starting point for the calculation of compensation is the value that would have been realized by Raytheon and Machlett by the sale of ELSI as a going concern in the orderly liquidation. Going concern value typically includes the fair market value of the company's assets and the future profits of the company's continued operations. In ELSI's case, however, the actions of the Respondent made it impossible for ELSI to become self-sufficient. Thus, while those familiar with ELSI's operations and its potential for sale determined that the intangible value of ELSI's product lines in an orderly liquidation would command a value ([66]), it was not then — and is not now — possible to place an exact value on these assets or on the future earnings potential of each line.

The closest remaining approximation of ELSI's going concern value is the book value of the assets as of 31 March 1968: Lire 17,053 million. Book value, being merely an accounting tool, does not measure going concern value as such, because it merely value assets at acquisition cost less depreciation. This is so also with respect to any asset, such as land and buildings, which may have appreciated in value. It does not measure the actual market value of the assets or the full intangible value of the company, and therefore understates ELSI's real economic worth ([67]).

The Respondent does not argue that the United States is not entitled to the value of ELSI as a going concern. Instead, the Respondent argues that book value does not reflect the market value of the assets ([68]). First, the balance sheet drawn up as of 31 March 1968 was current within the framework of ELSI's system of financial accounting, was supported by reliable records, and therefore is the valuation that most closely approximates the value of ELSI's assets at that time ([69]). Second, while book value does not take into account the deterioration in value of ELSI's assets as a result of the delay caused by the bankruptcy, Raytheon and Machlett are entitled to the value of ELSI at the time of the Respondent's wrongful interference with the orderly liquidation, not at the expiration of, or at any point during the bankruptcy process. It was the Respondent — not Raytheon or Machlett — who caused and interfered with the bankruptcy process and thereby caused the delay in the purchase of ELSI's assets. The Respondent, therefore, is responsible for any decrease in the value of ELSI's assets due to this delay.

The Counter-Memorial also implies that the Court should reject the compensation sought on the basis that it is supported by « documents originating from ELSI or Raytheon or affidavits closely connected with Raytheon ([70]) ». Again, this assertion should be rejected. International arbitrations have long accorded probative value to affidavits of interested parties, particularly those that are based on personal knowledge and are corroborated by contemporaneous business records, such as those presented in support of this case ([71]).

([66]) Memorial, Annex 13, para. 15.

([67]) Of course, if the Respondent had made available the investment incentives it had promised or had otherwise become involved with ELSI prior to the requisition, ELSI's book value would have been substantially higher.

([68]) *See* Counter-Memorial, p. 115.

([69]) *See supra*, Part II, Chapter I, Section 3.

([70]) Counter-Memorial, p. 115.

([71]) D. SANDIFER, *Evidence before International Tribunals* (1975), pp. 351-55; *see e.g.*, *Gill Case*, 5 *Reports of International Arbitral Awards*, pp. 157-159 (1931) (affidavit corroborated by letters from British Minister and

The Respondent does not offer an alternative method of valuation. Instead, the Respondent merely questions whether some other measure properly reflects the value of ELSI. As the following discussion demonstrates, neither the quick–sale value, the valuation performed by the judicial valuator, nor the valuation submitted by ELTEL properly establish the market value of ELSI in the spring of 1968.

Consistent with its recognized limited use, ELSI's management created a worst case scenario for the sale of ELSI's assets for purposes of internal corporate planning by ELSI's shareholders. In so doing, they established what is referred to as a « quick–sale » value. This value was calculated by discounting the book value of ELSI's assets in order to identify a worst–case minimum realizable value of ELSI's plant and tangible assets in an orderly liquidation. The quick–sale value was an internal determination of the minimum guaranteed return on the sale constructed for planning purposes. It does not reflect the full value of ELSI's tangible assets or their market value, nor does it take into account the significant intangible value of ELSI's business ([72]). In addition, it did not include construction in process, studies in process, deferred costs, and other smaller book–value items ([73]).

The Counter–Memorial erroneously places substantial probative weight on the United States use of the quick–sale value in the 1974 diplomatic claim. Obviously, the use of a quick–sale value in the original claim is not dispositive of the proper measure of ELSI's going concern value. The value was used as a matter of convenience in the diplomatic claim and in the spirit of compromise on which a settlement of the dispute might be based. As this claim has now been brought to the Court for resolution, the United States has a right to the full measure of compensation for injuries imposed by the Respondent.

The valuations performed by the bankruptcy valuator and the valuation submitted by ELTEL should both be rejected as they do not assess the going concern value of ELSI at the time of the requisition. The bankruptcy valuator attempted to value ELSI's assets as of 11 October 1968, more than five months after the time of the Respondent's wrongdoing. Moreover, the valuation which was presented to the bankruptcy judge by ELTEL two days after the third auction, and more than a year after the illegal requisition, clearly under–valued ELSI's plant, machinery, and equipment ([74]). This valuation also failed to include all of ELSI's assets, such as those in Milan and Rome, and the X–ray, semiconductor, complex components and other product lines. Of course this valuation was prepared by ELTEL's parent company, Siemens S.p.A., itself a member of the IRI group, and therefore cannot be considered an objective assessment of ELSI's true value.

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employer); *Stacpoole Case*, 5 *Reports of International Arbitral Awards*, pp. 95–96 (affidavit corroborated by disinterested party seven years after loss); *Tracy Case*, 5 *Reports of International Arbitral Awards*, pp. 90, 92 (1930 (claimant's affidavit corroborated by affidavit from someone in position to know the facts of loss).

([72]) The intangibles include ELSI's reputation as a producer of reliable electronic products, experience and know–how in the electronics industry, its supplier and customer lists and market reputation, patent licenses and other rights to technology supplied by Raytheon and Machlett, the technical assistance agreements that would have been executed by Raytheon and the new purchasers, and the value of existing contracts.

([73]) The difference between the Lire 193 million quick–sale price and the Lire 217 million price established by the court–appointed valuator for work–in–process is stark evidence of the artificially low value of the quick–sale estimate for purposes of a worst–case scenario.

([74]) Counter–Memorial, Volume 5 (Unnumbered Documents, Volume III).

CHAPTER IV

THE AWARD OF INTEREST

Compensation awarded should include interest, compounded annually, from the date of the requisition until the date of the award ([75]). The circumstances in this case not only call for an award of interest but also require that the rate and calculation of the total amount reflect the commercial realities of the case. Raytheon and Machlett invested in ELSI with the goal of obtaining a return on their investment. These same commercial considerations were paramount in Raytheon's and Machlett's decision to engage in an orderly liquidation of ELSI's assets. The Respondent's requisition of ELSI's assets and interference with the ensuing bankruptcy frustrated Raytheon's and Machlett's investment objective, deprived Raytheon and Machlett of funds to satisfy ELSI's creditors, and caused Raytheon and Machlett to pay ELSI's debts from its own funds. Thus, the Respondent is responsible for the loss of the use of the revenue and funds over time.

The Respondent asks this Court not to award interest because the application to the Court could have been made « many years earlier ([76]) ». However, the Respondent presents no legal support for the proposition that delay in filing a claim is a bar to an award of interest. The Respondent's argument is also based on a faulty factual premise — that any delay in the filing of the claim is attributable to actions of the United States, Raytheon, or Machlett. The injured parties did not delay in seeking redress for their grievances. The claims asserted in this case were communicated to the Respondent immediately after the requisition and by a diplomatic claim provided to the Respondent in 1972 and formally presented in 1974. Subsequent to the presentation of that claim, the two governments have been in diplomatic communication in an attempt to reach a negotiated settlement of the dispute. In short, the Respondent can claim no prejudice as a result of the passage of time which would entitle it to a reduction in or absolution from the obligation to pay interest on this claim or to attribute the delay to the claimants. Indeed, Respondent has *benefited* from the value of Raytheon's and Machlett's lost investment in ELSI since the time of the requisition and should now be held accountable for it.

The Respondent's reliance on the *Corfu Channel Case* as a basis for denial of an award of interest is misplaced ([77]). The question of interest was not before the Court in that case, as the United Kingdom did not assert a claim for interest. Thus, the Respondent has presented no basis for a refusal to award interest in this case.

Interest awarded should be compounded annually ([78]). The Respondent bases its opposition to an award of compound interest on the ground that it was not awarded in the case involving *British Property in the Spanish Zone of Morocco* ([79]). Although the arbitrator in that case did award simple interest, he went on to recognize that there are situations where compound interest is proper ([80]). An award of compound interest is compelling in this case since Raytheon and

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([75]) For a complete discussion of the award of interest, see Memorial, pp. 62–67.
([76]) Counter-Memorial, p. 117.
([77]) Counter-Memorial, p. 117.
([78]) Memorial, pp. 66–67.
([79]) 2 *Reports of International Arbitral Awards*, p. 650 (1924), cited in the Counter-Memorial, p. 117.
([80]) *Ibid. See also Case of Antoine Fabiani*, summarized in M. WHITEMAN, *op. cit.*, at pp. 1785–89; *American Independent Oil Co. v. The Government of the State of Kuwait*, 21 *International Legal Materials*, p. 976 at p. 1042 (1982).

Machlett have lost the use of their funds for nearly twenty years. If Raytheon and Machlett had not suffered the financial losses they did, these funds would either have generated additional earnings or would have been used to repay debt. These funds therefore would have generated either interest earnings or interest savings, which in turn would have been devoted to profitable use. Each year that compensation is not awarded to Raytheon and Machlett, the injury to them is in fact compounded. Thus, the actual loss to Raytheon and Machlett is most closely approximated by calculating interest at a commercial borrowing rate, compounded annually.

SUBMISSIONS

Accordingly, the United States submits to the Court that it is entitled to a declaration and judgment that:

(*a*) the claims brought by the United States are admissible before the Court since all reasonable local remedies have been exhausted;

(*b*) Italy — by engaging in the acts and omissions described above and in the Memorial, which prevented Raytheon and Machlett, United States corporations, from liquidating the assets of their wholly-owned Italian corporation ELSI and caused the latter's bankruptcy, and by its subsequent actions and omissions — violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated:

– Article III(2), in that Italy's actions and omissions prevented Raytheon and Machlett from exercising their right to manage and control an Italian corporation;

– Article (V)(1) and (3), in that Italy's actions and omissions constituted a failure to provide the full protection and security as required by the Treaty and by international law;

– Article V(2), in that Italy's actions and omissions constituted a taking of Raytheon's and Machlett's interests in property without just compensation and due process of law;

– Article VII, in that these actions and omissions denied Raytheon and Machlett the right to dispose of their interests in immovable property on terms no less favorable than an Italian corporation would enjoy on a reciprocal basis;

– Article I of the Supplement, in that the treatment afforded Raytheon and Machlett was both arbitrary and discriminatory, prevented their effective control and management of ELSI, and also impaired their other legally acquired rights and interests;

(*c*) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to compensation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

(*d*) that Italy accordingly should pay to the United States the amount of US$12,679,000, plus interest, computed as described above and in the Memorial.

18 March 1988.

ABRAHAM D. SOFAER
Agent of the United States of America

ARNOLD I. BURNS
Deputy Attorney General
Department of Justice

ANNEX I

STATEMENT BY PROFESSOR FRANCO BONELLI
UNIVERSITY OF GENOA

Dated 2 March 1988

My name is Franco Bonelli. I am an attorney and counselor at law duly admitted to practice in all courts in Italy. I graduated *magna cum laude* from the University of Genoa in 1960. I am the senior partner in Studio Legale Bonelli where I specialize in commercial law, particularly bankruptcy law. In my practice I have counselled numerous major private and public companies in bankruptcy law and bankruptcy proceedings. I have held the chair of Commercial Law at the University of Genoa since 1976 and was a visiting professor at Stanford University in the United States. I am the author of several legal publications on commercial law. I am the founder and editor of « Giurisprudenza Commerciale » and « Diritto del Commercio Internazionale ». I have been involved both as arbitrator and as advocate in various domestic arbitrations of commercial disputes and in international arbitrations under the rules of the Chamber of Commerce in Paris.

I have been asked to provide my opinion on whether Elettronica–Sicula, S.p.A. (« ELSI ») was entitled in 1968 to proceed with an orderly liquidation under Italian law, whether ELSI was obligated to file a petition in bankruptcy prior to the requisition on 1 April 1968, and whether any delays in ELSI's bookkeeping in early 1968 due to earthquakes in Sicily or strikes at the plant violated Italian law.

The following opinion is based on my experience in Italian bankruptcy law and my review of the Memorial of the United States Government, the Counter–Memorial of the Government of Italy, and the accompanying annexes to each.

Entitlement to an Orderly Liquidation.

1. A company is entitled under Article 2448, N. 5, of the Italian Civil Code to engage in an orderly liquidation of its assets upon a resolution of its shareholders to that affect. Raytheon and Machlett acted in accordance with this law when they voted on 28 March 1968 to liquidate the plant and assets of ELSI.

2. In Italy it is widely recognized that an orderly liquidation generates a more favorable return to the shareholders than does placing the company into bankruptcy.

There are two principal reasons for this. First, a trustee in bankruptcy lacks the knowledge of the industry and marketing expertise to locate a buyer and execute the terms of the sale at the greatest return to the shareholders. Second, the trustee does not have the same monetary incentive to maximize the sales price as would the shareholders in an orderly liquidation.

3. In my experience it is common practice for larger bank creditors in Italy to settle claims for 40 or 50 percent of value, rather than taking the risk of receiving little or nothing in the bankruptcy process.

No Obligation to File a Petition in Bankruptcy.

4. Based on my review of ELSI's financial data attached to Annex 13 of the United States Memorial, it is my opinion that ELSI was under no obligation to file a petition in bankruptcy

under Italian law. Under Italian law, ELSI would have been obligated to file a petition in bankruptcy only if its liabilities clearly exceeded its assets or if it was impossible for ELSI to fulfill regularly its financial obligations. At no time during its operations, as summarized in Attachment E1 to Annex 13 of the United States Memorial, did ELSI's liabilities exceed the book value of its assets. Moreover, as evidenced by the United States Memorial, ELSI consistently met and was in a position to meet all of its financial obligations.

I have no reason to believe the book value was incorrect since it appears from the United States Memorial that ELSI's balance sheets were audited by the company's auditors and by the accounting firm of Coopers and Lybrand. Therefore, if the book value had been higher than the actual value, the book value would have been diminished by virtue of Articles 2423 and 2425 of the Italian Civil Code.

No Jeopardy of Compulsory Dissolution.

5. It is also my opinion that ELSI was never in jeopardy of compulsory dissolution. Under Article 2447 of the Italian Civil Code, ELSI would have been considered dissolved as a matter of law if its capital were depleted below a statutory minimum amount. At the relevant time the statutory minimum was Lire 1,000,000. Attachment B1 to Annex 13 of the United States Memorial demonstrates that ELSI's capital, even after taking into account losses, was always well above the statutory minimum.

Compliance with Article 2446.

6. It is my opinion that ELSI was all times in compliance with Article 2446 of the Italian Civil Code. When a company's losses exceed one–third of its capital, Article 2446 grants the shareholders of a company a one–year grace period from the date they knew or should have known of such losses either to reduce its capital or to take another appropriate action. As Annex 13, Attachment B1 demonstrates, at the fiscal year ending September 30, 1966, ELSI's capital was Lire 4,000 million and its losses were Lire 2,007,1 million. As the same Annex demonstrates, in 1967 the company devalued the capital stock to Lire 1,500 million to reduce the company's losses and invested an additional Lire 2,500 million to bring the company's capital back to Lire 4,000 million. During the fiscal year ending September 30, 1967, however, ELSI's losses once again exceeded one–third of its capital. This time, the company did not adjust its capital and instead the shareholders voted to proceed with the orderly liquidation of ELSI's assets. This decision was taken within the one–year grace period authorized by Article 2446 and was in all respects in conformity with Italian law.

Delays in ELSI's Bookkeeping.

7. Any delays in ELSI's bookkeeping in early 1968 that were due to earthquakes in Sicily or strikes at the plant were merely brief and unavoidable interruptions in ELSI's recordkeeping. In my opinion such delays do not violate Articles 216 or 217 of the Italian Bankruptcy Act.

Genoa, March 2, 1988,

FRANCO BONELLI
Studio Legale Bonelli – Genoa

Title II

ON BANKRUPTCY

Chapter I

On Declaring Bankruptcy

5. *State of insolvency.* – The entrepreneur who finds himself in a state of insolvency is declared bankrupt.

The state of insolvency is manifested by defaults or other external facts which would demonstrate that the debtor is no longer in a position to satisfy his own obligations in a regular manner.

Titolo II

DEL FALLIMENTO

Capo I

Della dichiarazione di fallimento

5. *Stato d'insolvenza.* – L'imprenditore che si trova in stato d'insolvenza è dichiarato fallito.

Lo stato d'insolvenza si manifesta con inadempimenti od altri fatti esteriori, i quali dimostrino che il debitore non è più in grado di soddisfare regolarmente le proprie obbligazioni.

ANNEX 2

STATEMENT BY PROFESSOR ELIO FAZZALARI UNIVERSITY OF ROME

Dated 29 February 1988

My name is Elio Fazzalari. I am an attorney at law practicing in Italy and am qualified to appear before the Supreme Court of *Cassazione*. I have been appointed by the International Chamber of Commerce of Paris as chairman of several international arbitrations.

I graduated in 1944 from the Law Faculty of Rome University. I have been a professor of Civil Procedure since 1957. Since 1972, I have tought Civil Procedure at the Law Faculty of Rome University.

I am a member of the International Association for Comparative Law and a professor at the International Faculty of Comparative Law in Strasbourg.

I am the Director of the Procedural Law Section of « Enciclopedia del Diritto ».

I am the author of several legal publications and treaties of civil procedure.

* * *

I was requested to provide my opinion as to whether Raytheon and Machlett exhausted all local remedies in Italy with respect to their claim before the International Court of Justice involving their subsidiary Elettronica–Sicula, S.p.A.

The following opinion is based on my knowledge of Italian civil law and my review of the Memorial of the United States and of the Government of Italy.

I

In its defense the State of Italy claims that, as a consequence of the execution order of the two treaties between Italy and the United States of America (treaties of July 12, 1949 and September 1, 1960, respectively), the Italian internal law has been integrated with the provisions of the said treaties and therefore Raytheon and Machlett should have and could have requested enforcement of these provisions in an Italian court. On the other hand, the respondent does not specify which subjective position it assumes may have arised in the Italian internal law nor which judicial remedies it assumes may belong to Raytheon and Machlett.

Thus, Article V of the Treaty, providing an indemnification for an individual dispossessed of his own property, is not self–executing. In fact, in domestic law — to the structure of which it is necessary to make reference, and in our case to Italian law — an indemnification can be recognized either as « diritto soggettivo » (enforceable in an ordinary court) or as « interesse legittimo » (which is a different situation, enforceable in an administrative court): the provision of an indemnification obligation does not imply a determination of which of the two subjective positions an individual has been awarded, and such specific determination must be derived from other provisions of Italian law.

Also the provision of Article I of the Supplementary Agreement is not a complete norm; in any case, a claim for damages in an Italian court is subject to the same specification as mentioned above with regard to Article III of the Treaty: the Italian legislator must further specify what kind of indemnification and/or compensation is provided and which court is competent to deal therewith.

Similarly, as Italy has not introduced in Italian law provisions affording United States citizens the additional protections of Articles III and VII, United States citizens in Italian courts may only assert the protection of Italian law as applied to all companies in Italy.

Any claim for the additional protections created by Articles III and VII — as well as those arising from Article 1 of Supplementary Agreement and Article V of the Treaty — must therefore be raised by the United States at the international level.

II

Having excluded that the Treaty has introduced into the internal law claims and judicial remedies stronger and different from those already available in the Italian legal system, we can only repeat that Raytheon and Machlett have exhausted all available remedies for the simple reason that there were no remedies available to them.

In fact, in case of an arbitrary requisition of the assets of a company, the shareholders do not have any claim against the requisition order, because such claim is reserved to the company (in the case in issue ELSI exercised the claim).

Similarly, an action for compensation by the authorities, as a consequence of a judicial declaration of the illegitimacy of the requisition, is reserved to the company which was the object of the requisition and not to its shareholders. And, in any case, if the company has become bankrupt, any judicial action is reserved to the receiver, while the shareholders become creditors of the bankruptcy (in the case in issue, the receiver of ELSI exercised all claims without success).

Rome, February 29, 1988.

ANNEX 3

LETTER FROM PROFESSOR ANTONIO LA PERGOLA PROFESSOR AT THE UNIVERSITY OF BOLOGNA TO RAYTHEON COMPANY,

Dated 9 December 1971

[legal opinion from Prof. ANTONIO LA PERGOLA, Atty.]

...For the reasons set forth above, then, I believe that I must conclude that in a situation of this kind, all the requirements appear to be satisfied for the US citizens who are members of Raytheon–Elsi S.p.A. to be protected at the international level, without any internal remedies being explored before the filing of a possibile claim against the Italian Government.

La questione che mi viene proposta è quella di stabilire se — considerato tutto il complesso delle vicende della S.p.A. Raytheon–Elsi, costituita a Palermo e per il caso che il governo degli Stati Uniti intenda di avanzare reclamo contro il governo italiano per un illecito internazionale nei confronti dei cittadini statunitensi, azionisti di detta società — si possa ritenere che sia stato soddisfatto il requisito dell'esaurimento dei rimedi interni, e che il reclamo internazionale sia proponibile.

Per rispondere al quesito, richiamerò, anzitutto, i principi di diritto internazionale che consentono di accertare quando un individuo — in particolare, l'azionista di una società commerciale — possa essere legittimamente tutelato dallo Stato di cui è cittadino, per torto subito da parte di uno Stato straniero. Dopo di che, passerò ad indagare se nella situazione della specie ricorrano gli estremi per l'ammissibilità del reclamo internazionale.

1. – È opinione comune degli studiosi e dei corpi giudicanti che ciascuno Stato sia legittimato a proteggere i propri cittadini nei confronti dell'illecito che essi abbiano subito ad opera di Stati stranieri. Tale tutela è però, subordinata al fatto che l'individuo abbia infruttuosamente esaurito i rimedi che l'ordinamento interno dello Stato autore del preteso illecito consente effettivamente di esperire. Il significato e l'ambito di applicazione della regola ora richiamata — *local redress rule* — verrebbe, però, frainteso, se si ritenesse che l'esaurimento dei rimedi interni costituisca la sola condizione a dover essere soddisfatta perchè possa ammettersi la tutela internazionale dell'individuo. Ogni qualvolta lo Stato agisce per tutelare un proprio cittadino non basta, infatti, che questo abbia tentato inutilmente di ottenere il risarcimento del danno o comunque la riparazione dell'illecito da parte dello Stato straniero: occorre anche che il reclamo sia fondato su di un qualche titolo idoneo a far valere la responsabilità internazionale dello Stato straniero. Non avrebbe, dunque, alcun senso chiedersi, nel caso che mi viene proposto, se i cittadini americani, azionisti della Raytheon–Elsi, abbiano o meno esperito i rimedi locali, senza accertare al tempo stesso che sussistano le altre condizioni volute dal diritto internazionale perché un eventuale reclamo contro il governo italiano possa essere fondatamente avanzato. Diverso sarebbe il caso in cui s'intendesse avanzare non un reclamo in senso proprio, bensì una generica tutela diplomatica a favore di tali subbietti, dal momento che l'esercizio di questo più lato diritto di protezione diplomatica — ultimamente richiamato e disciplinato nella Convenzione di Vienna sulle relazioni diplomatiche del 18 aprile 1961, ma indubbiamente radicato nel diritto internazionale generale — è svincolato — con la sola ed ovvia eccezione che nemmeno la generica tutela diplomatica può estendersi ad altri soggetti, diversi da quelli connessi allo Stato dal legame della

cittadinanza — dalla sussistenza dei requisiti necessari per la proposizione di un reclamo internazionale. Tali requisiti sono, essenzialmente, i seguenti:

a) L'appartenenza dell'individuo allo Stato reclamante (c.d. *nationality of the claim*). Essa va intesa nel senso che l'individuo debba aver mantenuto lo *status* di cittadino dal momento in cui egli subisce il danno o la lesione derivante dal comportamento illecito di uno Stato straniero, ininterrottamente fino al momento in cui lo Stato cui esso appartiene abbia avanzato reclamo o addirittura fino al momento in cui il reclamo sia stato deciso dai competenti organi giudicanti. Da taluni si ritiene altresì che parallelamente a tale requisito sia richiesto un vincolo (*genuine link*) effettivo, dunque, e non occasionale o involontario, tra il soggetto leso e lo Stato autore dell'illecito, quale potrebbe, per es., risultare dalla conclusione di un contratto o dal fatto di risiedere in detto Stato.

b) Altro requisito è che allo Stato, contro il quale è proposto reclamo, sia imputata la commissione di un illecito internazionale. L'illecito deve consistere nell'inosservanza di una regola internazionale la quale vincoli lo Stato stesso a un determinato trattamento nei confronti dei cittadini dello Stato reclamante. Nel compimento dell'illecito non rileva il fatto che la regola violata sia consuetudinaria piuttosto che convenzionale. Si avrà, tutt'al più, maggiore difficoltà nel provare la violazione di una regola consuetudinaria, anzichè di un trattato, fermo restando che l'onere della prova deve gravare sullo Stato reclamante. Questo perchè la prova di una eventuale violazione delle regole pattizie è presumibilmente agevolata dall'esistenza di un testo scritto, sul quale il giudice può fare affidamento per stabilire quando l'illecito si è verificato, laddove non vi è concordia di opinioni sul contenuto delle norme consuetudinarie dalle quali lo Stato è vincolato ad assicurare diritti allo straniero, se si prescinde dall'obbligo di adeguare l'organizzazione ed il funzionamento della giurisdizione ad un minimo livello d'imparzialità e di garanzie procedurali.

Non importa qui considerare altri aspetti problematici della definizione dell'illecito internazionale. Mi limito a rilevare che dottrina e giurisprudenza concordano nel ritenere che l'illecito commesso in origine contro un individuo deve essere considerato come un illecito contro lo Stato al quale l'individuo appartiene (*Mavrommatis Palestine Concessions*, International Court of Justice. Series *A*, N. 2). Questo è un punto fermo di tutto il diritto dei reclami, che non può essere messo in discussione, perché ancorato alla premessa, tuttora pacifica, secondo la quale gli individui sono privi di soggettività internazionale. Discende da tale premessa che l'infrazione di una regola internazionale, la quale vincoli lo Stato ad un certo contegno verso lo straniero, significa violazione di un diritto dello Stato di cui lo straniero è cittadino: e cioè del diritto di pretendere che la regola fosse osservata o addirittura del diritto di protezione diplomatica, riconosciuto ad ogni Stato nei confronti dei propri sudditi. È certo, dunque, che il reclamo internazionale è proponibile, vuoi che l'illecito tragga origine da un torto inflitto al privato, vuoi che esso consista, invece, nella violazione immediata di un diritto dello Stato reclamante, in nessun modo collegata con un qualche contegno che l'autore dell'illecito abbia tenuto nei confronti dei cittadini di tale Stato. Ciò non esclude, tuttavia, che, quando lo Stato agisce per tutelare un proprio suddito, l'ammissibilità del reclamo sia subordinata a talune condizioni le quali, logicamente, non possono ricevere applicazione nel caso in cui lo Stato reclamante lamenti di aver direttamente subito l'illecito. Tali, appunto, sono le condizioni di ammissibilità del reclamo che ho fin qui richiamato, e prima di ogni altra quella dell'esperimento dei rimedi interni. Si spiega infatti che i rimedi in questione debbano essere esauriti dagli invidivui stranieri, sempre che essi siano effettivi e che servano alla riparazione del danno e della lesione subiti, in quanto si presume che il soggetto abbia dovuto o voluto sottoporsi all'ordinamento dello Stato territoriale; ma altrettanto non può presumersi del sovrano straniero: *par in parem non habet jurisdictionem*. A ciò si aggiunge che la proposizione di un reclamo per torto arrecato all'individuo non può in alcun caso prescindere dalla dimostrazione del danno o dalla lesione subita dall'individuo tutelato. Da qui deriva che questa figura di illecito si distingue dall'altra dell'illecito direttamente commesso nei confronti dello Stato sovrano (*direct injury*), la quale ultima si concreta solo che vi sia la minaccia o la turbativa della lesione degli interessi o dei diritti di uno Stato. Per stabilire poi, in concreto, quale siano il danno o la lesione scaturenti dall'illecito, si dovrà aver riguardo

al contenuto di quella certa regola internazionale, la cui violazione è allegata dallo Stato reclamante; il reclamo dovrà pure indicare in quale delle forme consentite dal diritto internazionale, il danno e la lesione lamentati dall'individuo debbano essere riparati.

Se si ritenesse di poter prescindere dal requisito del danno o della lesione del soggetto privato, si dovrebbe, del resto, negare ogni fondamento a tutto il sistema delle regole che governano la proposizione dei reclami internazionali: il requisito della *nationality of the claim* si fonda, infatti, sul concetto secondo cui ogni lesione della sfera dell'individuo equivale a una lesione della sfera dello Stato; la stessa regola dell'esaurimento dei rimedi interni, presuppone che l'individuo abbia subito un danno che gli derivi dalla violazione di una posizione giuridica vantaggiosa della quale egli dovrebbe godere in base all'ordinamento dello Stato territoriale e che possa essere riparato, nei modi previsti da tale ordinamento, senza che si verifichi quel diniego o ritardo della giustizia (*delay or denial of justice*) che, dal punto di vista del diritto internazionale, costituisce una autonoma figura di illecito.

2. – Questo è il quadro essenziale dei principi entro il quale deve essere contenuta l'indagine del caso di specie.

Occorre ora vedere come, nell'applicazione di tali principi, possa venire in rilievo la circostanza che l'individuo, per conto del quale verrebbe proposto il reclamo, sia azionista di una società italiana. Tale elemento della fattispecie può sollevare qualche perplessità quanto all'ammissibilità del reclamo. Gli studiosi ed i collegi arbitrali continuano, invero, a dibattere il problema se la tutela degli azionisti della società commerciale debba, o meno, rimanere preclusa dal fatto che si tratti di individui organizzati in entità giuridiche, le quali, nella maggior parte degli ordinamenti statuali, hanno personalità e nazionalità propria, con il risultato che i soci possano essere cittadini di più Stati e che alla società può essere attribuita la nazionalità di uno Stato diverso dallo Stato o dagli Stati ai quali appartengono gli azionisti. Per ammettere la tutela internazionale dell'azionista senza riserve occorrerebbe, dunque, lacerare il velo della personalità della società. Questa soluzione è stata infatti patrocinata innanzi alla Corte permanente dell'Aja, da un autorevole giurista italiano, lo Scialoia, il quale osservava, nel caso Canevaro, che il diritto del governo italiano a proteggere i propri cittadini non è limitato nè escluso dal carattere straniero delle società, perché « se i diritti della società come persona giuridica sono distinti da quelli degli azionisti, in realtà essi si esercitano soltanto negli interessi dei soci ». Altri rilevano, però, che la tutela internazionale del singolo socio può dar luogo a seri inconvenienti e così, prima di tutto, ai conflitti che sorgerebbero le volte in cui intervenissero diversi Stati, ciascuno per tutelare internazionalmente propri cittadini, azionisti di una medesima società. Lo Stato autore dell'illecito si troverebbe, in tal caso, a rispondere nei confronti di altrettanti soggetti quanti sono gli Stati che propongono reclamo. Se, poi, gli azionisti della società straniera fossero, a loro volta, non già individui, ma società, magari di diversa nazionalità, potrebbe addirittura accadere che venissero a concorrere ed a cumularsi i reclami proposti, sempre contro il medesimo Stato, rispettivamente per conto della società e dei singoli azionisti. Di fronte a simili prospettive, la giurisprudenza arbitrale ha dovuto procedere con molta cautela, ispirandosi largamente a considerazioni di equità, per trovare il giusto punto di conciliazione tra la esigenza di non comprimere indebitamente il diritto di protezione diplomatica di ciascuno Stato, da un canto, e di non dilatare, dall'altro, oltre ragionevoli limiti, la responsabilità internazionale degli Stati in cui operino società commerciali costituite da individui di varia cittadinanza.

Opportunamente, dunque, il giudice Bagge, arbitro in alcune importanti controversie connesse alla tutela degli azionisti, scrive a questo riguardo che le regole dell'intervento sono di natura semiguridica e semipolitica, auspicando che esse non vengano applicate con criteri tanto rigorosi e inflessibili da pregiudicare, piuttosto che agevolare, i buoni rapporti tra gli Stati sovrani. I precedenti giurisprudenziali che mi sembrano rilevanti sono, peraltro, pochi e riguardano prevalentemente reclami presentati dagli Stati Uniti e dalla Gran Bretagna. Questi due Stati si sono infatti trovati a dover tutelare con una certa frequenza gli interessi patrimoniali dei propri sudditi all'estero e degli azionisti in particolare: la tutela è stata esercitata in un primo tempo, mediante l'interposizione di buoni uffici e senza pretesa d'intervento ufficiale, e dal *Delagoya Bay Case* (1889) in poi (MOORE, Digest of International Law, 1906, vol. VI) con l'instaurazione di formali reclami. Ritengo di poter enucleare dalla decisione di questo caso e dalla suc-

cessiva giurisprudenza alcuni essenzialissimi principi che, per quanto mi risulta, vengono oggi comunemente accolti, e che in ogni caso mi paiono i più rispondenti a quelle esigenze *juris aequi* dalle quali il diritto dei reclami internazionali non può, specialmente in questa delicata materia, divergere.

a) La società, come ente distinto dai singoli soci deve avere la nazionalità dello Stato contro il quale si reclama. Ciò serve ad escludere che la società, in quanto tale, possa essere tutelata dallo Stato che interviene per proteggere gli azionisti, di guisa che questi ultimi, se privati dell'assistenza dello Stato di cui sono cittadini, rimarrebbero spogli di qualsiasi possibile tutela *internazionale* (*Delagoa Bay Case*, cit.; *Tlahualilo Case*, in HACKWORT, Digest of International Law, Vol. V, 1943).

b) La società deve essere estinta o versare in uno stato di liquidazione o di fallimento e tale situazione deve essere, beninteso, imputabile ad un illecito internazionale (BAASCH AND ROMER; *Kunhardt Case in Ralstin*, Venezuelan Arbitrations of 1903 (1904); *El Triunfo Case*, in MOORE, Digest of International Law (1906), Vol. VI; *Romano-Americana Case*, in HACKWORTH, Digest, cit.).

La *ratio* di questo requisito è duplice. Prima di tutto si vuole che la società sia incapace di far valere la lesione dei propri diritti da parte dello Stato territoriale altrimenti che per mezzo di un liquidatore o curatore e che, dunque, i singoli azionisti si trovino nell'impossibilità di fare affidamento sul normale funzionamento degli organi sociali, per la tutela di ogni eventuale lesione dei loro diritti che discenda, mediatamente, da un torto inflitto alla società. Anche in questo caso, dunque, tutela internazionale e protezione diplomatica sono le sole possibili vie per tutelare i diritti del socio e per ottenere la riparazione del danno da esso subito. Inoltre, è da considerare che, ove la società sia sciolta o estinta, o versi in uno stato equivalente allo scioglimento o all'estinzione, il diritto degli azionisti cessa di atteggiarsi semplicemente come un diritto di partecipare ai profitti della società e si converte in un diritto alla ripartizione dell'eventuale attivo costituito dal patrimonio sociale netto. Anche in sede di applicazione di questi principi da parte della giurisprudenza internazionale, si è discusso in ordine a quali diritti possano ritenersi immediatamente e direttamente spettanti all'azionista come tale: mentre si esclude che in questa categoria di posizioni soggettive dell'azionista possano rientrare i diritti conferiti all'azionista da norme o da principi regolanti l'organizzazione della società o diretti a rimediare al *mismanagement*, il diritto ad ottenere una quota proporzionale alla propria partecipazione sociale in sede di liquidazione costituisce — nella maggior parte degli ordinamenti giuridici nazionali — un diritto soggettivo di carattere patrimoniale (*proprietary right*) immediato o, direttamente spettante all'azionista come singolo.

c) Sempre che si riesca a stabilire che, cessando di operare regolarmente la società, il socio abbia subito un danno derivante dalla lesione dei diritti ad esso attribuiti, lo Stato di cui l'azionista è cittadino potrà intentare reclamo contro lo Stato autore dell'illecito.

Se tutti gli estremi che ho indicato ricorrono nella specie, allora è da ritenere ammissibile la tutela diretta dell'azionista senza tener conto dell'esistenza della società come autonomo soggetto di diritto. Ne seguirà — ed è questa una conseguenza assai importante — che il reclamo non è subordinato all'esaurimento dei rimedi interni, non avendo il socio, in quanto tale, alcun rimedio da esperire all'interno dello Stato territoriale, per ottenere la riparazione del proprio danno. Ai fini dell'ammissibilità del reclamo internazionale, il caso in cui non esistano effettivi rimedi equivale, infatti, a quello in cui i rimedi esistenti siano stati inutilmente esauriti.

Le considerazioni che precedono permettono di inquadrare con sufficiente precisione gli aspetti rilevanti per la soluzione delle questioni che, nella specie, mi sono state sottoposte.

Tenendo infatti presente quanto prima ho avuto modo di osservare in ordine al primo requisito per la proposizione del reclamo da parte dello Stato al quale appartengono gli azionisti — la commissione di un illecito internazionale — si può fare riferimento alla norma dell'articolo 1 dell'accordo integrativo del trattato di commercio e navigazione del 2 febbraio 1948, stipulato a Washington il 26 settembre 1951, ed in particolare alla previsione della illiceità di ogni misura arbitraria o discriminativa che abbia come conseguenza di impedire l'effettivo controllo e l'am-

ministrazione delle imprese stabilite o acquistate da cittadini o persone giudiriche di una delle parti contraenti, ovvero di pregiudicare i loro diritti ed interessi relativamente ad imprese ed investimenti (specificamente, anche partecipazioni azionarie). L'impegno internazionale delle parti contraenti di non adottare misure discriminative od arbitrarie nei confronti dei cittadini dell'altro Stato è diretto anche a consentire la possibilità di ottenere, a condizioni normali, capitali ed altri beni straordinari occorrenti per lo sviluppo economico delle iniziative derivanti dagli investimenti dei cittadini delle due parti, oltre che ad ottenere la concessione delle speciali agevolazioni in materia fiscale, doganale e tariffaria (alle quali poi si riferisce l'art. 5 dello stesso accordo, con specifico riguardo alle provvidenze stabilite dalla legislazione italiana, in vigore al momento dell'entrata in vigore del Trattato o successiva) per gli investimenti ai fini dell'industrializzazione del Mezzogiorno.

Individuata così la norma internazionale, alla stregua della quale deve essere valutato il comportamento del governo italiano, per stabilire l'eventuale sussistenza di un illecito internazionale — e personalmente non ritengo possibile, nè utile, far riferimento a questo fine ad altre norme, consuetudinarie o pattizie — il problema che si pone è quello di accertare se la situazione di fatto che mi viene rappresentata dalla Raytheon Company possa in concreto offrire gli elementi necessari per ritenere che siano stati violati gli obblighi scaturenti da detta norma.

Nel quadro delle iniziative, direttamente o indirettamente riferibili al governo italiano, dei provvedimenti formali e di tutte le altre circostanze che hanno determinato o concorso a determinare lo stato di estremo disagio in cui sono venuti a trovarsi gli azionisti americani della Raytheon–Elsi S.p.A., un fatto emerge decisamente e merita di essere preso in particolare considerazione. In conseguenza di tutti gli avvenimenti, che risultano da vari atti sociali e che si trovano anche esposti nella relazione presentata al giudice delegato dal curatore del fallimento della Raytheon–Elsi S.p.A. in data 28 ottobre 1968, la Raytheon–Elsi S.p.A. — dopo che gli azionisti avevano a varie riprese, sia mediante il conferimento di ingenti somme a capitale di rischio, sia con finanziamenti diretti o da essi garantiti alla Società, dovuto far fronte alle perdite create dalla difficoltà di ambientamento dello stabilimento — era stata costretta ad adottare un programma di riorganizzazione delle sue strutture produttive, che aveva sortito favorevoli effetti, consentendo la riduzione delle perdite di gestione.

Tale programma — destinato ad assicurare, con l'aumento della produttività dell'azienda sociale, una maggiore competitività dei prodotti di questa — comportava sacrifici per una parte delle maestranze impiegate; sacrifici che, certo, non incontravano il favore dei sindacati.

Altre difficoltà, derivanti dalla situazione di alcune linee di prodotti dell'azienda, inducevano gli organi di gestione della Raytheon–Elsi S.p.A. a decidere la cessazione delle attività industriali, e poi anche delle attività commerciali, e a proporre agli azionisti la liquidazione della Società, al fine di procedere ad un ordinato ed oculato realizzo di tutte le attività di quest'ultima. In conseguenza di questa determinazione degli organi di gestione sociale, che venne resa pubblica, il Sindaco di Palermo, nella sua qualità di ufficiale del governo, e con la tacita approvazione del governo centrale, con suo provvedimento del 1° aprile 1968, ordinava la requisizione dello stabilimento e di tutte le relative attrezzature per la durata di mesi 6, successivamente prorogato.

Contro questo provvedimento, la Raytheon–Elsi S.p.A. reagiva prontamente con i mezzi consentiti dall'ordinamento italiano. Ma intanto, essendo stata ad essa sottratta la disponibilità di tutti i beni costituenti il suo patrimonio aziendale, veniva irrimediabilmente pregiudicata quella ordinata liquidazione delle attività sociali, alla quale la Raytheon–Elsi S.p.A. intendeva procedere; ed in conseguenza quest'ultima, per il sopravvenire di massicce scadenze di debiti, che essa non poteva pagare per la mancanza di liquidità così determinatasi, era costretta a richiedere la dichiarazione di fallimento. Il fallimento veniva dichiarato con sentenza 7–16 maggio 1968.

Che tale provvedimento di requisizione sia illegittimo è stato riconosciuto dal Prefetto di Palermo nell'esercizio del suo potere di controllo sugli atti del Sindaco quale ufficiale di governo. Il Prefetto ha dato atto che la situazione di dissesto, alla quale è seguita la dichiarazione di fallimento della Società, è diretta conseguenza del fatto che il complesso è stato sottratto alla disponibilità del privato per l'intervento dell'autorità governativa.

Comunque, ai fini che qui ci interessano, non pare necessario indagare se sussistano gli estremi di una illegittimità del provvedimento del Sindaco sulla base dell'ordinamento interno

italiano, perché questa è questione che interessa, ormai, l'ufficio fallimentare (essendo in Italia esclusivamente demandato al curatore della società fallita il potere di promuovere o resistere a tutte le azioni legali in base alle quali è possibile stabilire in via definitiva la contrarietà di questo provvedimento alle norme di diritto interno).

Posto che alla Società è ormai sottratta ogni possibilità di iniziativa per la tutela dei diritti che specificamente le competono, dato lo stato di fallimento in cui essa versa, si tratta, invece, di vedere se gli azionisti abbiano subito una qualche lesione dei loro diritti come risultato di un comportamento dello Stato italiano, ove questo risulti contrario agli obblighi internazionalmente assunti dall'Italia secondo le specifiche previsioni del trattato di amicizia. Non pare dubbio che il provvedimento del Sindaco di Palermo ha impedito, in primo luogo, l'instaurazione e lo svolgimento di quel procedimento di liquidazione delle attività patrimoniali della Raytheon-Elsi S.p.A., a conclusione del quale si sarebbe potuto stabilire se gli azionisti, dopo il pagamento dei debiti sociali, avrebbero potuto ottenere il rimborso, in tutto od in parte, dei loro conferimenti ed eventualmente l'attribuzione di una quota — proporzionale al loro conferimento — del residuo attivo netto sociale.

A prescindere, quindi, dal diretto nesso causale che esiste fra la requisizione e lo stato di dissesto, culminato nel fallimento della Società (a danno dei creditori sociali, nel cui collettivo ed obiettivo interesse la curatela è abilitata a prendere i più opportuni rimedi), il comportamento dell'organo dello Stato italiano ha immediatamente e definitivamente impedito ogni possibilità di provvedere alla liquidazione dell'attivo sociale, non solo mediante l'alienazione, secondo i criteri di diretta ed immediata convenienza per la Società, dei beni che a questi sono stati sottratti, ma anche mediante tutti gli opportuni accordi che quest'ultima avrebbe potuto raggiungere con i creditori sociali, per i quali in effetti erano in corso avanzate trattative, e che avrebbero anche consentito una possibilità di recupero, sia pure parziale, delle ingenti somme che gli azionisti avevano impegnato nell'affare.

Ora, l'aver reso impossibile la liquidazione della Società e le attività che normalmente conducono al realizzo dei beni sociali, ha inciso direttamente su un diritto, proprio e specifico, degli azionisti. Ed il comportamento dello Stato italiano che ha determinato questa situazione pregiudizievole per i diritti e gli interessi degli azionisti americani e per la sorte degli investimenti da essi fatti sotto forma di partecipazioni azionarie, è certamente contrario non solo all'espressa previsione della norma internazionale sopra richiamata, ma anche alla *ratio* di quest'ultima, diretta ad assicurare l'impegno ad un effettivo ed efficace riconoscimento delle esigenze di tutela di tali diritti e interessi. Il comportamento dello Stato assume carattere arbitrario e discriminatorio, infatti, in relazione a tutti quei principi di diritto internazionale e soprattutto al principio della buona fede, che ci offrono il costante criterio interpretativo dei trattati: è chiaro che le espressioni arbitrario o discriminatorio, usate nel Trattato, possono anche non coincidere con la nozione di illegittimità — soprattutto se questa venga riferita al significato che comunemente ad essa si attribuisce nella giurisprudenza degli ordinamenti statuali — nel senso che arbitrario o anche discriminatorio può essere un comportamento formalmente non illegittimo ma pur sempre contrario alla regola internazionale. Al limite, infatti, potrebbe ben esservi un comportamento o un atto dello Stato sottratto ad ogni forma di controllo o di sindacato, secondo i parametri del diritto interno, perché correttamente si può definire arbitrario un provvedimento per il solo fatto che supera i limiti di quella essenzialissima ragionevolezza e buona fede (che rileva ai fini della applicazione del Trattato), ancorché non si verifichi tecnicamente abuso o straripamento nell'esercizio dei poteri latamente discrezionali dell'attività pubblica. Tanto più opportuna è questa precisazione in quanto, nella specie, l'arbitrarietà del provvedimento del Sindaco di Palermo come ufficiale di governo è solo la nota più decisa di quel quadro, al quale prima accennavo e in cui si compongono vari altri fatti, direttamente o indirettamente imputabili allo Stato italiano. Questi fatti, che già di per sè isolatamente presi, rimangono indubbiamente sintomatici dell'inclinazione verso un trattamento, se non ostile, certamente non favorevole verso gli azionisti americani della Raytheon–Elsi S.p.A., assumono nel loro complesso decisa rilevanza al fine di esprimere un giudizio sulla contrarietà del comportamento italiano agli obblighi del Trattato.

Fra i fatti che mi vengono segnalati vi sono un pesante intervento del Presidente della Regione, prima della dichiarazione di fallimento della Società, diretto apertamente ad ostacolare il programma di liquidazione, divisato dalla Società; la grande pubblicità data dal governo ita-

liano attraverso la radio e la televisione all'intento di una Società del gruppo IRI, sotto il controllo dello Stato, di procedere al rilievo dell'impianto, con l'effetto di scoraggiare ogni eventuale acquirente privato e rendere impossibile quell'acquisto che esso ha poi effettuato ad un prezzo di gran lunga inferiore al prezzo di stima; il comportamento delle banche creditizie dell'IRI nei confronti degli azionisti americani, con l'intentare vessatorie azioni legali presso le corti italiane, al fine di rendere onerosa la situazione di questi ultimi.

Da tutti questi elementi io credo che si possa trarre il fondato convincimento dell'arbitrarietà del comportamento del governo italiano, con la conseguenza che sussiste l'illecito internazionale.

Come prima ho precisato, occorre però, al fine di legittimare la proposizione di un reclamo, che concorrano altri requisiti; ma nel nostro caso non si può certo dubitare che essi sussistano.

Infatti, gli azionisti sono cittadini americani: è dunque soddisfatto il requisito della *nationality* del reclamo. Essi hanno poi stabilito, in conseguenza del loro interesse e degli investimenti in una società italiana, un *genuine link* con lo Stato territoriale.

La Società ha, peraltro, indubbiamente, la nazionalità italiana; appartenendo la Società allo Stato autore dell'illecito, ricorre un altro degli estremi perché il singolo azionista possa essere tutelato dallo Stato di cui è cittadino. La Società versa per di più in uno stato di fallimento che è, *inter alia*, diretta conseguenza del provvedimento di requisizione. L'esistenza del fallimento impedisce ogni iniziativa diretta degli organi sociali al fine di ottenere che la società sia reintegrata nella situazione nella quale essa si sarebbe trovata se non fosse intervenuto l'illecito. Il che — sulla base dei principi convalidati dalla giurisprudenza internazionalistica — costituisce un altro elemento che rende possibile la tutela immediata dei soci da parte dello Stato di cui essi sono cittadini. Non si pone, quindi, il problema dell'esaurimento dei rimedi interni, che infatti, in questa situazione, non sarebbero direttamente esperibili dagli azionisti.

Questi ultimi hanno subito una lesione specifica del loro interesse perché il comportamento illecito dello Stato ha reso impossibile la liquidazione. Tale comportamento è di per sè astrattamente idoneo a causare un danno, anche se la quantificazione concreta di questo danno è argomento che non forma oggetto del quesito che mi è stato posto.

Per le ragioni svolte sopra, ritengo, allora, di dover concludere che, nella situazione della specie, appaiono soddisfatti tutti i requisiti perché i soci cittadini statunitensi della Raytheon-Elsi S.p.A. vengano tutelati internazionalmente, senza che vi siano rimedi interni da esperire prima della proposizione di un eventuale reclamo contro il governo italiano.

Prof. ANTONIO LA PERGOLA
LL.M. (Harvard)

ANNEX 4

LETTER FROM AVV. GIUSEPPE BISCONTI STUDIO LEGALE BISCONTI, ROME, TO RAYTHEON COMPANY

Dated 6 Novembre 1971

Gentlemen:

You have requested an opinion as to what remedies are available under Italian law to the shareholders of Raytheon Elsi S.p.A. (hereinafter referred to as « ELSI ») in relation to the damages suffered by said shareholders as a consequence of the requisition by the Mayor of Palermo of ELSI's assets on April 2, 1968 and of subsequent events.

I have acted as Italian counsel to Raytheon Company, a shareholder in ELSI, in relation to various matters since 1962. I have also acted as Italian counsel to Raytheon Company in relation to ELSI matters continuously since March 1968.

As such counsel, I am fully familiar with the events concerning ELSI that occurred since the resolution of ELSI's Board of Directors of March 16, 1968 to cease production and undertake an orderly liquidation of ELSI and specifically with the events represented by the aforementioned requisition, the subsequent action by the Italian Government, the bankruptcy of ELSI and its developments to date and the pending litigation instituted by the Italian creditor banks against Raytheon Company. Under Italian law the following remedies are available:

1. Remedies against the requisition. The Mayor of Palermo in making the requisition acted as an official of the National Government. Under Italian law, an appeal against the requisition order can be taken to the Prefect. Such appeal was promptly taken by ELSI. As an effect of the bankruptcy of ELSI which occurred subsequent to and as a consequence of the requisition of ELSI's assets by the Mayor, the right to pursue the appeal vested solely in the curator of ELSI's bankruptcy. The remedy as such was a remedy available to ELSI as a company and prior to the bankruptcy there was under Italian law no remedy available to the shareholders of ELSI. The requisition was made by the Mayor acting as an official of the National Government and there is no remedy under Italian law against the National Government other than the aforementioned appeal.

2. Under Italian law as an effect of the bankruptcy ELSI and its management were deprived of the right to take any action in ELSI's name and such right has vested in the curator. Under Italianl aw the curator exercises any such rights in the interests of ELSI's creditors and not of the shareholders. Subsequent to the bankruptcy of the company, there is no possibility under Italian law for the company itself nor for the shareholders to exercise any rights or action which the company might have had prior to the bankruptcy. Following the decision by the Prefect of Palermo of August 22, 1969 which ruled that the requisition by the Mayor was illegal, the curator of ELSI brought suit against the Italian Government and the Mayor of Palermo to recover damages on behalf of ELSI's creditors. No such action would be available under Italian law to ELSI's shareholders.

3. As stated above, the shareholders of ELSI have no direct action against the Italian Government under Italian law in relation to the damages suffered by them as a consequence of the requisition and subsequent event. In my opinion, the shareholders would not have a cause of action even under Article 2043 of the Italian Civil Code, because: (*a*) the requisition was direct-

ed against ELSI and not the shareholders even though the latter eventually suffered damages; and (*b*) Italian law provides for a specific remedy against the requisition which is the aforementioned appeal to the Prefect. I know of no judicial decision in which Article 2043 of the Italian Civil Code was applied in similar circumstances. It is my opinion that the shareholders of ELSI would have no remedy or no effective remedy under Article 2043 of the Italian Civil Code.

4. By way of conclusion, there is no remedy under Italian law available to the shareholders of ELSI in relation to the damage suffered by them as a consequence of the requisition by the Mayor of Palermo and the subsequent events. In my opinion there can be no question as to whether the shareholders have exhausted all (nonexistent) local remedies.

Respectfully submitted

Studio legale Bisconti
Avv. Giuseppe Bisconti

ANNEX 5

ELSI - ELETTRONICA SICULA S.p.A.

BY-LAWS (ARTICLES OF INCORPORATION) APPROVED BY THE SHAREHOLDERS EXTRAORDINARY MEETING

Of 19 July 1961

ARTICLES OF INCORPORATION

Consolidation Act approved by the Special Meeting of July 19, 1961, ratified by the Civil Court of Palermo by decree of October 28, 1961, amended in accordance with the resolution of the Special Meeting of October 31, 1961

ARTICLE 17

The Special Meeting at first convening passes valid resolutions with the presence and the favorable vote of more than half of the capital stock [of the Company].

At second convening, the Special Meeting passes resolutions with the favorable vote of as many members as would represent more than a third of the capital stock.

However, both at first and at second convening, the favorable vote of as many members as would represent at least 90 percent of the capital stock is necessary to pass resolutions that concern changing the Company's purpose, changing the Company's legal nature [form], dissolving the Company ahead of time, moving the Company's main office abroad, or the takeover or consolidation of the Company by or with other companies.

ELSI – ELETTRONICA SICULA S.p.A.

Sede Sociale: Palermo Via Villagrazia, 79

Capitala Sociale L: 2.000.000.000

STATUTO SOCIALE

Testo Unico approvato dall'Assemblea straordinaria del 19 *luglio* 1961, *omologato dal Tribunale Civile di Palermo con decreto del* 28 *ottobre* 1961, *modificato secondo la delibera dell'Assemblea Straordinaria del* 31 *ottobre* 1961

Le deliberazioni possono essere prese per alzata di mano o, quando si tratta di nomine per le cariche sociali, per acclamazione, a meno che un diverso sistema di votazione venga richiesto da tanti azionisti che rappresentino non meno di un quarto delle azioni presenti in Assemblea.

Articolo 16

L'Assemblea ordinaria in prima convocazione delibera validamente a maggioranza assoluta di voti purché siano intervenuti tanti azionisti che rappresentino in proprio o per delega almeno la metà del capitale sociale.

Nel computo si terrà conto delle azioni costituenti la cauzione degli Amministratori anche quando i medesimi, giusto l'art. 2373 del Codice Civile, devono astenersi dal voto.

In seconda convocazione l'Assemblea ordinaria delibera sugli oggetti che avrebbero dovuto essere trattati nella prima, qualunque sia la parte di capitale rappresentata dai soci intervenuti.

Articolo 17

L'Assemblea straordinaria in prima convocazione delibera validamente con la presenza e con il voto favorevole di più della metà del capitale sociale.

In seconda convocazione l'Assemblea straordinaria delibera con il voto favorevole di tanti soci che rappresentino più del terzo del capitale sociale.

Tuttavia sia in prima che in seconda convocazione è necessario il voto favorevole di tanti soci che rappresentino almeno il novanta per cento del capitale azionario per le deliberazioni concernenti il cambiamento dell'oggetto sociale, la trasformazione della Società, lo scioglimento anticipato di questa, il trasferimento della sede sociale all'estero, l'assorbimento o il consolidamento della Società da o con altre Società.

Articolo 18

La gestione della Società è controllata da un Collegio Sindacale composto da tre o cinque Sindaci effettivi e due supplenti.

I Sindaci durano in carica tre anni.

L'Assemblea ne nomina il Presidente e ne fissa l'emolumento.

ARTICOLO 19

L'esercizio sociale si chiude al 31 dicembre di ogni anno.

Il Consiglio provvede entro i termini sotto l'osservanza delle disposizioni di legge alla compilazione dell'inventario e del bilancio corredandoli con una relazione sull'andamento della gestione sociale e sottoponendoli all'approvazione dell'Assemblea dei Soci.

ARTICOLO 20

Sugli utili che risultano dal bilancio, approvato dall'Assemblea, deduzione fatta di tutte le spese di amministrazione e di esercizio, si preleva il 5 % sino a costituire il fondo di riserva legale.

L'utile residuato, dopo averne prelevato il 4 % a favore del Consiglio di Amministrazione, si ripartisce alle azioni, salvo diversa deliberazione dell'Assemblea.

REJOINDER

SUBMITTED BY

ITALY

(CASE CONCERNING ELETTRONICA SICULA S.P.A. – ELSI)

18 JULY 1988

INTRODUCTION

1. *The Admissibility of the application and the Applicant's allegations on the merits: some introductory remarks.*

First of all, the Italian Government reiterates its objection to the admissibility of the application for the reasons set forth in Part III of the Counter-Memorial (1) and further developed in Part III of this Rejoinder.

With regard to the facts, it may be useful to summarize at the outset the contentions made in the Applicant's Reply, which contains several discrepancies with respect to the Memorial.

The unlawful behaviour attributed by the Applicant to the Italian Government allegedly consists of four welldefined acts or omissions, namely: the requisition of the ELSI plant by decree of the Mayor of Palermo acting in his capacity of government official; the Prefect's delay in rendering a decision on the appeal; the failure of public autohorities to protect ELSI's property from the factory workers' occupation; the interference in the bankruptcy proceedings in order to discourage private purchasers and allow IRI to buy up the plant at a price well below its fair market value (2).

All the above-mentioned behaviour is alleged to be the result of a diabolical plot hatched by the Italian public authorities at many different levels (central government, or at least several ministries, regional and local officials, State-owned companies, bankruptcy institutions, etc.) all done to take over a « technological jewel », i.e. ELSI, on the cheap.

This plot allegedly led to the bankruptcy of ELSI, which would otherwise have been wound up in an « orderly liquidation ». It also meant that in the bankruptcy proceedings the realized value of the company's assets was much smaller than their true value so that Raytheon and Machlett suffered damage to the extent of the difference between the actual amount received and what would have been obtained if ELSI had been sold as a « going concern », or at least on the base of its quick-sale value, in the frame of an orderly liquidation (3). To be added to this are the legal costs incurred and the compound interest on both items.

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(1) Counter-Memorial submitted by Italy (Case concerning Elettronica Sicula S.p.A. – ELSI), hereinafter referred to as « The Counter-Memorial ».

(2) The Memorial submitted by the United States of America (Case concerning Elettronica Sicula S.p.A. – ELSI), (hereinafter referred to as « Memorial »), also contained (p. 22 expecially at note 18) a further accusation against the Italian authorities: publicly-owned banks claimed that Raytheon, as « dominant partner », should pay ELSI's unsecured debts.

This reference has been dropped in the Reply submitted by the United States of America on 18 March 1988, (hereinafter referred to as « Reply »), (see p. 128) and it should be acknowledged that the Applicant no longer intends to pursue a claim on such point and the arguments supporting it. United States Government counsel has apparently realized that it would be absolutely untenable and contradictory to claim that the publicly-owned Italian banks would go against their own interests and ruin someone who owed them money, thus losing all their unsecured loans. As chance would have it, the loss incurred by the banks would have been equivalent in economic terms (about lire 4,000 million) to the profit made by IRI according to the charges made by the Applicant (Memorial, Annex 13, schedule E).

(3) The quantification of the alleged damage has increased with time. While the Claim of the Raytheon company and Machlett Laboratories, incorporated against the Government of Italy in connection with Raytheon-Elsi S.p.A. (hereinafter referred to as the « 1974 Claim »), contained in Counter-Memorial, Unnumbered Documents, Vol. I, II, III, refers exclusively to the quick-sale value, and the Memorial to the book value and, in the second instance, to the quick-sale value, in the Reply the Applicant mentions a higher value, justifying the increase by the profits a « going concern » would expect to make. These ever increasing contentions ring particularly strange with reference to a company whose history is marked solely by losses growing from year to year.

As set out above, according to the United States Government the facts represent a series of violations of the 1948 Treaty of Friendship, Commerce and Navigation between the United States and Italy and of the 1951 Supplementary Agreement and thereby give the United States Government title to reparation of the losses allegedly incurred.

2. *The facts represented by the Respondent.*

The Respondent has done more than merely indicate the gaps and inconsistencies in the version of the facts presented by the Applicant and its patently tendentious nature. The Italian Government has also attempted to clarify the order in which the facts actually took place.

For instance, with regard to the requisition decree, the Respondent illustrated its legal basis under Italian law and pointed out that its aim was not to deprive ELSI of the ownership of its plant but merely to regulate the use of the plant for a period of six months (4). As far as the « orderly liquidation » is concerned, an outline has been given of the content of the decision taken by the ELSI board of directors on 16 March 1968 (i.e. two weeks before the actual requisition (5), and confirmed by the shareholders' meeting of 28 March (6), i.e. immediate cessation of production, of all commercial activities and of employment relations as from 29 March (7). Moreover, the Counter-Memorial examined expectable results of an « orderly liquidation » taking into account the precarious economic and technical conditions of ELSI (8). Precise figures have been given to show how the chance of avoiding bankruptcy implied the need to get the banks to which ELSI owed money to accept the recovery of only 50 % of their credits (9). Therefore, the fact that ELSI filed a petition for bankruptcy on 26 April 1968 was an inevitable consequence of its state of insolvency and not of the requisition decree. This was attested by the Palermo Court of Appeal in its decision of 23 November 1973 (10).

With reference to the alleged manipulation of the bankruptcy procedure by the Respondent, it has been pointed out that, in Italy, this type of proceeding is carried out by a receiver appointed by the Court, who acts in cooperation with the presiding bankruptcy judge and also consults a committee composed of the creditors. All this contributes to ensuring that the proceeding is objective. Furthermore, the Counter-Memorial also anlaysed the way in which the bankruptcy auctions were organized and the prices fixed for the sale of the plant and equipment(11). The conclusion was reached that the price paid by the purchaser was quite reasonable (12), even when compared with the estimated quick-sale value stated in the 1974 Claim by the Raytheon and Machlett companies.

As to the occupation of the factory by the striking work force, it has been pointed out that it began in early March 1968, when the plant was under exclusive ELSI control, and not after the requisition. Moreover, the occupation did not prevent the winding-up operations from being carried out regularly (13).

As to the delay with which the Prefect of Palermo rendered the decision upholding the ELSI appeal against the requisition decree (22 August 1969), documentary evidence has been produced to show that the average length of such procedures is 12 months, which is not substantially less than the time actually taken in that case (16 months). It has also been pointed out that each petitioner has the right to make a special request that the decision concerning him be expedited. In the ELSI case, this was done only on 9 July 1969 (14).

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(4) Counter-Memorial, p. 83.
(5) Memorial, Annex 31.
(6) Memorial, Annex 32.
(7) Counter-Memorial, p. 81.
(8) Counter-Memorial, p. 77-78 and 80 *et seq.*
(9) Counter-Memorial, p. 82.
(10) Memorial, Annex 81; see also Counter-Memorial, p. 87.
(11) Counter-Memorial, pp. 88, 89-90.
(12) Counter-Memorial, p. 90.
(13) Counter-Memorial, p. 86.
(14) Counter-Memorial, p. 87.

One further aspect has been stessed: starting from 30 September 1968 (i.e. from the day on which the requisition decree expired), ELSI lost control of the factory, as a result not of the requisition decree, but of bankruptcy. The delay in the Prefect's decision was therefore not detrimental in any way. Lastly, with regard to the Applicant's assertion that no adequate compensation was paid, it has been responded that, although the decree of the Mayor of Palermo acknowledged ELSI's right to such compensation, the actual payment of compensation was postponed pending the appeal to the Prefect of Palermo, and then the upholding of the appeal implied that the right to such compensation was replaced by the right to compensation for damages caused by the requisition. To this effect a sum of money was awarded by Court of Appeal of Palermo in its decision of 23 November 1973, which was confirmed by the Court of Cassation on 26 April 1976 ([15]). The sum was actually paid to the receiver in the ELSI bankruptcy proceeding. Therefore, in the final analysis, it has to be acknowledged that the Respondent fulfilled its obligation to compensate the damage caused by the requisition of the ELSI plant.

3. *The Applicant's failure to provide evidence to justify its claims.*

The Applicant and the Respondent have thus given the Court two widely differing versions of the facts relating to the present case. This means that the dispute between them concerns not only the different interpretation of Treaty provisions but, to an even greater extent, the different statement of the facts to which those legal provisions are to be applied. However, the comparison between the two versions in question cannot be based on the assumption that they have equal weight, and that the Court is called upon simply to establish which of the two parties can prove its arguments more fully and convincingly. This is not the case, because the Applicant, who claims to have been unfairly treated and therefore requests a reparation from the Respondent, must demonstrate that the facts on which its claims are based are true.

We know that, in international cases, it is very often impossible to identify an Applicant and a Respondent since the parties may have concluded a special arbitration agreement. Therefore, it is generally held that the problem of the burden of proof to be shared by the parties cannot be resolved in the same terms as in a case heard before a national court. Nevertheless, it is to be pointed out that, in the present case, which has been brought before the International Court of Justice by a unilateral application, there is an Applicant and there is a Respondent. And as it is true that the Applicant has put forward certain claims, it is equally true that it must prove them.

It is interesting to note in this respect that when the Court has had to deal with a question involving the burden of proof, e.g. the *Corfu Channel case* — a case centered around an unlawful act committed in the territory of the Respondent (Albania) — the Court ruled that the sole fact that this State exerted control over its own territory did not mean that it was obliged to have a knowledge of all unlawful acts committed in such territory ([16]). The judgment declared that the fact of controlling the territory *per se* « neither involves *prima facie* responsibility nor shifts the *burden of proof* » (logically, in the sense of freeing the Applicant from this burden). It is likewise significant that, in an order on the *Minquiers and Ecrehos case*, the Court, after considering the position of the two parties (who were both claiming sovereignty over the same territory), and taking into account two articles of the special agreement concluded by them, stated that « each party has to prove its alleged title *and the facts upon which it relies* » ([17]).

Lastly, it should also be noted that in its judgment of 27 June 1986 in the case between Nicaragua and the United States concerning *Military and Paramilitary Activities in and against Nicaragua* ([18]) the Court considered, among other points, Article 53 of its Statute with respect to the situation in which one of the parties does not appear and the other party requests its claims

([15]) The English text of these decisions can be found in Memorial, Annexes 81 and 82.
([16]) *ICj Reports* 1948, p. 18.
([17]) *ICj Reports* 1953, p. 52.
([18]) *ICj Reports* 1986, p. 14 *et seq.*

to be satisfied ([19]). On that occasion the Court stated that « the Court must attain the same degree of certainty as in any other case that the claim of the Party appearing is sound in law and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence » ([20]). Later in the same decision the Court stated that « it is of course for the party appearing to prove the allegations it makes » ([21]).

In conclusion, therefore, even though both Parties are called upon to prove their respective claims in an international proceeding, it seems unchallengeable that in a suit in which the Applicant complains of being the victim of unlawful acts, of which it accuses the Respondent and for which it requests reparation, while the Respondent denies any beeach of its obligations and merely requests that the application should be rejected, it is up to the Applicant to provide evidence to justify its claims.

4. *In particular, the lack of evidence concerning the causal link between the alleged acts and the alleged losses.*

The nature of the present dispute leads to another important consequence concerning the evidence that the Applicant is obliged to provide. As was said, a series of events involving ELSI occurred in the years 1968 and 1969 for which, according to the Applicant, the Italian Government is responsible. However, although these facts have a chronological sequence, it still has to be proved — and this proof is necessary — that there is a causal link between them: in other words, it still has to be proved that there is any cause–and–effect relationship between them.

In particular, it must be pointed out that the most important circumstances giving rise to damage the Applicant has complained of were a direct consequence of the bankruptcy: the non-availability of the ELSI factory and plant after the requisition period (i.e. after 30 September 1968), the compulsory liquidation of the company's assets and the sale of the plant to the ELTEL company. It is a well–known fact that the bankruptcy proceeding was requested by ELSI. Therefore, the Applicant could attribute the above–mentioned circumstances to the Italian Government only by asserting that the filing for bankruptcy was caused by the requisition. However, this assumption must be supported by evidence, which has not been forthcoming. On the other hand, the Respondent's evidence to the contrary is substantial.

With reference to the general problem of the role of causation in the field of State responsibility, it is interesting to recall the principles adopted in the Draft Convention on the International Responsibility of States for Injuries to Aliens, established by the Harvard Law School in 1961 ([22]). Article 1, paragraph 1, of the Draft stated the following principle: « A State is internationally responsibile for an act or omission which, under international law, is wrongful, is attributable to that State, and causes injury to an alien ». In Article 14, paragraph 3, the concept of causation was defined in the following terms: « An injury is « caused » ... by an act or omission if the loss or detriment suffered by the injured alien is the direct consequence of that act or omission ». Paragraph 4 added: « An injury is not « caused » by an act or omission: (*a*) if there was no reasonable relation between the facts which made the act or omission wrongful and the loss or detriment suffered by the injured alien, or; (*b*) if, in the case of act or omission creating an unreasonable risk of injury, the loss or detriment suffered by the injured alien occurred outside the scope of the risk ».

The restriction of indemnifiable damages to those which are the direct consequence of the wrongful act of a State coincides with the prevailing jurisprudence of international arbitration tribunals. This point will be further elaborated upon when we come to deal with the claim for damages presented by the Applicant. For the time being only two observations will be made: the only direct consequence of the requisition decree of the ELSI plant issued by the Mayor of

([19]) *ICj Reports* 1986, p. 24, para. 18.
([20]) *ICj Reports* 1986, p. 24, para. 29.
([21]) *ICj Reports* 1986, p. 25, para. 30.
([22]) *American Journal of International Law*, Vol. 55, 1961, p. 548 *et seq.*

Palermo on 1 April 1968 was its temporary unavailability to the company to which it belonged. For this reason, the damages granted by the Court of Appeal of Palermo (decision later upheld by the Court of Cassation) were limited to the consequences of this unavailability by its owner calculated as the equivalent of 5 % of the value of the requisition assets. As to the greater losses for which the Applicant is claiming compensation, they actually result from the bankruptcy for which ELSI itself filed a petition. They are only indirectly related to the requisition even if one accepted the Applicant's arguments that the unavailability of the plant was the cause of the insolvency (which is clearly disproved by the fact that ELSI had ceased all commercial activities as a result of the decision of 16 March 1968 of its Board of Directors). The truth is that there is absolutely no relation between the requisition decree and the fact that the company was liquidated for bankruptcy.

5. *The question of attribution of the alleged acts to the Italian State.*

One further remark must be made concerning the way the Applicant has presented the facts concerning this case. We have already pointed out that, in the Draft Convention on the Responsibility of States for Injuries to Aliens, established by the Harvard Law School in 1961, one of the prescribed conditions for a State to be considered responsible for a wrongful international act is that the act or omission in question must be « attributable to that State ». A similar provision is contained in Article 3 of the Draft Articles on the Responsibility of States, the first part of which was provisionally adopted by the International Law Commission in 1980 ([23]). This text also contains detailed provisions regarding what may be termed « acts of State » under international law. While the first category of this kind of acts logically consists of the behaviour of any State organ deemed to be such under the law of the country (Article 5), it is denied that the behaviour of a person or persons not acting on behalf of the State can be considered an « act of State » (Article 11).

The reason for mentioning these two drafts is that the behaviour for which the Applicant considers the Italian Government to be responsible may indeed be partly attributed to the Respondent, but must partly be attributed to others. In fact, it is not denied that both the requisition decree issued by the Mayor of Palermo in his capacity of government official and the decision taken by the Prefect of Palermo on the appeal by ELSI can be attributed to the Italian State. The same cannot be said, however, of the alleged interference in the bankruptcy proceeding, insofar as it occurred through the action of the receiver (who, in fact, represents the creditors and acts in their interest) under the control of the bankruptcy judge. And above all it is denied that one can attribute to the Italian State any decisions taken by an IRI company (ELTEL) or by IRI itself outside the exceptional case of a specific Government directive, as it was clearly shown that the IRI group is legally and effectively independent from the Government. With regard to the latter point, Article 7, paragraph 2, of the Draft Articles provisionally adopted by the International Law Commission considers as an « act of State » the behaviour of the organ of any agency which is not « part of the structure of the State or of a public territorial community », but is « empowered by the internal laws of the State to exercise powers of public authority insofar as the organ has acted in such a capacity in the case in point ». It is easy to show in the present case that the organs of IRI or of companies associated with the IRI group have no powers to act as a public authority under Italian law and therefore have not acted in such a capacity.

The indifference of the Applicant about the existence of a causal relation between the alleged losses and the actions defined as wrongful, and about the limits within which such an action may be attributed to the Italian State is displayed in numerous assertions contained in the Reply. By way of example one may quote the passages contained on page 125, where it is stated that the requisition « prevented Raytheon and Machlett from selling ELSI's assets and thus proceeding

([23]) The English text of the Draft Articles is in the *Yearbook of the International Law Commission*, 1980, II, 2, p. 30 *et seq.*

with the orderly liquidation as planned ». It is added immediately afterwards that, despite the steps taken immediately by the two companies to have the requisition removed, « the Respondent refused to quash the order and indeed told Raytheon that it would continue indefinitely » ([24]). It must be objected that: (*a*) it was not the requisition, having only six months' validity, that prevented the sale of the ELSI plant and the orderly liquidation of the company after 30 September 1968; (*b*) any impediment was due to the bankruptcy requested by ELSI, and it has yet to be proved that the latter was to be a consequence of the requisition; (*c*) it is completely untrue that the Prefect of Palermo refused to quash the requisition decree; indeed, its decision was to quash it; (*d*) it was never intended that the requisition should continue indefinitely: this would have implied a modification of the decree of the Mayor of Palermo fixing the term as 6 months from 1 April 1968, and such a modification was never made; (*e*) the declarations allegedly made by the President of the Sicilian Region on 19–20 April to the effect that the requisition would continue after its normal expiry were clearly made by a non-competent organ, as personal anticipation unwarranted and not confirmed by facts. They cannot be attributed to the Italian Government.

([24]) Reply, p. 125.

PART I

STATEMENT OF FACTS

1. *Summary.*

In addition to the remarks already made in the Counter–Memorial, the following observations, concerning in particular:

(*A*) the requisition;
(*B*) the Prefect's decision;
(*C*) the occupation by the work force;
(*D*) ELSI's situation and IRI's role, are now submitted to the Court.

2. (*A*) *The Requisition. Italian practice concerning the requisition of plants.*

The adoption by the Mayor of Palermo, acting as a government official, of a decree for requisitioning the ELSI factory, which was then overruled by the Prefect, is the only allegation of fact made by the applicant Government. All the other allegations made by the Applicant are merely unproven assertions which may be rejected out of hand.

2.1. It was pointed out in the Counter–Memorial (1), and will be repeated here, that during the period of time under consideration, the requisition of plants by mayors was a common occurrence throughout Italy and was used mainly to protect the jobs and salaries of the employees of companies threatened with closure, so that the companies' financial difficulties would not have a negative effect on employment. Moreover, the requisition of plants was ordered to eliminate the negative effects on the local economy and on law and order deriving from a prolonged suspension of production in the requisitioned plant.

That this was a common practice among Italian mayors at the time during which also the ELSI requisition was decreed, is shown not only by judicial decisions concerning them, as mentioned in the Counter–Memorial (2) and which will be again described in detail in the following pages, but also by the discussions by scholars of the general problem of the mayors' power to requisition industrial plants.

It is no coincidence that an essay by Professor Bigliazzi Geri was published in 1969 which concluded that mayors actually do have the power of requisitioning industrial plants under Article 42 (3) of the Constitution. In the essay, some preliminary considerations concern the requisition decree by the Mayor of Monsummano (issued on 6 February 1964) of a plant, the closing down of which had led to the immediate dismissal of all the workforce. As the author pointed out, « this decree was, as is known, not unprecedented, since there are reported cases of similar measures having been taken by mayors in similar situations » (4).

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(1) Counter–Memorial, p. 84.
(2) Counter–Memorial, p. 84.
(3) Document N. 33.
(4) Lina BIGLIAZZI GERI, Urgente necessità, requisizione d'azienda e potere del sindaco, in *Democrazia e diritto*, 1964, p. 93 *et seq.*

The Mayor of Palermo of the time, Dr. Bevilacqua, stated in his affidavit (5) that the requisition decree of the ELSI plant was in accordance with the policy followed by mayors of many Italian towns at that time in similar circumstances. He also explicitly mentioned the requisition decree by the Mayor of Florence issued shortly earlier with regard to the « Nuovo Pignone » company.

It may be useful to describe the most significant cases in order to show that the Mayor of Palermo conformed to the practice followed by mayors in other parts of Italy, both before and after the period in question.

One typical instance is the *Marzotto case* (6), which gave rise to a complex judicial litigation originating from the requisition of a plant decreed by the Mayor of Pisa on 25 June 1968 in response to the fact that, in view of the serious crisis in the textile sector, activity had been ceased pending structuring.

The underlying reasons for the Mayor's decree are clearly expressed in the decree itself.

At the beginning it is stated that the management of the company had ordered production to be suspended indefinitely in one of its factories employing some 850 workmen and clerical staff. The measure was considered to be « socially unacceptable », to have caused a situation of severe hardship for the Marzotto employees and their families, and to have consequently strongly jeopardized the economy of the town. In view of the fact that the Marzotto plant at Pisa, which had been operating in the wool sector for several decades, employing well-trained specialist personnel, was one of the cornerstones of the economy of the town and the area surrounding it, the decree also pointed out that the suspension of activity would cause irreparable damage to the township, as the difficult general economic situation facing the town would not allow the dismissed Marzotto employees to find employment elsewhere. Furthermore, the various contacts with the management had not led to any positive results and it was not possibile to forecast when the plant might open again. Thus, there was a serious state of public necessity, and urgent and exceptional measures had to be taken in order to avoid the definitive closure of the plant and to preserve the plant and equipment so that production could start again promptly.

A requisition in similar circumstances was decreed by the Mayor of Piteglio on 22 July 1968 concerning the Lima paper mills owned by « Stabilimento toscano carta e affini ». This was taken in order to avert a situation which had much in common with the Marzotto case.

It is of great interest to read the grounds on which the requisition decree was issued, especially in view of the emphasis placed by the Mayor on the principle of the « social function » of ownership (Articles 41, paragraph 2, 42, paragraph 2, of the Constitution) (7). He described as « antisocial » the behaviour of the company, which he expressly defined as « socially unacceptable ». The said principle was also indeed to explain the requirement of « urgent need ». In this particular case, this need was identified as the serious hardship and irreparable damage the owners' attitude would cause to the employees concerned and consequently to the whole township. The terms « *public* interest » or « *public* necessity » (in Article 7 of the Law N. 2248 of 1865: (8) « serious and urgent public necessity », or in Article 834 of the Civil Code (9), with reference to expropriation, « in the public interest ») were given the broad meaning of « general interest ». Therefore, this was not intended as referring to the interest of the State or of public agencies, but also to that of a wider category of subjects, such as the employees and their families and, by extension, the entire township.

Equally typical is the case of S.p.A. Torrington of Genoa, an associate of the international Torrington group, which manufactured needles for the textile industry.

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(5) Affidavit of Dr. Bevilacqua, Document N. 2. That this was not an exceptional measure and that many other such urgent measures were taken by Italian mayors in similar circumstances is also confirmed by Dr. Ravalli, the Prefect of Palermo at the time of the events in question, in his Affidavit, Document N. 8.

(6) For an accurate reconstruction of the dispute, see L. BIGLIAZZI GERI, L'« affare Marzotto », in *Riv. giur. lav.*, 1968, I, p. 415 *et seq.* For the text of the Supreme Court decision see Counter-Memorial, Document N. 23.

(7) Document N. 33.

(8) Memorial, Annex 34.

(9) Document N. 16.

The Torrington group came to Italy in October 1958 when it purchased the Aghi Zebra San Giorgio plant, which employed some 150 persons. The number of employees subsequently increased four-fold as a result of increased production, which was remunerative for a time.

However, also as the result of deteriorating working conditions (strikes and absenteeism), the economic situation took a turn for the worse in 1973-1975. Considerable losses were incurred and the company was wound up.

The trade union organizations decided to occupy the plant. On 6 November 1975 the Mayor of Genoa requisitioned the same plant.

The Mayor's decree explicitly stated that the prolonged suspension of production and the dismissal of the employees had had a serious effect on the economy of Genoa. Social tensions had been sparked off which would inevitably grow and even lead to specific problems of law and order.

While the Mayor's power to requisition plants was acknowledged on principle by the Consiglio di Stato, the requisition decree was set aside for reasons relating to the special circumstances of the case ([10]).

2.2. Another case which aroused much interest was that of the Società Italiana Industria Zuccheri (SIIZ) ([11]).

By means of a decree of 16 July 1974, the Mayor of Chieti requisitioned the SIIZ sugar mill of Chieti Scalo for a period of ninety days. The management of the plant was entrusted to the Abruzzo Development Agency for the purpose of carrying out and administering the 1974 sugar beet campaign. It was the company which had intention not to carry out the sugar beet campaign in the Chieti plant in 1974.

By means of the requisition, the Mayor intended to ward off the economic and social damage which would befall the employees if the company ceased its operations.

The use of the SITE company may also be mentioned ([12]).

On 16 September 1974 the employees of the Padua branch, as a result of threats of dismissal to reduce staff, occupied the plant, thus preventing the construction activities from being carried on. On 29 September 1974, the Mayor of Padua ordered the requisition of the SITE plant.

A further case concerned the Soc. Manifattura dell'Adda, whose plant was requisitioned by decree of the Mayor of Berbenno in Valtellina on 20 February 1975, in order to ensure the continuity of its production, which was considered essential for the economy of the area.

The Manifattura's difficulties, together with those of the Fossati plant in Sondrio, contributed to the serious economic and social crisis affecting the whole valley. Consequently, also in Berbenno it was necessary to evaluate the possible effects on law and order that such a state of uncertainty might have. While the administrative court upheld company's appeal against the requisition, it nevertheless noted that the Mayor's concerns over a possibile worsening of the situation and its possible repercussions on law and order were justified ([13]).

A further example is the case of the San Marco company, the plant of which was requisitioned in 1975 for the purpose of ensuring, in the interests of local employment, the company's future activity and, thereby, to safeguard law and order ([14]).

During the same year, by a decree issued on 2 February 1975, the Mayor of Sondrio provided for the immediate requisition of the plant of S.p.A. Cotonificio Felice Fossati, in order to ensure the continuity of the company's activity, considered essential both for the area's economy and for the public interest ([15]).

([10]) Decision N. 72 of Consiglio di Stato, dated 7 February 1978, in Counter-Memorial, Annex 29.

([11]) For further details, see Decision N. 198 of TAR of Abruzzo, dated 30 Dec· 1974, reproduced in Document N. 7.

([12]) See also Counter-Memorial, p. 84.

([13]) For the text of the full translation of the decisions of the administrative court, see Documents N. 9 and 10.

([14]) Already cited in Counter-Memorial, p. 85.

([15]) See Decision N. 211 of T.A.R. of Lombardy, dated 30 Juli 1975, Document N. 9; Decision N. 21 of the Council of State, V Section, dated 18 Jan. 1977, in Counter-Memorial, Document N. 28.

For the same reasons, on 14 September 1974, the Mayor of Brindisi requisitioned the plant of Società Industriale del Mezzogiorno (SIDELM) ([16]).

At the end of 1973, the management of SIDELM, acknowledged that considerable losses had been made in previous financial years. Furthermore, it expected the situation to worsen owing to unfavourable market conditions. The management therefore decided to wind up the company.

The plant was then occupied by the work force.

The prolonged negotiations and continuing occupation worsened the discontent of the work force and heightened trade union and social tension. The resulting situation led the Mayor to issue a requisition decree on the basis of Article 7 of Law N. 2248 of 20 March 1865, Appendix E. The requisition was of six months duration; the management of the plant was entrusted to the Progresso e Lavoro Cooperative of Brindisi.

As reported by the administrative court in the decision on SIDELM's appeal ([17]) the decree stressed that, in view of public demonstrations and the spreading of inaccurate and alarming information in the press, « the situation had become untenable and unbearable ». It also alluded to possible reactions by the trade union organizations and the employees, who had expressed their intention « to occupy the railway station very soon ».

In the well-known Eridania Zuccherifici Nazionali S.p.A. case ([18]) the requisitions were made because the company intended to close down the plants, and consequently dismiss the work force. It was considered urgent to reassure the population concerning the future activity of the plants, which were an indispensable hub of economic life for the whole area and the intention was to protect law and order which had been jeopardized by the state of unrest reflected in all the productive and commercial sectors.

It may therefore be concluded that mayors had frequently resorted to the use of their power to requisition industrial plants for reasons of law and order or also in view of social unrest.

The concept of « economic and social law and order » thus emerged. Indeed, the requisition of plants for reasons of « law and order » was used as a means of protecting public security in the economic and social sense.

The cases reviewed above show how the requisition decree issued by the Mayor of Palermo in 1968 was a measure that many Italian mayors have taken under similar circumstances.

3. *Instances of requisition of plants in the United States.*

However, the criticism expressed by the United States Government over the fact that, even in such a difficult period for the Italian economy, the authorities of this country could, as an extreme remedy for particularly serious crises, have recourse to the temporary requisitioning of plants appears even more surprising in view of the fact that in the United States such a practice is anything but unknown.

« The relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties, such as laundries, or coal mines, or railroads, may be subjected to public operation only for a short time to meet war or emergency needs, and can then be returned to their owners (...) »: this statement was made by the United States Supreme Court when, in 1951, it was called upon to decide on another case of temporary taking of a plant by the public authorities in the difficult years of postwar reconstruction ([19]).

The case in point is of particular interest for the present dispute as it concerned a coal mine where production was virtually blocked due to a strike and which, as a consequence thereof, the Federal Government had decided to requisition and to operate under its own responsibility

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([16]) Counter-Memorial, p. 85.
([17]) Counter-Memorial, Document N. 25.
([18]) Counter-Memorial, p. 85.
([19]) *Pewee Coal Company Inc. v. United States*, 71 *Supreme Court*, p. 670 at p. 673.

for six months in order to avoid total paralysis of coal-mining activities in the country ([20]). Far from considering the requisition as such to be unlawful, the Supreme Court merely addressed the question of the compensation to be paid to the owner of the mine as a result of the requisition by the Government. In this context, the Court attempted to rationalize the subject of requisition or «temporary takings» in the light of its abundant case-law. As the Court stated, «[t]emporary takings can assume various forms .... There may be a taking in which the owners are ousted from operation, their business suspended, and the property devoted to new uses (...). A second kind of taking is where, as here, the Government, for public safety or the protection of the public welfare, « takes » the property in the sense of assuming the responsibility of its direction and employment for national purposes, leaving the actual operations in the hands of its owners as government officials appointed to conduct its affairs with the assets and equipment of the controlled company. Examples are the operation of railroads, motor carriers, or coal mines (...) ». ([21])

Without making at this stage a detailed examination of the criteria used by United States courts when determining the compensation to which the owner is entitled in the case of the temporary taking of his plant by public authorities, it may be noted that it shows that only in a few cases the principle of « just compensation » has led to the granting of compensation equal to the « fair market value » of the property taken. In cases in which, because of the economic crisis and/or strikes in progress prior to the intervention of public authorities, the value of the requisitioned plant was reduced, the United States courts had no hesitation in allowing only compensation smaller than « fair market value ».

What is here important is to show that the practice of requisitioning plants in cases of proven urgency and/or need to safeguard the general interests of the economy and social peace is a remedy that has been used also by the United States Government. Furthermore, while in Italy it is clear that the power of requisitioning of the public authorities only exists if and to the extent that it is expressely recognized by law, in the United States it is uncertain whether the authorization of the legislator is in any case required or whether the taking of private property for public use by an officier of the United States is admissible « as an act of Government » even in the absence of an explicit or tacit authorization by an Act of Congress ([22]).

4. (*B*) *The Prefect's decision.*

As already clarified in the Counter-Memorial ([23]), contrary to the Applicant's assumption, ELSI waited a good 19 days before making its appeal to the Prefect and more than one year before urging the Prefect to take its decision. The Prefect, as shown by the Affidavit of Dr. Ravalli ([24]), had formed the reasonable conclusion from ELSI's behaviour that the company had no strong interest in the result of the appeal.

This is confirmed by the fact that the company filed a petition for bankruptcy barely one week after lodging the appeal with the Prefect. Thus, a favorable decision of the appeal would not have had as the consequence the free management of the assets.

What the Applicant states on its Reply (See p. 150), namely that « if the requisition had been rescinded, the bankruptcy could have been avoided by ELSI », is totally inaccurate. It was ELSI's long-standing insolvency that led to its bankruptcy. Only if the state of insolvency had been uprighted — an unlikely event within those few days — bankruptcy could have been avoided.

([20]) The same mine has been subjected to a total of 4 separate temporary takings by the Federal Government, ranging in duration from three months to one year, although the reason was always the same, namely that « of ending strikes and restoring the production of coal in the national interest » (cf. *Pewee Coal Company, Inc. v. United States*, 161 *F. Supp.* 952, at p. 955).

([21]) 71 *Supreme Court*, 670, at p. 673.

([22]) For the negative case see *Youngtown Sheet Tube Co. et al. v. Sawer, Secretary of Commerce* and nine other cases, 103 *F. Supp.* 569, at p. 573; the case involved a requisition order issued by the Secretary of Commerce following an Executive Order by the President of the United States himself regarding the main steel factories in the country, which had been hit by a wave of strikes called for an indefinite duration.

([23]) Counter-Memorial, p. 87.

([24]) Document N. 8.

The truth is that the Prefect's decision:

(*a*) was irrelevant to ELSI's state of insolvency, and indeed the company filed for bankruptcy without waiting for the decision on the appeal and without urging it; it was in any event irrelevant after the expiry of the sixth month, in view of the temporary nature of the requisition;

(*b*) was rendered within the period of time representing the average of this type of appeal ([25]);

(*c*) was taken as soon as ELSI (or the receiver acting on its behalf) urged the decision, after 14 months.

Therefore to argue, as the Applicant does in its Memorial, (see pp. 21–22) and in its Reply (see pp. 125–126 and p. 132), that the decision was rendered by the Prefect only after ELTEL had acquired the company assets amounts to captiously exploiting a chance time sequence to obtain a facile effect.

It must likewise be stressed that the complete reading of the Prefect's decision, instead of a quotation of fragments out of context (as the Applicant does in the Reply see p. 38), leads to the appreciation that the Prefect acknowledged that the Mayor was entitled to exert the powers of requisition in accordance with the laws referred to, although he actually quashed the order because in actual fact it was not possible to achieve the intended result, i.e. the reopening of the plant.

5. (*C*) *The occupation by the work force.*

The Applicant's assertions over the occupation of the plant are incorrect. The work force occupied the plant more than two weeks before the requisition, as is shown by a judicial decision and press reports ([26]) and not afterwards, as the Applicant would have it ([27]).

6. (*D*) *ELSI's situation and IRI's role: the Applicant's contentions.*

According to the United States Government, the Italian Government and IRI first boycotted the attempt to proceed with the « orderly liquidation » of ELSI, and then interferred with the bankruptcy proceeding so as to allow IRI to acquire the plant through one of its subsidiaries at a price lower than its fair market value.

This argument is based on the following three assumptions, which form the heart of the Applicant's presentation ([28]):

– ELSI was a *going concern*, in good, although not perfect, financial health at the time of the events in question;

– the ELSI industrial complex was competitive and thus attractive to the market in that it was capable of the « manufacture of high quality and highly sophisticated electronics »;

– finally, IRI or one of its subsidiaries, is alleged to have « boycotted » the first three auction sales in order to decrease the market value of the plant which was subsequently purchased by ELTEL.

All three of the above contentions are totally gratuitous in that the United States Government does not produce a shred of evidence in support of them. Furthermore, they are not true. This objection, already expressed in the Counter–Memorial of the Italian Government ([29]),

([25]) Counter–Memorial, p. 88.

([26]) Cf. the decision of the Court of Palermo, in Memorial, Annex 80, in particular at p. 8, and the article appeared in *L'ORA*, 10 March 1968, Document N. 30.

([27]) Memorial, pp. 53–54. Reply, p. 133, note 39. The distinction between actual and occasional sit–ins, which was suggested by the Applicant, lacks of any supporting evidence. The truth is that, the occupation having taking place in March, there was no reaction on the part of ELSI, which obviously had legal interest in the matter.

([28]) Reply, pp. 127, *et seq.*

was not challenged in the Reply, as the passive repetition of the original arguments which have been proved unfounded cannot be taken as a challenge. Consequently, the Italian Government can justifiably claim that the basic premises of the application are not founded on evidence presented in either the United States pleadings, but is merely conclusory, assertive, and argumentative.

7. *ELSI's economic and financial situation.*

ELSI's crisis, which was stabilized when the events in question occurred, is evident from the very statements made in the Memorial and Reply of the Applicant Government, namely that:

(*a*) ELSI's debts, according to the Memorial, p. 11, amounted to Lire 16.66 billion;

(*b*) its assets, which had a book value of Lire 17.05 billion, could not, as even Raytheon admits (Memorial, p. 11), be assigned a quick-sale value of more than Lire 10.84 billion;

(*c*) there was consequently a negative balance of about six billion lire, and since Raytheon itself admitted that ELSI was unable to meet its obligations, it must be assumed that the part that could not be met amounted to at least six billion Lire.

Nor can it be argued that the above-mentioned negative balance was due solely to the probable lower price obtained on the market in the course of a quick-sale. Indeed, ELSI's state of insolvency would certainly have been known to a conscientious management since it had been in existence since late 1967. Three points are of interest in this regard:

(i) In 1967 ELSI incurred a loss of more than Lire 2,000 million (after losing Lire 326 million in 1962, 1,228 million in 1963, 284 million in 1964 and 361 million in 1965) ([30]) and was obliged to proceed to reduce and then increase its capital. Despite this, in 1967, ELSI again lost more than one third of its capital, thus revealing beyond any doubt that it was incapable of producing event the minimum amount of income it needed to survive on the market. The disastrous trend that now begins to be outlined is certainly not compatible with the image of a « going concern » and solvent enterprise suggested by the applicant Government. Furthermore, this was formally recognized by Raytheon management ([31]);

(ii) The ELSI financial reports leave ample space for doubt. Dr. Giuseppe Mercadante, who analysed them on behalf of the Bankruptcy Court, noted, among other things: the need for writing down stock for an amount « oscillating between Lire 1,500,000,000 and Lire 2,000,000,000 ([32]) the inclusion of non-existent assets in the balance sheet (for instance, an entry of Lire 246,296,774 against a certain Neg Alfred Anateckmer of Quickborn (West Germany), when the goods forwarded to this client had already been returned by the latter and were still held in customs ([33]); and again direct « accommodation bills discounted with the banks » for an amount of Lire. 1,200,000,000. ([34]) Consequently, ELSI's true losses for 1967 alone, which are obtained by adding to the amount entered under this heading in the official balance sheet (Lire 2,681,300,000) the decreases in value due to the above mentioned items, actually wiped out the company's share capital, even though the latter had only recently been increased; all this in a company which, in order to achieve liquidity, had been obliged to discount « accommodation bills », i.e. bills that do not relate to any commercial transaction;

([29]) Counter-Memorial, pp. 77, *et seq.*

([30]) Counter-Memorial, p. 77.

([31]) See Project for the Financing and Reorganization of the Company « 1967 Report », prepared by Raytheon-Elsi S.p.A., Memorial, Annex 22.

([32]) See the Technical-Accountancy Advice on Raytheon-Elsi S.p.A., Counter-Memorial, Document N. 36, at pp. 21-22 of the new translation presented by the Italian Government.

([33]) *Ibidem*, p. 23.

([34]) *Ibidem*, p. 31.

(iii) As indicated in the Affidavit of Mr Joseph A. Scopelliti ([35]), already in early 1968 Raytheon had to transfer Lire 150 million to the First National City Bank of Milan to cover the demands of an ELSI creditor who would not be fended off with vague promises of future payment. ELSI was therefore unable to meet even the smallest of its commitments with its own resources, thus revealing that its insolvency was not only economic but also financial.

The concept of « orderly liquidation » sounds quite odd against such a background. This even more so, as also the concept of « going concern » mentioned by the United States Government displays some very peculiar features. The production lines were closed and, in early 1968, the only activity of ELSI was to complete a number of unfinished products. Moreover, on 2 March 1968 the workers actually began an occupation of the plant and the management deemed it prudent to remove all the accounting files from the head office and take them to a small office in Milan. Thus, the overall picture was as follows: the company had a chronic deficit; its production lines were shut down; its work force was occupying the plant; its management had practically disappeared.

8. *The responsibility for ELSI's crisis.*

The economic and financial disaster described above may be attributed direcly to erroneous company management and misguided speculation by Raytheon. It is important to state it, because the Applicant wrongly contends that « Raytheon and Machlett did nothing to create ELSI's financial problems ».

Suffice it to recall a few financial figures:

(*a*) Dr. Mercadante, in his 1968 Report to the bankruptcy Court, points out that, in the ELSI financial reports of the previous three years, the royalties paid to Raytheon, the costs of Raytheon technical assistance and Raytheon technical consultants' costs appeared to be blown up out of all proportion both in absolute terms and compared with the cost of surveys and experiments also paid for by the company. Dr. Mercadante's report states that it is not clear « why the company spent so much on studies, research and development (not counting amongst others the high cost for technical consultants) while paying royalties to its holding company which should have permitted a well–organized production adopting the production lines laid down by the same », while « there are indications that the company, after a number of years' production, had not yet defined its production lines » and « that the main losses resulted in the SCD sector (electronic equipment), revealing it to be a complete failure and on which huge amounts of money had been spent » ([36]);

(*b*) ELSI debts amounted to an average of Lire 12 billion, on which it had to pay a huge amount of interest. In the previous three fiscal years ([37]), ELSI on average paid interest of Lire 800 million per year (lire of the time), excluding the interest paid on medium–term loans. Taking into account the much smaller amount of equity invested by Raytheon, this means that ELSI was undercapitalized from the start and therefore doomed to go bankrupt unless it could obtain a resounding commercial and industrial success ([38]).

Dr. Mercadante pointed out that, if ELSI management had had « greater technical rectitude » it would not have allowed the « large costs » on surveys and research, etc. in view of the « fact that the overall aim of the company has not been achieved after so many years of activity » ([39]), and that these expenses were « not justifiable » ([40]).

([35]) Memorial, Annex N. 17, p. 8.
([36]) See the Tecnichal–Accountancy Advice by Dr. Mercadante, (*supra*, nota 32), at p. 35.
([37]) *Ibidem* p. 19.
([38]) Affidavit of Ing. Busacca, Counter–Memorial, p. 78 and Document N. 44.
([39]) Mercadante Report, p. 31.
([40]) Mercadante Report, p. 17.

One may add that obsolete equipment had been acquired by ELSI (e.g. the semiconductor production line, which proved to be the most ruinous) ([41]).

Some reasonably critical analysis of the matter is quite sufficient to close the argument of ELSI's « high quality » and « highly sophisticated » electronics (which, anyway, found no market) and to show that Raytheon and Machlett had more than some responsability in creating financial problems for ELSI.

9. *The obligation to file a petition for bankruptcy.*

In its Reply, the Applicant Government stresses the fact that ELSI management was under no obligation simply to file for bankruptcy. To this effect it cites the opinion of Professor Franco Bonelli ([42]). Yet, the contention is groundless. In 1967, Raytheon's official losses amounted to Lire 2,681.30 million. According to Dr. Mercadante, a further sum of Lire 1,200–1,500 million must be added for over–evaluation of stock and at least 3–400 million for non–existent credits. The situation must have been worse ([43]) since it would otherwise be impossibile to explain the large gap of six billion lire between book value of ELSI's assets and the value acknowledged by Raytheon itself in the case of a quick-sale. This leads to the following conclusions: (*a*) ELSI's capital (amounting to 4,000 million) was completely lost; (*b*) the failure to call a meeting to immediately restore share capital to the minimum level required by law or, alternatively, to wind up the company, actually represents an offence committed by the management (see Articles 2447 and 2621 of the Civil Code ([44]); (*c*) the management was liable for prosecution for simple bankruptcy (see Article 217, N. 3 and 4 of the Bankruptcy Law ([45]) since, notwithstanding the company's insolvency, no petition for bankruptcy was filed; and (*d*) the offence of misuse of credit (Articles 218 of the Bankruptcy Law), insofar as the management, by concealing the company's financial difficulties, continued to live off loans, including the 150 million received from Raytheon in early 1968 to pay off a recalcitrant creditor. Thus, it is clearly established that not having increased ELSI's capital, and having come to know that the shareholders had no intention of doing so, ELSI's management should have filed for bankruptcy ([46]).

Under these circumstances, the hypothetical « orderly liquidation », envisaged by the Applicant Government, could certainly not take place. In fact, things were quite different. After acknowledging that it was unable to pay its debts, as is clear from the fact that it was intended to satisfy unsecured creditors claims to the extent on only 50 %, ELSI was now trying to avoid bankruptcy in the hope that the creditors would accept large cuts. At the same time, contrary to the Applicant's contention, Raytheon never showed willingness to provide ELSI with sufficient liquidity to proceed with an orderly liquidation.

After all, an orderly liquidation, and not only in the Italian legal system, requires the 100 % satisfaction of creditors, while Raytheon and ELSI suggested 50 %.

In fact, the Applicant appears to consider the hypothetical « orderly liquidation » as a remedy which would be available also to an insolvent debtor, while under Italian law an insolvent debtor is from the outset under an obligation to file for bankruptcy, and therefore cannot maintain possession of its assets, manage them, and freely liquidate them.

Therefore, to speak of « orderly liquidation » as the natural way of winding up ELSI, and to criticize the failure to allow Raytheon to do so, is also the result of a distorted view of the applicable law to the case in point.

In this connection it is not inappropriate to recall that in 1 January, 1968 President Johnson promulgated an executive order establishing a mandatory program restraining USdirect in-

([41]) Affidavit of Ing. Busacca, Counter–Memorial, Document N. 44, and Affidavit of Ing. Ravalico Document N. 14.

([42]) Reply, Annex 1.

([43]) See, for instance, on the state of the art, the remarks of Ing. Ravalico, Document No. 14.

([44]) Document N. 16.

([45]) Counter–Memorial, Document N. 21.

([46]) For these considerations and for the obbligation of ELSI's management to file for bankruptcy, see the Opinion of Professor Pier Giusto Jaeger, Document N. 32.

vestment abroad ([47]). Although not mentioned in the US pleadings, this program had a broad and important negative effect on the ability of US businesses such as Raytheon to lend or invest additional funds and working capital to their foreign subsidiaries, or to perform guarantees of indebtedness of such subsidiaries. ([48])

The effect of the Regulations was particularly harsh on parents of subsidiaries such as ELSI, operating in Western Europe ([49]).

The effect of the Regulations was to force US parent corporations to offset their « direct investments » in their subsidiaries by making « long–term foreign borrowings » in the Eurodollar market ([50]). However, in addition to the increased expense of any such borrowing, under the Regulations, a repayment would eventually be « charged against » the permissible activity of the US parent in future years; in 1968 there was no way of knowing when and how this unprecendented and severe program would be dismantled ([51]).

Most importantly, for a new guarantee of indebtedness of a foreign subsidiary to be authorized, there were requirements for certification that the parent company « has no reason to believe, under existing circumstances, that the affiliated foreign national will be unable to pay or otherwise satisfy such indebtedness without resort to performance under the guarantee » ([52]). No such certification could have truthfully been made as to ELSI. Concerning payments of preexising guarantees, the US parent would have had to « determine ... in good faith that (its foreign subsidiary) ... has not sufficient funds available to it to pay such indebtedness » ([53]).

The difficulties perceived by Raytheon in handling its overseas business in view of these regulations were mentioned neither in the Memorial nor in the Reply, although doubtless they were a contributing (and governmental) cause of Raytheon's announced intent to terminate ELSI's operations in 1968 ([54]).

10. *The claims brought by Italian banks against the sole shareholder of ELSI.*

Perhaps the stubborness with which the Applicant Government claims that ELSI was entitled to proceed with an orderly liquidation and that the bankruptcy petition became necessary only as a result of the requisition decree and the consequent loss of free access to its plant, may find its reason in the fact that, perhaps unconsciously, it tends to argue in terms of the bankruptcy law of the United States. In fact, there are several basic differences between United States law and Italian law which will be clarified here in order to avoid further use of concepts which, in spite of their identical nature, have completely different meanings when referred to one legal system rather than to the other.

([47]) See « Message to the Nation on the Balance of Payments » and Executive Order N. 11387, reproduced as Annexes (1) and (2) of Federal Reserve Bank of New York Circular N. 6090 of January 4, 1968. Document N. 25.

([48]) See Regulations of the Secretary of Commerce, dated January 1, 1968 (cfr. Title 15, Ch. X, Part 1000), reproduced as Annex (3) of Federal Reserve Bank Circular N. 6090, and in praticular Sec. 1000.312 (*a*) and (*e*) of the Regulations. Document N. 25.

([49]) *Ibidem*, Regulations Sec. 1000.319 (*c*).

([50]) *Ibidem*, Regulations Sec. 1000.504 (*b*).

([51]) See for example speech delivered by the Vice President, Tax–Legal, of the National Foreign Trade Council on October 9, 1968, at pages 3–5. Document N. 26.

([52]) See General Authorization N. 1 of January 22, 1968, Sec. 2 (*a*) (1), contained in Federal Reserve Bank of New York Circular N. 6102 of January 25, 1968. Document N. 27.

([53]) *Ibidem*, Sec. 2 (*a*) (2).

([54]) In material filed with the United States Securities and Exchange Commission for the Fiscal Year ended December 31, 1968 (form 10–K Annual Report Pursuant to Section 13 or 15 (d) of the Securities exchange Act of 1934, enclosing the Prospects of Raytheon Company dated April 15, 1968, (see Document N. 24), Raytheon said in respect of ELSI and its other foreign subsidiaries and affiliates that « The planned operations of these foreign companies are dependent, to an unpredictable degree, upon United States government regulations on foreign investments... » (page 8 of Prospectus; page 30 of Filing); and in item (e) of Part I of its 10–K filed for the fiscal year ended December 31, 1971 (see Document No. 23) at page 12, Raytheon wrote that « Continuation of the United States Foreign Direct Investment Regulation which became effective in 1968 might restrict the Company's ability to develop its international operations », showing that the problem with these Regulations persisted for several years after 1968.

Unlike Italian bankruptcy law and that of the majority of other continental systems, all of which are notoriously « creditor oriented », the main characteristic of United States bankruptcy law has always been that of being « debtor oriented ». In other words, in Italy, and in continental Europe in general, bankruptcy is mainly considered as a sanction which befalls the insolvent debtor in order to safeguard the prevailing interest of the creditors in a prompt and equitable satisfaction from the proceeds of the sale of the debtor assets. On the contrary, in the United States bankruptcy is rather a means placed at the debtor's disposal, to discharge his previous debts and resume his activity on a fresh footing (« fresh start doctrine ») irrespectively of its insolvency ([55]). Thus a bankruptcy petition may be filed also by a solvent debtor (« Voluntary Cases »: Section 301 Bankruptcy Act), whereas in case of insolvency, the creditors may file a bankruptcy petition against the debtor (« Involuntary Case »: Section 303 Bankruptcy Act), but there is no obligation for the debtor to file a petition himself. Furthermore, even an insolvent debtor may choose between a bankruptcy petition under Chapter 7 of the Bankruptcy Act (« Liquidation ») and a petition for reorganization under Chapter 11 of the same Act (« Reorganization »). In the first case, a trustee is appointed, who proceeds to liquidate the debtor's property and consequently distribute the proceeds among the creditors. In the second case the debtor, who normally retains his assets and continues to operate his business, prepares a « plan of rehabilitation » containing a complete list of creditors divided up into classes, indicating those who will suffer impairment of their rights and those who will not, and how the payments will be made. The plan will be binding for all concerned if it obtains the approval of the majority of members of each class of creditors or, failing this, if it is considered « fair and equitable » by the competent bankruptcy court.

What are the inferences that can be drawn from this with regard to the present case?

First of all, there is no doubt that, at least as from March 1968, ELSI was to be considered as « insolvent » even under the United States bankruptcy law. Indeed, Section 19 of the Bankruptcy Act prior to the 1979 reform reads as follows: « A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property... shall not at a fair valuation be sufficient in amount to pay his debts ». ELSI had acknowledged its inability to pay the larger creditors more than 50 % from the proceeds of the sale of its assets. Yet, the company would have been « insolvent » also under the new criterion introduced with the 1979 reform (Section 303 (*h*): « ... the debtor is generally not paying such debtor's debts as such debts become due... »). In fact, at the beginning of March, ELSI was going to face a complete lack of cash, as was confirmed by the company management itself, and specifically by John D. Clare, who, at a meeting with the President of the Sicilian Region on 20 February 1968 openly announced that « (*a*) Feb. 23 – Board Meeting; (*b*) Feb. 26–29 – Inevitable bank crisis; (*c*) March 8 – We run out of money and shut the plant ». ([56])

Under United States law, ELSI would however not have been obliged to file a petition of bankruptcy, notwithstanding its insolvency. The company would also have been free to choose between a (voluntary) bankruptcy petition under Chapter 7 and a (voluntary) petition for reorganization under Chapter 11. In the first case its assets would have been liquidated immediately,

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([55]) « One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh ... »: *Local Loan Co. v. Hunt*, 292 U.S. 234, at p. 244. On this point, see, also for further references to case-law, KING-COOK, *Creditors' Rights – Debtors' Protection and Bankruptcy*, Matthew Bender, 1985, p. 777 *et seq.*; EPSTEIN, *Debtor–Creditor Law*, 3rd ed., West Publishing Co., 1985 p. 138 *et seq.*; COLLIER BANKRUPTCY MANUAL, Matthew Bender, 1961, p. 176 *et seq.*

([56]) Cfr. Document N. 19, containing the original handwritten minutes of the meeting. The Counter-Memorial quoted the passage in the minutes of a meeting held on 20 February 1968, in which the President of ELSI, John D. Clare, was reported as having drawn « a percise time chart showing (*a*) Feb. 23 – Board Meeting; (*b*) Feb. 26–29 – Inevitable bank crisis; (*c*) March 8 – We run out of money and shut the plant » (Counter-Memorial, p. 81). By a letter of 13 January 1988 addressed to the Court's Registrar the applicant Government supplied a photocoy of the manuscript version of the same minutes along with an attempt to justify why a different text had been annexed to the Memorial. The Italian Government prefers to refrain from making any comment on this explanation, but wishes to point out that the photocopy of the manuscript version fully confirms the accuracy of the quoted passage. The President of ELSI really drew his « precise time chart » over a month before the requisition decree. If this fact was suppressed in a later version of the minutes, the only conceivable reason is that whoever altered the text of the minutes thought that it could be embarrassing for Raytheon.

while in the second case ELSI would have been able to continue its activity, in the hope of convincing its creditors or, failing to get their approval, to have the judge impose on them the « plan of rehabilitation » providing for the 50 % payment of credits or even less. All this of course is only theoretical because, in practice, it is anything but certain first of all that United States banks, placed in the same situation of the Italian banks vis–à–vis ELSI, would have waited patiently as long as the latter did, instead of filing an involuntary bankruptcy petition as they were entitled to do. Moreover, in a reorganization procedure, the confirmation of an advantageous plan of rehabilitation to a large extent depends on the actual capacity for recovery of the insolvent company and ELSI could hardly be said to meet that requirement.... Be it as it may, it should not be forgotten that ELSI was a company incorporated under Italian law and as such was subject to the bankruptcy law of Italy and not that of the United States.

11. *More. The « lifting of the corporate veil » doctrine in Italian and United States law.*

Again with regard to possible misunderstandings that could arise over the present case as a result of actual or supposed differences between Italian law and United States law, the Respondent Government wishes to point out that the action brought by the Italian banks against Raytheon and Machlett, as the sole shareholders of ELSI, in order to recover the credits claimed from the latter, can in no way be considered as discriminatory, or worse, as the product of the umpteenth plot carried out against the two United States companies.

It has already been emphasized that judicial action of this kind is normal practice in Italy in view of the widespread acceptance in legal theory and practice of applying the principle of the sole shareholder's liability for the company's obligations, as established in Article 2362 of the Civil Code, also in the case in which a negligible number of shares are attributed to another partner who is a pure figurehead ([57]).

But since in its Reply the Applicant Government continues to include among the damages to be paid by the Italian Government also the legal costs incurred by Raytheon and Machlett in the suits in question ([58]), it is worth here, in addition to recalling the remedies concerning the situation under Italian law, to note that the result would be exactly the same if the case was considered under United States law.

In fact, also in the United States, the problem exists as to whether and to what extent shareholders are liable for the obligations of their corporation. The conditions required « to disregard the corporate entity » or « to pierce the corporate veil », in a given case are still controversial; however, all authorities agree that, in some circumstances and in some particular cases, the corporation may be disregarded as an intermediate between the ultimate person or persons or corporation and the adverse party (...) ([59]).

Generally speaking, the common significant factors which would have justified disregarding a corporate entity have been under–capitalization, failure to observe formalities, non payment of dividends, siphoning off of corporate funds by dominant shareholders, the insolvency of the debtor corporation at the time, non functioning of other officers or directors, missing corporate records, use of the corporation as a front for the operations of the dominant shareholder ([60]). The conclusion to disregard the corporate entity may not, however, rest on a single factor but often involves a consideration of a number of the above–mentioned factors; in addition the particular function must generally present an element of injustice or fundamental unfairness. Thus, to mention only those factors which are of particular interest in the present case, the courts are in general more willing to « pierce the corporate veil » when the defendant is a corporation rather than an individual, and are particularly likely to find the parent business entity liable if, for in-

([57]) Counter–Memorial, p. 93.

([58]) Reply, pp. 156-157.

([59]) FLETCHER CYCLOPEDIA CORPORATIONS (1983), I, p. 388 *et seq.* (with further references to both case-law and scholarly writing).

([60]) FLETCHER CYCLOPEDIA CORPORATIONS, *cit.*, p. 428 *et seq.* (with further references); HAMILTON, *The Law of Corporations*, 2 ed., West Publishing Company 1987, p. 81 *et seq.*

stance, the subsidiary and the parent are running parts of the same business, and the subsidiary is under-capitalized, and/or if the subsidiary has eventually been forced into bankruptcy ([61]).

This being so, it seems clear that on this issue there are striking similarities between Italian law and the law of the United States or, more precisely, the law applied within each of the individual states of the Union. On both sides of the Atlantic Ocean there is no hard and fast rule as to the conditions under which the corporate entity may be disregarded; at the same time, according to both the Italian and the United States laws, as a general rule, the « corporate veil » may be « pierced », and the liability of the shareholder(s) for the obligations of the corporation be affirmed, whenever the corporate fiction is being used by the corporation itself to defeat public convenience, justify wrong done either to third parties dealing with the corporation or internally between shareholders, or to perpetrate fraud or other reprehensible conduct.

This is not the place to express an opinion on whether or not the Italian courts were right when, although asked to do so by a number of banks having suffered substantial loss because of ELSI's insolvency, they repeatedly refused to « pierce the corporate veil » of that corporation and to allow the banks to recover their credits directly from its two shareholders. More than one distinguished scholar, when commenting on the decisions rendered, has argued that on that occasion the courts may not have taken into sufficient account the fact that ELSI was a typical example of a wholly owned subsidiary – Raytheon owned 99.15 % of the shares while Machlett, who held the remaining 0.85 %, *was just another wholly owned subsidiary of Raytheon* – which long before it went bankrupt was kept in a condition of clear under-capitalization by its parent company ([62]). In the light of the foregoing remarks, however, it should be clear at least that there was absolutely nothing unusual in the fact that the Italian banks tried to recover from Raytheon and Machlett what they had been unable to get from ELSI. Any competent lawyer in either Italy or the United States would have urged the banks to do so, and it may well be that in the United States the banks would have been more successful than they actually were before the Italian courts.

12. *The quality of ELSI's plant and production.*

The considerations made so far concerning ELSI's insolvency already contradict the contention that the company purchased by ELTEL was an industrial jewel, to gain possession of which a sort of plot was hatched. Indeed it does seem strange that such a highly productive company should have such a negative economic performance and that its promoters should make the decisions they did (i.e. Raytheon decided not to invest further money in ELSI, while ELSI dismissed the entire work force).

In fact, the following has to be said:

(*a*) ELSI's production was of a low quality. The expert of the bankruptcy court, Dr. Mercadante, expressly mentioned in his Technical-Accountancy Advice goods being returned by customers and defective products left in customs, etc. ([63]).

(*b*) An unhappy site had been chosen for the plant, with some of the sections actually situated at different levels ([64]).

(*c*) The way the plant was structured was completely negative, because it was badly built and there was no adequate planning ([65]).

([61]) FLETCHER CYCLOPEDIA CORPORATIONS, *cit.*, p. 455 *et seq.* and p. 472 *et seq.* (with further references); HAMILTON, The Law of Corporations, *cit.*, p. 91 *et seq.*

([62]) See, among others, PELLIZZI, Unico azionista e controllo totalitario indiretto, in *Giurisprudenza commerciale* 1981, II, p. 615 *et seq.*; S. SCOTTI CAMUZZI, *Unico azionista, gruppi, « lettres de patronage »*, Milan, 1979, pp. 30 *et seq.*

([63]) Technical-Accountancy Advise on Raytheon-Elsi S.p.A., Counter-Memorial, Document N. 36.

([64]) Affidavit of Ing. Cavalli, Document N. 1 and the Remarks of Dr. Alessandro Alberigi Quaranta, in Document. 20.

([65]) Affidavits of Ing. Cavalli, Document N. 1, of Ing. Ravalico, Document N. 14, and the Affidavit of Ing. Cammarata, Document N. 13.

(*d*) The production lines were lacking in concrete functionality. The products had no market attraction and the semiconductor production has turned out to be a failure. Only a small proportion of the television components which were produced could be absorbed by the television set market. Other devices for television were now obsolete as they applied to black-and-white TV, while colour was becoming increasingly popular in Italy. This is proved by the fact that when ELTEL purchased the company, in 1969, it changed its entire production ([66]).

It is probably worth reporting fully what was declared by Ing. Busacca, who was working for ELSI at the time and was in charge of microwave tube design, and by Mr. Ravalico, the manager of ELTEL. The words of those having actually experienced the events are self explanatory.

According to Ing. Busacca:

« (...) As at 29.3.1968 Raytheon–Elsi had five production lines:

1. Semi–conductors
2. X–ray tubes
3. Black–and–white cathode ray tubes
4. Telephone surge arresters
5. Microwave tubes.

The company's technical and economic situation can be described as follows:

– Semi–conductor line: the machinery was unserviceable and idle because it had been designed for germanium technology, which had been obsolescent for many years; an attempt was in progress to produce silicon diodes which, although technically valid, had no significant market.

– X–ray tube line: the machinery was very old and the manufacturing processing was carried out at great risk to the operators. The product was quite good but there was no scope for the research required to develop it, for improvement to the plant or for winning a share of the market away from the large electromedical apparatus constructors, who had their own production lines.

– The black–and–white cathode–ray tube line involved the majority of the active work force in operations, and ought to have been automated but it was not because black–and–white consumption was heading for certain decline. The processes were rather uncertain although the quality often happened to be good.

– The telephone surge arrester line was based on the exploitation of a patent and utilized makeshift equipment and involved high risks, since Cobalt 60 radioactive material was included in the products during processing.

– The microwave tube line was based on the market represented by the HAWK missile system and a small research activity had been started up.

– On the whole, the plant was to be considered uneconomical: The plant engineering and available technologies were generally obsolete. The machinery was intensively exploited, old and hard to manage. The work force was comparatively unskilled. A negligible impulse had been given to independent research and there was no available plan to renew the production lines (even by means of licensing) (...) » ([67]).

According to Rag. Ravalico, on the other hand:

« (...) IRI « interested » SIT–Siemens in proceeding with the acquisition of the bankrupt company, ELSI.

The term « interested » is actually inexact, because no one was « interested » in ELSI because of its well–known technical obsolescence and commercial incompetence. But to prevent trade union unrest — the year was 1968 — and sit–ins in via Veneto in front of IRI head office, it

([66]) See again Affidavits of Ing. Busacca, Counter–Memorial, (Document N. 44), of Ing. Ravalico, (Document N. 14), and of Ing. Cammarata, (Document N. 13).

([67]) For the whole text of the Affidavit, see Counter–Memorial, Document N. 44.

was necessary to « take an interest in the business », mainly for reasons of law and order. I personally directed the take–over operations in my (...) official capacity.

After obtaining possession of the ELSI company, initially as lessees, we found the following situation:

1. The general facilities were inadequate, dilapidated and badly designed from the very beginning. The company had not grown according to an organic economic development plant. It had developed on a day–to–day basis. One of the consequences of this was that the production facilities had been sited haphazardly, in temporary structures etc. As a result, most of the general facilities — after we had taken possession of them — were only scrap metal, and were sold off as such, because they necessarily had to be replaced by viable general facilities.

2. The production lines were all old, broken down and obsolete. The semi–conductor line (the most bankrupt), the X–ray tube line, the microwave oven line etc., which had been of inefficient production capacity *ab origine*, were all written off at once as scrap. It was not that they were obsolescent as a result of having been shut down pending the bankruptcy proceedings. They were obsolescent due to prior industrial and technical reasons. An attempt was made to salvage the TV cathode ray tubes line, and the line producing microwave tubes for military use. The first was a failure, and the second was successful thanks to considerable intervention.

The cathode (picture) tube line was organized using absolutely outdated technology, and it manufactured products that were completely useless on the market. These were black–and–white 23" picture tubes that were totally unsaleable on the Italian market in those years. And they were made using glass from Russia, with absolutely prohibitive transportation costs to Palermo, as one can well imagine. Since the technology then being used was no longer sound, an attempt was made to negotiate to be able to continue using RCA technology. But even this attempt proved negative.

It was not enough to change the technology: it was necessary to start *ex novo*, with huge new investments to cater for the demand of a market that was now moving towards colour TV. ELSI's commercial network was almost non–existent, and it had a bad commercial image.

The microwave tube line was continued, because the prospects existed for the products to be absorbed on the market, providing work for a few dozen members of the company's 1,000–plus work force.

But it became necessary to renegotiate the assistance contracts with Raytheon, in order to be able to obtain the technical information and updates needed, in view of Raytheon's extremely, and quite unjustifiably, high royalties. After a short time, it became clear that this attemp could not proceed further, and it became necessary to think about starting up work on completely new products that would enable the company to retrain several hundred workers for new jobs.

3. The stocks were not able to cover even the cost of managing them. The stores were full of unsaleable picture tubes, above all, and old, wholly unusable materials that were for the production lines that were going to sold off as scrap.

4. Through ELTEL S.p.A., which it controlled, SIT–Siemens had to invest over Lire 4,000,000,000 immediately in order to buy up Raytheon at the judicial bankruptcy auction held on 12 July 1969.

It later had to invest about 3,500 million between 1969 and 1972 to restructure the plant, general facilities, and the machinery and production lines, and to retrain the work force.

5. ELTEL then moved the production of the electronic parts of the power units for the telecommunications facilities from L'Aquila to Palermo, at the former ELSI factory. The only way to keep the local jobs was to rebuild the whole factory, in practice, because as Raytheon had left it, the factory was absolutely useless in technical and production terms, and had only been taken over as a bankrupt concern on purely social grounds (...) ».

(*e*) The ELSI company was lacking not only in industrial features but also with regard to its commercial functions. Among other things the oversized work force meant prohibitively

high costs, such that the products, which were in any case delicate, were not competitive on the market;

(*f*) the only real advantage ELSI had was its work force, even though it was too large for a company of that size. The work force appears to be technically well trained (although not everyone agrees with this: see Ing. Busacca) ([68]), and this explains why someone ultimately purchased the company in question. However, the existence of well-trained labour is not enough to render an off-market company attractive.

Furthermore, the company had ceased to be a going concern directly because of the ELSI management. The halting of the production lines took place in early March 1968 ([69]). Therefore, when the events lamented by the Applicant Government took place, ELSI was no longer a functioning company. Thus, the hypothetical orderly liquidation would therefore have involved not a company that was operating somehow or other, but the remains of a structure which had proved so uneconomical as to have been already closed down. All that was worth keeping, was the work force which the ELSI management had already proceeded to dismiss and who saw their jobs disappear.

12.1 *ELSI's requests for benefits to which it was not entitled.*

One further consideration is to be added. Again in its Reply the Applicant Government complains of the failure to grant benefits that were promised (it is not clear when or by whom), for which it blames the Italian Republic.

The truth of the matter is that either ELSI was entitled by law to such benefits, in which case it should have taken legal action if they were withheld (but this was not the case and ELSI did not in fact take any action), or it was not, as we shall now proceed to demonstrate; in the latter case, the only alternative was for ELSI to request that benefits to which it was not entitled be granted out of « benevolence ». This is what ELSI asked, receiving the refusal that anyone requesting an illegal favour should expect to get.

Even for the type of production concerned, ELSI was not entitled to such benefits.

The Applicant complains of the failure to apply to ELSI's favor Article 1 of Law N. 835 of 6 October 1950 according to which the State administration was under an obligation to reserve the « supplies » of materials provided for in legislative decree N. 40 of 18 February 1947 to existing industrial facilities in the *Mezzogiorno* (Southern Italy). In particular, according to Article 16 of Law N. 717 of 26 June 1965, in force at the time of the events, the Government was supposed to reserve 30 % of its supply contract for companies operating in the *Mezzogiorno* ([70]).

Under Italian law the supply contract is a contract by means of which one party (in the present case, the Government) purchases goods or services, on a continual basis, from another party for its own use and (in the case of the public administration) to carry out its statutory tasks. This means that the materials in question have to be purchased ready for use immediately, without requiring any further assembly or convertion. This obviously did not apply to ELSI's products, since they were simple components and not finished products, and were therefore of no use at all to the Government, who would have had to sell them to other companies to be assembled and used in different products. This is not allowed by Italian law, since it would mean that the Government would in some way act as « go-between » between private companies.

([68]) Counter-Memorial, Document N. 44.

([69]) See the dismissal letter addressed to the employees of ELSI, dated 16 March 1968 (Document N. 21) and to Ing. Busacca (Document N. 22). It would be appropriate to point out here that a partial — and regretfully unfruitful — effort to make ELSI operative again was carried out by the Mayor of Palermo himself, through the assignment — conferred upon Ing. Laurin, an ELSI senior company director — to direct and take care of the plant during the requisition. This remark, already made in page 84 *et seq.* of the Counter-Memorial, is ignored in the US Reply.

([70]) The texts of the relevant rules are reproduced in Document N. 34.

It is for these reasons, which are seen to be based purely on legal provisions and do not include any intention to harass ELSI, that the Italian Government could not grant the benefits requested, as also Minister Andreotti pointed out in his speech in Parliament of 25 July 1968 ([71]).

Again with reference to the benefits extended under Italian legislation to companies operating in the *Mezzogiorno*, the Applicant notes that also other norms involving special freight discounts for materials used or produced by such companies were not applied to ELSI.

However, also the above norms were not applicable to ELSI's products, and for the same reasons previously outlined.

Article 15 of Law N. 717 of 26 June 1965 and the respective ministerial decrees implementing it, both dated 29 March 1967, provided for benefits in the following cases:

(*a*) raw materials and semi-finished products to be used for production purposes;

(*b*) building materials, machinery and anything else required for the reconstruction, transformation, extension and modernization of industrial plants;

(*c*) transport outside Southern Italy of *finished* products.

Raytheon requested precisely the application of the benefits provided for in section (*c*) above, since, as was stated also in the Memorial, the size and weight of the products meant high freight costs.

However, as can be seen from the text of the provision, the only and decisive condition for its application was represented by the fact that the products concerned were *finished* products and therefore required no further assembly. This was not true in the ELSI case.

Therefore, it was not possibile to grant even this benefit to ELSI.

It was therefore not that the Italian Government caused damage to ELSI but rather that ELSI was demanding benefits from the Italian Government in the form of « aid » beyond it was legally entitled to. After realizing that it had made a bad investment and that it had mismanaged it, Raytheon in other words did its best to pin the cost of all its own mistakes on the Italian Government. To try and achieve this it exploited the need, which was particularly strongly felt in Italy at the time, to protect jobs. Failing to attain this objective, the decision was taken to close down the plant, an act which was also in line with the policy of general reduction of United States investments abroad.

13. *The terms of the sale.*

The Applicant Government contends that « either as a total package or individually to maximize the realizable price » ([72]), « each product line could be sold as a separate package, including the respective technology, contracts, customer and supplier bases, and established name and reputation to buyers elsewhere in Italy, Europe or Japan » ([73]). This inference is drawn by the Applicant Government from the Affidavit of Mr Scopelliti. But what prospects could there have been for such a badly structured plant, production lines resulting in such large failures, products of such little worth that they were often returned to the seller (and in any case had no market appeal), technologies that proved to be so inefficient as to bring criticism also from the Bankruptcy Court expert, Dr Mercadante? In order to be able to reason from inferences, such as the likelihood of selling ELSI as a going concern ([74]), the inferences must based on adequate premises. Otherwise they may turn out to be purely gratuitous. In the case in point, the necessary premises are not to be found, because the poor industrial performance resulting in the ELSI debacle, the production and marketing deficiencies observed, the structural shortcomings found in the plant, all add up to an overall picture of the Palermo plant such as to render improbable any course of action other than to sell the plant as a whole.

([71]) Memorial, Annex 46.
([72]) Reply, p. 127.
([73]) Memorial, Annex N. 17.
([74]) Reply, p. 130 *et seq.*

14. *IRI's role in the acquisition of the plant.*

In the light of what has been seen above, it has little meaning to speak of IRI'S interfering with the bankruptcy proceedings. It is easy to prove the inaccuracy of the contentions presented by the Applicant Government in this context. ([75])

IRI was established by RDL (Royal–Decree Law) N. 5 of 23 January 1933, converted into Law N. 512 of 3 May 1933 ([76]). It was subsequently modified by RDL N. 905 of 24 May 1937. An institution was set up, whose action would be directed mainly towards the technical, economic and financial reorganization of national industrial activities.

IRI became a public agency with a permanent structure, which was given the task of managing the shareholdings in its possession, of undertaking new industrial ventures, also in cooperation with private capital, and of carrying out initiatives in the field of vocational training.

The Institute's activity has therefore to be set in the broader framework of State holdings, i.e. of publicly owned shareholdings in profit–making companies.

It is true that IRI enjoys financial independence, having its own « endowment fund » (Article 18 of the statute as approved by Decree–Law N. 51 of 12 February 1948) ([77]). It directly owns the shares that it possesses, which differs from the case of the direct participation of the State, which become part of the latter's assets. IRI operates in accordance with the profitability criteria typical of a market economy. It has its own organizational structure, consisting of a President, a Vice President, a Director General, a Board of Directors, and a Board of Auditors.

In other words, the IRI group comprises a group of companies, which operate in accordance with the laws of the free market.

The « social » side of State holdings comes from the special attention focussed on the creation and preservation of jobs. However the purpose of IRI is neither to salvage lame companies (for this purpose there is another agency in Italy, GEPI, for those cases in which the salvaging of a lame company presents particularly important social aspects) nor to engage in initiatives according to choices made by public authorities. Only occasionally IRI participared in the acquisition of unprofitable companies, acting on the instructions of the Italian Government.

In the telecommunications sector the IRI companies are grouped under STET, a jointstock company quoted on the Milan Stock Exchange. FINMECCANICA, with whom ELSI had meetings at the time it was seeking an Italian partner, is not a « division » of IRI, but a jointstock company which, like STET, is wholly subject to the norms regulating private companies, and is quoted on the stock exchange.

Raytheon had already contacted IRI at a time when ELSI had not yet met its inevitable doom. However, IRI was not, and could not, be interested in entering into partnership with a company in such disastrous conditions. Subsequently, when deadlock was reached in the ELSI bankruptcy proceeding, IRI was obliged to intervene, mainly to safeguard employment and the situation of the Palermo workers who had been thrown out of their jobs.

The heart of the matter remains the question of whether the ELSI company was worthless or not. We have seen that the company had no value. This explains why the attempts by the political authorities, especially the local authorities, to find ways and means of salvaging it were unsuccessful. The cost of possible comprehensive solutions for running an obsolete plant was obviously too high for an organization that must compete according to the rules of the market. The formula of the sale of ELSI as a going concern is constantly repeated by the Applicant Government. The Reply goes as far as to state that, while the Italian Government had publicly announced its intention to purchase ELSI, ELTEL – an IRI subsidiary – « boycotted the first three bankruptcy auctions, seeking to buy only some of the assets at a lower price » ([78]). However, this is contradicted both by the facts of the present case and by other events in which IRI has been involved.

([75]) Memorial, pp. 16, *et seq.*
([76]) Document N. 31.
([77]) Document N. 28.
([78]) Memorial, p. 16.

Certainly, ELSI was of no interest to IRI as it was. This was confirmed by the fact that, after the purchase, ELTEL had to spend large amounts — as much as Lire 3,500,000,000 ([79]) — to restructure the plant and completely change its production, even transferring to it some production lines which were previously operating elsewhere. After its purchase by ELTEL, the ELSI plant was converted for the production mainly of electric control panels, a production line that was removed from the SIP plant in L'Aquila ([80]). So IRI and its subsidiaries operating in the sector were in no way attracted by a « going concern » which, as has been shown, was not a going concern at all. What they actually purchased was the site on which the ELSI plant was located, taking over its oversized but qualified work force. It is therefore pointless to claim now that IRI plotted and conspired to obtain the production lines, which were dismantled, sold for scrap and replaced by others, or to obtain the technology, which was not used because, as well as obsolete, it was not relevant to the industrial aims then actually pursued. It is thus not surprising that IRI and STET were reluctant to take over a plant which they, like everybody else, knew to be useless as a specific operating structure and in the predictable need of productive reorganization.

Furthermore, if ELSI had been, if not an « industrial jewel », at least something with some marker appeal, as the Applicant Government is now claiming, why was it that no bidder came forward, particularly when the bankruptcy auctions were deserted? The Reply uses the term « boycotting ». IRI, however, has never had such powers. Recently, for instance, one of the IRI sectoral leader companies, FINMECCANICA, which as we have seen was previously involved in discussions with ELSI, had to negotiate the reorganization of the Italian thermo-engineering sector with other entrepreneurs. As the newspapers reported, FINMECCANICA and its subsidiary Ansaldo missed the boat: Franco Tosi and ASEA Brown Boveri deemed it preferable to come to an agreement between themselves and to leave the State holding companies out of the new reorganization. No one therefore stood in the way of other entrepreneurs plucking the ELSI apple if they had a mind to, just as no one prevented Franco Tosi (a member of the Pesenti group) and ASEA Brown Boveri from reaching an agreement cutting IRI out of the thermo-engineering sector ([81]). In the case of ELSI, the absence of competitors wanting to buy the alleged « industrial jewel » cannot be ascribed to boycotting by IRI, which in any case has never been proved. It was much more simply due to the easily understandable fact pointed out earlier, i.e. that no one wanted the Palermo plant, either as a whole or in part. And to tell the truth, no evidence has even been produced of anybody else's interest being boycotted. What is true is that the bankruptcy auctions fall into line with what has already been demonstrated: ELSI was not a going concern but a ruined company, which nobody wanted. And when the group leader STET was obliged to intervene in order to save the jobs of the now unemployed ELSI work force, ELTEL had simply to make the best of a bad bargain.

15. *Concluding remarks.*

In actual fact the criticisms advanced by the Applicant Government are based on even more complicated considerations and use a rethorical trick that can easily be exposed. Anyone reading the documents presented to the Court, starting with the latest one, can see that the Reply practically takes for granted what is set out briefly in the Memorial and explained at greater length in the 1974 Claim. In other words, by no longer going into the facts in detail, an attempt is made to give the impression that the alleged facts are obvious. On the contrary, these are merely assertions, or inferences, which are wholly unproven and actually do not stand to reason.

([79]) Affidavit of Ing. Ravalico (Document N. 14).

([80]) Affidavit of Ing. Ravalico (Document N. 14), and more generally, Affidavit of Ing. Cammarata, (Document N. 13).

([81]) On these facts and in particular on the disappointment of IRI for the agreement it failed to reach, see the article published in *Il SOLE-24 ORE*, 3 October 1987, (Document N. 29).

The 1974 Claim devoted considerable space (26 consecutive pages) ([82]) to describing, without proving, as must again be emphasized, a basically fraudulent plan to acquire the allegedly valuable ELSI plant at below its fair market price.

The contention of the United States Government is based on the following premises: the alleged existence of a sort of plot hatched by State holding companies, the Mayor of Palermo, banks and the bankruptcy receiver, focused on a valuable company, that IRI managed to acquire in an underhand way. As has been pointed out above, no such valuable company existed and therefore the hypothesis cannot be true. But the logical and legal coherence of the entire argument is also open to criticism.

The sequence of events that emerges from the outline of the facts contained in the 1974 Claim is as follows:

– on realizing that it lacked the capacity to attain a competitive size on the market, ELSI started looking for a possible Italian partner;
– IRI was approached, but was not interested;
– the banks, controlled by IRI, refused the proposals made by Raytheon and the ELSI management;
– the Mayor of Palermo issued the requisition decree;
– the bankruptcy trustee leased the plant to an IRI controlled company;
– an IRI subsidiary, ELTEL, purchased the plant after forcing the price down.

However:

(*a*) the need to find a strong partner is the first clue to the fact that ELSI by itself was not capable of attaining a competitive size. The tone used in the applicant Government's Reply was one of substantial reproach to the Italian Government and IRI for not having rushed to ELSI's aid. No one appears to have explained, however, why this should have been done, or, if it was true that ELSI was a valuable company, for which compensation is now being demanded, why the participation of a third party, i.e of the State holding companies, was being begged;

(*b*) IRI's refusal was explained at the time by its lack of interest in investing in a company with a production like ELSI's; and in fact, when ELTEL, an IRI subsidiary, did purchase the company from the bankrupt's estate, it immediately set about changing the production lines ([83]);

(*c*) the banks' refusal to accept an « orderly liquidation » which would halve their credits is presented as an irrational and in any case spiteful attitude on their part, and basically attributable to IRI, by whom it is assumed that the banks were controlled, and through it, by the Italian Government. However:

(*c*1) when a debtor offers to pay only a part of his debts, he is the one who is normally reproached and not the creditor who refuses the deal. Furthermore, under the Italian Civil Code (see Article 1181) ([84]), the creditor is entitled to refuse partial payment;

(*c*2) not all the banks to which ELSI owed money are controlled by IRI, which in its turn cannot be portrayed as an agent of the Italian Government, so that the link between the behaviour of the banks to which the money was owed and the Mayor or the Prefect of Palermo is non–existent; in this case it is hard to see what the Applicant Government has to complain about;

(*d*) in Italy there is the separation of powers, especially between the judiciary and the executive. Therefore, to assume that there could be a concerted attitude between the receiver appointed by the bankruptcy court, the Mayor of Palermo, and IRI is not only a contemptous argument vis–à–vis the Italian judiciary, but also an argument quite out of place.

([82]) See Counter–Memorial, Unnumbered Documents, vol. I, pp. 41–67.
([83]) See Affidavit of Ing. Ravalico, Document N. 14.
([84]) For the English text of Article 1181, see Document N. 16.

In all probability the matter is much simpler than the highly imaginative version served in the Memorial and Reply of the Applicant Government. The Respondent could simply rest its case on the statement that the Applicant Government has produced no evidence of linked behaviour, and linked unlawfully, between companies, local authorities and judges. And in view of the seriousness of such a charge, reasonable caution should be exerted when asserting that such links existed. However, the facts alleged have induced the Italian Government to go beyond a mere passive denial of the Applicant's arguments and to stress the enormity of the allegations.

ELSI was an unsuccessful deal, at least from 1962 on, or rather an unsuccessful speculation, because Raytheon believed it was possible to make a profit by shelving the State and local authorities with the costs of an obsolete company, thereby exploiting the need to create jobs in the *Mezzogiorno* ([85]). According to Ing. Busacca, ELSI did not distinguish itself either for its technology, nor for the state of its plant. According to Rag. Ravalico, its products were obsolete and off market. According to Dr. Mercadante, ELSI's products were defective. According to its balance sheets, the company was undercapitalized. Obviously all it produced were losses, and more losses.

It was the obvious concern of the Italian local and central authorities to provide the maximum possible employment. In high unemployment areas like the *Mezzogiorno*, the closing of a company normally gives rise to tension and a necessary degree of solidarity. Raytheon was ready to take advantage of all this, both at the beginning, when it benefited from financial inducements, and in the end, when the wages of its 168 employees were paid by the Sicilian Regional Government. As part of the general pressure applied to save the company Raytheon contacted IRI. However, in view of the economic uselessness of the ELSI plant, IRI made the correct managerial decision not to have anything to do with it, fully aware that once it was caught up in the affair it would have trouble coming out of it unscathed. Raytheon then made another attempt using an illusory rehabilitation plan in which it claimed that the banks were prepared to accept 50 % payment. However, to anyone examining the matter thoroughly, it was clear that no such conclusion was warranted since the ELSI plant had no market value except on the scrap market (and most of the plant was actually sold off as scrap) ([86]) while no commitment to « cover » ELSI was forthcoming from the parent company (since the promises mentioned by the Applicant Government are only hypothetical). With no further hope of (*a*) receiving government orders, as no reason exists for giving them to a company that produced badly, (*b*) of association with the State holding system, which had no reason to waste its money on a company that produced losses, and (*c*) of an agreed rehabilitation plan, which was intrinsically unfeasable and in any case involved cuts in the creditors' share which the creditors would have no reason to accept, particularly since in Italy the bankruptcy proceeding is required by law; Raytheon stiffened its attitude in the hope that the State holding companies or the local political authorities would give in at the last moment (the payment of the wages of 187 employees by the Sicilian Region raised hopes of a possible bail-out) ([87]). ELSI issued a communiquè, which was given wide circulation, to the effect that, as from 16 March 1968, the company would cease all activities and that as from 29 March the employees would be laid off. It is interesting to note the tone of the ELSI communiqué: it said in effect that Raytheon had invested many billion lire, and that the Italian Republic did not intend to mount any rescue operation. The only thing it omitted to communicate, and indeed tended to ignore, was the fact that the company was economically worthless and financially ruined, and that the Italian legal system does not consider that an insolvent debtor has the right to receive aid from anybody, particularly when he is responsible, as ELSI was responsible, for having wasted someone else's money (see the financing received) in products capable of making only losses.

([85]) Therefore, for instance, ELSI benefited from soft loans, which were provided for in the law: see Counter-Memorial, pp. 77 and 78. The Reply, however, avoids any mentioning of these soft loans.

([86]) See Affidavit of Ing. Rabalico, Document N. 14.

([87]) On the attitude showed by ELSI's management in those critical days, see the article published in *L'ORA*, Document N. 29.

As was to be expected, the ELSI work force staged several demonstrations ([88]). On 25 March a general strike was actually called in Palermo to express solidarity with the ELSI workers. The local authorities were thus obliged to intervene. Raytheon, realizing that it now had the opportunity to blame others, and not its own errors, for the company's debacle, decided to speculate on the events. This was the beginning of the complaints.

It may be objected that this is only surmise. If it is, it is no different, however, from the surmise contained in the contentions of the Applicant Government, except for some fundamental aspects: the constant losses incurred by ELSI, out of all proportion to the capital invested, are an unchallenged fact; the ruinous state of the ELSI company is an unchallengeable fact, since it can be worked out from the figures and from the proposal to pay 50 % to the creditors; the state of obsolescence of the plant is equally unchallengeable, as it is confirmed in several Affidavits. The fact is therefore that ELSI and Raytheon were aware of the disastrous situation of the company and of the impossibility of presenting to the market a company that was losing money so fast. And yet, despite these facts, one still finds a request for compensation of a « full value » that has no connection at all with reality.

([88]) On this point, see also the Affidavit of Avv. Maggio, Document N. 3.

PART II

THE JURISDICTION OF THE COURT

Since the two Parties expressly agree that the Court has jurisdiction over the dispute, under Article XXVI of the Treaty, « in so far as it relates to the interpretation and application of the 1948 Treaty and the 1951 Supplementary Agreement » (1), it is hard to see why the Applicant finds it expedient to point out that « the Respondent is now barred from raising an objection » (2) Over many years of negotiation on the claims put forward by the United States Government on behalf of Raytheon and Machlett, no intention of raising an objection to the Court's jurisdiction with regard to an application based on the Treaty has ever been voiced by the Italian Government.

The Respondent Government only expressed the view that, given the new position taken by the United States Government on many issues in its Memorial, the Italian Government would have been entitled to insist that « the basic contentions concerning the interpretation or the application of the Treaty should have first been put forward in diplomatic negotiations » (3). However, as the Counter-Memorial made clear, « in the interests of a complete settlement of the dispute, the defendant Government refrains from putting forward » any request for the Court « to declare that the conditions set forth in Article XXVI of the Treaty have not been fulfilled » (4).

There is little accuracy in the Reply's contention that « the United States has repeatedly raised with the Respondent since 1972 the legal claims now before this Court» (5). As a perusal of the Memorandum of Law presented in 1974 and of the Memorial shows (6), the Applicant Government has significantly altered its basic contentions concerning the Treaty and the Supplementary Agreement. This may be an embarrassing fact for the Applicant Government to acknowledge; it cannot be denied by noting that the same Government has persistently claimed compensation (7).

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(1) Counter-Memorial, p. 97. In quoting this passage the Applicant Government's Reply (at p. 133) omits the words « in so far ». The omission may be inadvertent, as the jurisdiction of the Court over the dispute clearly rests only on Article XXVI of the Treaty, which reads as follows: « Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, when the High Contracting Parties shall agree to settlement by some other pacific means ».

(2) Reply, p. 135.

(3) Counter-Memorial, p. 97.

(4) Counter-Memorial, p. 97.

(5) Reply, p. 30.

(6) See Counter-Memorial, pp. 97.

(7) The Reply (p. 135) concludes as follows: «Since the Respondent has consistently refused to pay compensation for the damages suffered by the United States, the dispute has not been satisfactorily adjusted by diplomacy and is now properly before this Court pursuant to Article XXVI of the Treaty ».

PART III

THE ADMISSIBILITY OF THE CLAIM

The Italian Government has contended in its Counter-Memorial that « the United States Government's claim is inadmissible in view of the fact that local remedies were not exhausted by the two United States corporations on behalf of which the claim is put forward » (1). The Applicant Government attempts to justify the admissibility of its claim in its Reply (2). However, the United States Government does not contest that the objection that local remedies were not exhausted may be made in relation to a claim under the Treaty. It is also common ground that, in order to establish whether local remedies have been exhausted, « the only possible test is to assume the truth of the fact on which the claimant State bases its claim » (3).

One of the Applicant Government's contentions is that « the Respondent is estopped from asserting that there exists any requirement to further exhaust local remedies » (4). It is difficult to see on what basis the existence of an estoppel could be alleged. At no time did the Italian Government say that local remedies did not have to be exhausted. Nor could a waiver be implied in the alleged fact that « the Respondent made statements that it was willing to go to arbitration with the United States » (5). Objections relating to nonexhaustion of local remedies have frequently been considered on their merits in arbitration decisions over claims put forward by a State against another State on behalf of individuals. As the arbitral tribunal said in the *Case Concerning the Air Services Agreement of 27 March 1946 (United States v. France)*, « the rule of international law relating to the requirement of exhaustion of local remedies, when making a distinction between the State-to-State claims in which the requirement applies, and claims which are not subject to such a requirement, must necessarily base this distinction on the *juridical* character of the *legal relationship* between States which is invoked in support of the claim. Consequently, with respect to the applicability of the local remedies rule, a distinction is generally made between « cases of diplomatic protection » and « cases of direct injury » (6).

Moreover, far from being an unexpected issue, the question of exhaustion of local remedies had been discussed at length in the Memorandum of Law submitted by the Applicant Government in 1974 (7). It was reasonable for the same Government to take into account the fact that the issue would have to be considered in arbitration or judicial proceedings. The Defendant Government's constantly expressed view that the claim is unmeritorious certainly does not affect the application of the local remedies rule. As the arbitrator noted in the *Finnish Shipowners*

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(1) Counter-Memorial, p. 99.
(2) Reply, pp. 137-138.
(3) This passage, taken from the arbitral award in the *Ambatielos* case (12 *Reports of International Arbitral Awards*, p. 119), was quoted in the Counter-Memorial, p. 98; the Reply, p. 137, nt. 2, refers to the pages of the award containing the same passage.
(4) Reply, p. 135.
(5) Reply, p. 135. The Reply, also criticizes the Respondent for having failed to « suggest or request that Raytheon and Machlett enter Italian courts and sue on the basis of the Treaty ». Does this imply that, according to the Applicant, a State is under an obligation to recommend legal action against itself?
(6) Decision of 9 December 1978, 54 *International Law Reports*, pp. 304 *et seq.* and p. 324.
(7) Unnumbered Documents submitted by Italy, Vol. I, pp. 133-137.

case, « every relevant contention, whether it is well founded or not, brought forward by the claimant Government in the international procedure, must under the local remedies rule have been investigated and adjudicated upon by the highest competent municipal court ». ([8])

The Applicant Government seeks support in the circumstance that « assuming for the sake of argument that an action based on the Treaty could be brought — the statute of limitations on that action has now expired » ([9]). It is hard to see why the said circumstance should be relevant, as it is well known that the local remedies rule fully bars an international claim when local remedies which have not been exhausted become unavailable: the arbitration award in the *Ambatielos* case ([10]) provides a good example to this effect. In any case, the five–year deadline set by Article 2947, paragraph 1, of the Italian Civil Code ([11]) for claims relating to damages arising out of a wrongful act had already elapsed for any act committed in 1968 by the time the United States Government submitted its claim on 7 February 1974 on behalf of Raytheon and Machlett ([12]). Therefore, any attitude that the Italian Government may have taken after that date can in no way be considered as the cause of the remedy not having been exhausted.

The very attempt to build an argument of estoppel on such a slender basis conveys the impression that, even in the Applicant Government's view, there are no substantial reasons for overcoming the objection to the admissibility of the claim. The objection rests on the fact that Raytheon and Machlett — apart from not taking adequate steps to prevent some of the measures that the Applicant Government assumes to be wrongful ([13]) — failed to bring an action against the Italian State claiming compensation for damages arising from the alleged wrongful acts committed by public authorities. The general rule in the Italian Civil Code concerning compensation for damages arising from wrongful acts — Article 2043 ([14]) — is often invoked by individuals against the Italian State and substantial sums have been awarded to the claimants where appro-

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([8]) Also this passage, which is taken from 3 *Reports of International Arbitral Awards*, p. 1503, was quoted in the Counter–Memorial, p. 99. The Reply, p. 137, nt. 2, again refers to the pages of the award containing the same passage.

([9]) Reply, p. 139.

([10]) See 12 *Reports of International Arbitral Awards*, p. 118.

([11]) Under the said paragraph the deadline is five years from the day on which the wrongful act took place (« The right to compensation for damages arising from a wrongful act expires five years after the day in which the wrongful act took place »).

([12]) Unnumbered Documents submitted by Italy, Vol. I, p. 3.

([13]) For instance, Raytheon failed to appeal to the Court of Cassation against the decision by the Court of Palermo of 20 June 1969 concerning the terms of the fourth auction, while Machlett does not appear to have taken any steps to challenge the bankruptcy judge's decision.

([14]) « *Compensation for wrongful acts.* Any act committed either wilfully or through fault which causes wrongful damages to another person implies that the wrongdoer is under an obligation to pay compensation for those damages » (the Italian text with full translation is reproduced in Document N. 16).

With regard to the claim for compensation of damages arising from wrongful acts, which is available under Article 2043 of the Italian Civil Code, it is to be pointed out that Raytheon and Machlett, if convinced that the behaviour of Italian officers (the Mayor, the Prefect of Palermo, etc.) had been inspired by an intent of jeopardizing their interests in favour of IRI, could have also brought a criminal action against such authorities, in compliance with Article 323 of the Italian Criminal Code (« Innominate abuse of power ») (see Document N.17). This criminal action, if successful, would also have implied, in favour of Raytheon and Machlett, a right to compensation, under Article 2043 of the Italian Civil Code (in the Italian legal system, damage caused by a crime gives always rise to the right to compensation according to Article 185 of the Criminal Code).

In other words there were two ways available to the United States shareholders for seeking compensation: a criminal suit coupled with a civil suit or an independent civil suit, both allowing the shareholders to invoke Article 2043 of the Civil Code.

The different opinions given in the affidavits submitted by the Applicant, except for several incorrect premises on which they are based (e.g. on page 15 of the La Pergola's Opinion, it is taken for granted that the requisition would have continued, which it did not; on page 16, the Prefect of Palermo is said to have made a statement concerning the cause–and–effect relationship between requisition and bankruptcy which he never made and whose existence has never been proved) do not consider that, when a shareholder, as has been alleged in the present case, has suffered not only indirect damage resulting from damage inflicted to the company, but is instead the direct victim of a persecution by public authorities which cause him an immediate, personal and direct damage, he is entitled to compensation under Italian law.

In such a case, and irrespective of his nationality, any such shareholder can bring an action for damages against the public official responsible for such action, as well as against the branch of the public administration on behalf of which the latter was acting.

priate. In the present case, if one assumes, as one is supposed to do under the local remedies rule, that the Applicant Government's contentions are correct — Raytheon and Machlett suffered damages caused by Italian public authorities in violation of the Treaty and the Supplementary Agreement — the provisions of the Treaty and the Supplementary Agreement would have made it necessary for an Italian court to conclude — on the basis of the same assumption — that the Italian public authorities' acts were wrongful acts when applying Article 2043 of the Civil Code. ([15])

No set of fact similar to that to which the United States Government's application refers was ever invoked before an Italian court. The receiver, when he brought an action for compensation, ([16]) only complained of the requisition decree. ([17]) Nor did he invoke — or indeed could have invoked, as he was acting on behalf of ELSI, an Italian company under Article II, paragraph 2, of the Treaty — any provision in the Treaty or the Supplementary Agreement. Hence, the receiver's action can in no way justify the lack of initiative on the part of Raytheon and Machlett.

In order to contend that there were no local remedies available to Raytheon and Machlett, the Applicant Government refers to three opinions: two given to Raytheon in 1971 and the third one, which is dated February 1988, given to the United States Government by Professor Elio Fazzalari, who had acted over 13 years as Raytheon's counsel in relation to the claim — a fact which is mentioned neither in the opinion annexed to the Reply nor in the Reply, but results

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([15]) In addition to the remedies referred to above, there were other remedies provided for by the Italian legal system and available to the two United States companies. Such remedies are offered by the bankruptcy legislation in favour of all the creditors of the bankrupt company.

(*a*) Raytheon was in fact a chirographary creditor of ELSI for the sum of Lire 1,143,800,000 (see Memorial, p. 60 and Annex 14), in addition to the sums guaranteeed and paid as guarantor. However, this credit was never claimed in the bankruptcy proceedings (see Memorial, Annex 26, p. 9 and Annex 30, p. 5) upon recommendation of the Raytheon counsel, who was obviously well aware of how much below the triumphant forecasts the true value of the bankrupt company's assets really was.

(*b*) As for the complaints about the unfavourable conditions in which the ELSI sale took place (the absence of any foreign companies at the auctions and the general complaints about « irregularities ») that the allegations are groundless and the bankruptcy proceedings took place in full respect of Italian law.

However, it is a general principle of Italian bankruptcy legislation (Articles 23 and 26 of the Bankruptcy Law, text reproduced in Document N. 18) that all the acts of bankruptcy judges can be appealed against by petition to Courts, whose decisions can be reviewed by the Court of Cassation, according to Article 111 of the Italian Constitution. In fact most of the decisions of the bankruptcy judge were not appealed against and in any case the judicial review of the Court of Cassation was never asked for.

(*c*) With regard to the specific terms of the sale, Article 108 of the Bankruptcy Law states that they are set by the bankruptcy judge at the receiver's request and that the sale may be suspended when the price offered is much lower than the market price. In the case in point it was apparently not considered necessary to use these powers of suspension.

However, it is legally unchallengeable, and therefore an applied principle in the Italian legal system, that the sale order issued by the bankruptcy judge, who thereby obviously deems it not necessary to exert the powers of suspension, can be appealed against in a court of higher instance and, eventually, in the Court of Cassation.

The deadline for lodging an appeal is quite adequate and in any case such as to guarantee the right of defence of the parties concerned. The deadline is represented by the order transferring the assets to the purchaser, and is obviously subsequent to the date of the auction at which they were sold.

The appeal can be made by any of the parties interested in the correct conduct of the bankruptcy proceeding and in obtaining the highest possible proceeds from the sale. The two parties specifically concerned are the receiver and the bankrupt.

However, anyone, even third parties who are not involved in the proceeding but who consider that the auction price is too low with respect to the value of the assets, can make an appeal or request the suspension of the sale, even after the auction has been held, provided that they do so before the transfer order is issued. They are entitled to do this irrespective of whether they are willing to make a higher offer or whether they are reporting irregularities in the proceeding.

In the case in point, Raytheon made only a few, unsuccessful, appeals to the lower court and never went as far as the supreme Court of Cassation.

([16]) Raytheon's counsel Giuseppe Bisconti argued in 1971 that there was no cause of action under Article 2043 of the Civil Code because « Italian law provides for a specific remedy against the requisition which is the aforementioned appeal to the Prefect » (Unnumbered Documents submitted by Italy, Vol. I, p. 160). However, the receiver brought precisely such an action which was partly successful. The final decision in this case was given by the Court of Cassation on 26 April 1975. For the English translation of the decision, see Memorial, Annex 82.

([17]) For an English translation of the receiver's lawsuit see Memorial, Annex 79.

from documents exhibited by the Applicant Government ([18]). The two earlier opinions did not deal with the question of whether the Treaty could be invoked by Raytheon and Machlett before Italian courts. The Reply's assertion ([19]) that Professor La Pergola « considered in 1971 whether Raytheon could sue based on the Treaty » is unsound, not only grammatically. Professor La Pergola's Opinion is a discussion of diplomatic protection of shareholders. In the English translation of this Opinion, annexed by the Applicant Government to its 1974 « Memorandum of Law », the only argument given with regard to local remedies runs as follows: « The bankruptcy status prevents any direct initiative by the company towards reintegration or restoration in a situation in which it would have found itself had it not been for the illicit action. On the basis of the principles confirmed by internationalistic jurisprudence, this constitutes another element permitting immediate protection of the shareholders by the State of which they are citizens. Hence, the question of exhausting internal remedies does not apply since remedies, in this situation, would not have been directly available to the shareholders. The latter have suffered a specific injury of their interests since the illegal conduct of the State made the liquidation impossible » ([20]).

On the basis of Professor Fazzalari's « independent » Opinion, the Applicant Government puts forward only one argument in order to contend that the Treaty would have been of no avail to Raytheon and Machlett. The argument runs as follows: « Although the Treaty and Supplement at issue here were incorporated into Italian legislative acts, the provisions argued before this Court are not complete enough to permit a suit for compensation by a United States national against the Government of Italy in Italian courts » ([21]). In other, and perhaps simpler, words, the United States Government's contention is that Italian courts would have ignored all the provisions in the Treaty and the Supplementary Agreement which could have been invoked by the two United States companies notwithstanding the existence of specific legislation designed to ensure the application in Italy of the Treaty and the Supplementary Agreement ([22]).

The Reply does not quote, directly or indirectly, any single case in which Italian courts would have taken the view that any provision in the Treaty or the Supplementary Agreement is not self-executing. The Applicant Government attempts to diminish the importance of what the Reply calls the « only Italian case cited by the Respondent in support of its argument » ([23]). This was a decision by the Italian Court of Cassation ([24]) in which Article V, paragraph 4, of the Treaty which had been invoked before the Italian courts by a United States corporation, was applied to its benefit. The Reply's comment that there « were no damages awarded in that case » ([25]) is misleading, since no damages had been claimed; nor is the observation that the case « did not involve the Government of Italy » ([26]) any more pertinent: when a treaty provision is regarded as self-executing in the relations between private parties, it is certainly applied also in a case brought against public authorities.

The Italian Court of Cassation confirmed its attitude in favour of considering the Treaty provisions as self-executing when it applied Article XIV of the Treaty in a criminal case, *in re Walsh* ([27]). In Italy, as the claimant Government rightly noted in another context ([28]), « [a]lthough the opinion of the Supreme Court is not binding outside the case in which it is rendered, it is highly persuasive authority in subsequent cases in Italian courts ». Hence, the two decisions by

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([18]) See Memorial, Annex 13 (Schedule K) and Annex 40 (Exhibit A).

([19]) Reply, p. 138.

([20]) Unnumbered Documents submitted by Italy, Vol. I, p. 172. The English translation of the full opinion has been omitted in Annex 3 to the Reply.

([21]) Reply, p. 138.

([22]) The two legislative acts which provided the relevant « implementing orders » (*ordini di esecuzione*) were referred to in the Counter-Memorial, p. 100).

([23]) Reply, p. 138.

([24]) Decision N. 2228 of 30 July 1960, *The Durst Manufacturing Co. v. Banca Commerciale Italiana.* The text of this decision, to which the Counter-Memorial referred on p. 98, is reproduced in Document N. 11.

([25]) Reply, p. 139.

([26]) Reply, p. 139.

([27]) Decision No. 2579 of 6 December 1983 – 17 February 1984, *Commissione Tributaria Centrale* (1984), II-1143, reproduced in Document N. 12.

([28]) Reply, p. 139, nt. 22.

the Court of Cassation mentioned above give a strong indication of what would have been the attitude of Italian courts if Raytheon and Machlett had brought a claim and invoked provisions in the Treaty and the Supplementary Agreement.

An attitude in favour of the self-executing character of treaty provisions was shown by the Italian Court of Cassation also when individuals invoked, in cases brought against public authorities, provisions of treaties like GATT which were taken not to be self-executing by some non-Italian courts. For instance, decision N. 1455 of 21 May 1973, *Ministero delle Finanze v. S.p.a. Manifattura Lane Marzotto*, held that Article II (b) of GATT « is immediately applicable, without the need for futher legislative intervention, not only to the participating State but also to the subjects of the internal system, which gives rise directly to rights and obligations » ([29]).

The Reply ([30]) referred to a decision concerning Article 78, paragraph 4, of the Peace Treaty with Italy, which concluded that « the said Article constitutes a relationship enforceable in internal law » ([31]). With regard to the same provision, in decision N. 107 of 14 January 1976, *Ministero del Tesoro v. Mander Brothers Ltd.*, the Supreme Court stated that the said paragraph, « in providing that the Italian Government be charged with the obligation to indemnify citizens of the United Nations for losses suffered, from wartime events, following injury or damages caused to their property in Italy, gives rise, along with an international obligation of the Italian State vis-à-vis the other Contracting States, to a direct legal relation of a binding character, between the first State and the individual citizens of the United Nations. Such relation, complete in all its essential elements, is immediately effective in the domestic legal system, without the further requirement of a normative act of integration or of implementation, and therefore, as was pointed out by the *Sezioni Unite* of this Supreme Court, it is actionable by the same citizens before Italian courts » ([32]). This reasoning hardly supports the Applicant Government's assertion, with regard to the Treaty, that « although there is provision in Article V for indemnification by the Government of Italy of those individuals or corporations who have been deprived of their property, that Article is still not sufficiently complete » ([33]).

The Reply's further contention, that «since Raytheon's and Machlett's claims are those of shareholders, Italian law would prevent a suit seeking compensation based on the illegal requisition because Italian law reserves such a right to ELSI alone, despite the existence of the Treaty » ([34]), is an inaccurate rendering of Professor Fazzalari's «independent» Opinion to which it refers: the final part of the Opinion, in which the argument was put forward, was written on the basis of « [h]aving excluded that the treaty has introduced into the internal law claims and judicial remedies stronger and different from those already available in the Italian legal system » ([35]). Hence, this argument, whatever its merits, in no way affects the question whether the Treaty could be invoked before Italian courts.

The Counter-Memorial quoted a decision by the United States Court of Appeals for the Fifth Circuit, which held that the treaties of Friendship, Commerce and Navigation « are self-executing treaties » ([36]). The Applicant Government has in no way challenged this appraisal of the attitude of United States courts towards treaty provisions whose language is identical or similar to that of the provisions which could have been invoked before Italian courts. Nor has

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([29]) 96 *Il Foro Italiano* (1973), I-2444. English translation in 2 *The Italian Yearbook of International Law* (1976), pp. 383-384. See Document N. 5.

([30]) Reply, p. 138 and nt. 11.

([31]) Decision N. 3592 of 13 November 1974, *Ministero del Tesoro v. Di Raffaele*. English translation in 2 *The Italian Yearbook of International Law* (1976), pp. 366-368.

([32]) 99 *Il Foro Italiano* (1976), I-2463. English translation in 3 *The Italian Yearbook of International Law* (1977), p, 349-350. See Document No. 4.

([33]) Reply, p. 138. Under Italian law, the fact that in some instances there may be a doubt as to whether a remedy exists before an ordinary court or an administrative court never implies that no remedy exists or that a provision in a treaty may be taken as not being self-executing. The decision quoted at nt. 31 was in favour of the competence of ordinary courts. No doubt, also a claim for damages under Article 2043 of the Civil Code should be brought before an ordinary court.

([34]) Reply, p. 138.

([35]) Reply, Annex 2, Part. II.

([36]) The reference to the decision in *Spiess v. Itoh & Company*, 643 *Federal Reporter*, 2d Series, p. 353 *et. seq.* (1981) was made in the Counter-Memorial, p. 100, nt. 6.

the Applicant Government given any compelling reason why Italian courts should have disregarded these provisions. The decisions quoted above point, on the contrary, to an attitude which is certainly not less favourable to the self-executing character of treaty provisions. Thus, Raytheon and Machlett, in seeking immediate recourse to diplomatic protection ([37]), did not use the local remedies available to them, as they were required to do under the local remedies rule. As was said by Mr. Becker, the Agent for the United States Government in the *Interhandel* case: « Even if by violation of a treaty an international wrong would have been committed, that wrong still would not be sufficiently definite and complete so as to give rise to a claim between States. In order to give rise to an international claim, a treaty violation must have become definite and complete; it must have passed beyond the stage where domestic judicial action of a country can rectify the violation ([38]).

([37]) The request for an opinion on the admissibility of diplomatic protection (Unnumbered Documents submitted by Italy, Vol. I, p. 161) shows where their main objective was as early as 1971.

([38]) *I.C.J. Pleadings, Interhandel Case (Switzerland v. United States)*, p. 505.

PART IV

THE INTERPRETATION AND APPLICATION OF THE 1948 TREATY AND THE 1951 SUPPLEMENTARY AGREEMENT

1. *Aims pursued by the* 1948 *Treaty and principles on which it is based.*

In Part Five of the Reply, in which the legal basis of the claim of the United States is examined, some remarks are addressed in the first place to the question of the aims characterizing the Treaty of Friendship, Commerce and Navigation of 2 February 1948. The Italian Counter-Memorial (1) had stressed the importance that the object and purpose of a treaty have in the interpretation of its provisions in accordance with Article 31 of the Vienna Convention on the Law of Treaties (2). The Counter-Memorial emphasized the great variety of aims pursued by the 1948 Treaty and showed that the provisions to which the Applicant refers cannot be interpreted solely as a function of the interests of United States investors in Italy.

In fact, as the Applicant asserts in its Reply, the Treaty provisions show that « both Parties were concerned with the property and interests therein of each Party's corporations in the territory of the other » (3). However, for this very reason it is essential to ascertain accurately the extent to which the above-mentioned provisions refer to the property and interests owned by the Raytheon and Machlett corporations in Italian territory.

A further preliminary question is that of the principles on which the 1948 Treaty is based (4). The Applicant argues that the principles of national treatment and of most favoured nation treatment are not the only ones applied in the Treaty. (5) This is not a pertinent criticism of our reasoning which consisted in pointing out that these are the only two principles explicitly mentioned in the Preamble to the Treaty (6). The Applicant itself referred to an earlier case in which the Preamble was used by the Court to establish the object and purpose of a treaty (7). This does not imply denying that « [t]he operative standard of treatment must be analyzed for each of the articles advanced by the United States » (8). However, one should not neglect the significance of the phrase «in conformity with the laws and regulations in force», which qualifies the standard of treatment provided for in several articles of the Treaty.

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(1) Counter-Memorial, pp. 102-104.
(2) The Counter-Memorial, on p. 101, noted that « [a]lthough the 1969 Vienna Convention on the Law of Treaties does not apply to the interpretation of the Treaty and its Supplementary Agreement; the rules on interpretation included in the Convention are to be considered as corresponding to those applicable under general international law ». This appears to be common ground between the Parties, as in the Reply the « United States agrees that the rules of the Vienna convention apply to the interpretation of this Treaty » (p. 146, nt. 22).
(3) Reply, pp. 141-142.
(4) See Counter-Memorial, pp. 104-106.
(5) Reply, p. 142.
(6) Counter-Memorial p. 104.
(7) Reply, p. 142, nt. 4.
(8) Reply, p. 142.

2. *The Italian nationality of ELSI.*

A fundamental problem is related to the status of the ELSI company, i.e. of the entity that, having decided to cease its activities, had its plant and equipment requisitioned and was subsequently declared bankrupt at the request of its management, its plant finally being sold. In this connection it has been pointed out in the Counger–Memorial (9) that, in accordance with Article II, paragraph 2, of the Treaty, ELSI, having been incorporated in Italy under Italian law, is an Italian company, notwithstanding the fact that in 1968 all its shares were owned by the United States companies Raytheon and Machlett. In view of its nationality, therefore, ELSI was not eligible for protection under the 1948 Treaty and the 1951 Supplementary Agreement between Italy and the United States with reference to its activities in Italy and the events concerning it which occurred in Italy. In this regard the Counter–Memorial cited the decision of the Supreme Court of the United States in the case of *Sumitomo v. Avigliano* (10). In accordance with the Treaty of Friendship, Commerce and Navigation between the United States and Japan (in which Article XXII, paragraph 3, corresponds to the above–mentioned Article II, paragraph 2, of the Treaty between Italy and the United States), the Court ruled that since the Sumitomo company was incorporated in New York under New York law « it is a company of the United States, not a company of Japan », and therefore could not « invoke the rights provided in Article VIII paragraph 1 » of the Japan–United States Treaty.

With regard to this case the Applicant only asserts in a footnote (11) that the argument presented by the United States before the Supreme Court in the case of *Sumitomo vs. Avigliano* is not relevant to the present case since it « dealt with language particular to Article VIII (1) of the FCN Treaty ». It is easy to reply, however, that the only argument of the United States mentioned by the Italian Government in its Counter–Memorial (12) was drawn from the brief submitted to the Supreme Court by the United States as *Amicus Curiae*, and consisted in the observation that, in accordance with the Treaty with Japan, « a company has the nationality of its place of incorporation ». This obviously results from Article XXII paragraph 3 and not from Article VIII (1) of the said Treaty. Anyway, what really matters is the passage taken from the Supreme Court's decision: the Applicant is referred to the quotation on p. 98 of the Counter-Memorial which was summerized above.

Certainly, Article II, paragraph 2 of the 1948 Treaty represents a provision which is very clear and cannot be ignored. Consequently, the heart of the matter is to establish whether — given the fact that ELSI was not eligible by nationality to invoke the Treaty with regard to Italian authorities, any rights and interests of the two United States shareholders in ELSI, namely Raytheon and Machlett, are « specifically protected » by the provisions of the Treaty referred to by the Applicant, as is asserted by the latter. On principle, it is possible that certain provisions of an international bilateral instrument may be intended to protect specific rights or interests of the shareholders in a company. This was recognized by the Court in the *Barcelona Traction* case. (13) While the Applicant cites this well–known precedent (14), it fails to acknowledge that the Court's decision stressed the firm distinction between the company's rights and those of its shareholders (15). This distinction was based on the nature of corporations stock under domestic law; which was considered to be relevant also in international law insofar as the latter makes reference to the « rules generally accepted by municipal legal system which recognized the limited company whose capital is represented by shares » (16). *Inter alia* the Court stated that... « even if a company is no more than a means for its shareholders to achieve their economic purposes, so long as it is « in essere », it enjoys an independent existence » (17).

(9) Counter–Memorial, pp. 106–108.
(10) Counter–Memorial, pp. 106–107.
(11) Reply, p. 143, nt. 7.
(12) Counter–Memorial, p. 106.
(13) *I.C.J. Reports* 1970, p. 39, para. 58. See also p. 47, para. 90.
(14) Reply, p. 143.
(15) *I.C.J. Reports* 1970, p. 34, para. 41.
(16) *I.C.J. Reports* 1970, p. 37, para. 50.
(17) *I.C.J. Reports* 1970, p. 36, para. 45.

In fact this is the principle which, by means of provisions assigning the nationality of the companies to the one and to the other Party to the Treaty, is considered to be a fundamental starting point also by Treaties of Friendship, Commerce and Navigation. It is true that a small number of clauses adopt instead what the Court calls « the process of lifting the veil »; the Court stated that this process, « being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible *to play a similar role* in international law », with the result that « on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders » ([18]). It is clear, however, that when certain clauses specifically protect the interests of foreign shareholders in a national company they must be interpreted restrictively and rigorously, as is in all exceptional rules ([19]). The argument put forward by the Applicant according to which all the provisions of the 1948 Treaty and the 1951 Supplementary Agreement invoked by it are to be considered as instruments affording a wide range of protection for American shareholders of Italian companies does not appear to have any legal basis.

3. *The alleged interference by Italy in the management and control of ELSI. Was Article III, paragraph 2, of the Treaty violated?*

Let us now examine each of the claims advanced by the United States Government, in the order in which they appear in the Reply. The first wrongful act allegedly committed by the Respondent is to have interfered in the management and control of the ELSI company. This alleged act would have taken place, according to the Applicant, first when it was decided to requisition the plant and equipment, further when the decision by the Prefect of Palermo on the ELSI appeal against the requisition order was delayed and, lastly, when the bankruptcy proceeding was thwarted. Italy is thus alleged to have violated Articles III and VII of the 1948 Treaty and Article I of the 1951 Supplementary Agreement.

Article III is divided into two paragraphs and there is no allegation that Italy did not comply with the first of these paragraphs in the case in point. Therefore, the Applicant has implicitly admitted that the Raytheon and Machlett companies enjoyed the right of holding shares in ELSI under conditions no less favourable than those granted to companies of any third country. The Applicant implicitly recognizes also that ELSI, which was controlled by the said two United States companies, enjoyed the right to exercise the functions for which it had been created in conformity with the Italian law and regulations, upon terms no less favourable than those accorded to corporations controlled by corporations of any third country.

The dispute concerns paragraph 2 of Article III which the Applicant interprets as permitting the United States companies to organize, control and manage Italian commercial and industrial corporations subject only to the requirements established by Italian law. This right is alleged to have been violated by the requisition decree.

Such a contention is unfounded. First of all, with regard to the interpretation of the relevant section of Article III, paragraph 2, it was emphasized in the Counter-Memorial ([20]) that the right of United States companies to « organize, control and manage » corporations and associations in Italian territory has been granted by the Treaty « in conformity with applicable laws and regulations » in Italy; in other words, without prejudice to the powers granted by law to the Italian authorities. In its Reply, the Applicant admits that « the way in which management and control may be exercised is subject to the regulation under local law », althought it adds that « the right to manage and control may not be abrogated entirely regardless of the treatment accorded to Italian nationals » ([21]). Furthermore, Article III, paragraph 2, is deemed to include »

([18]) *I.C.J. Reports* 1970, p. 39, para. 58. Emphasis added.
([19]) Counter-Memorial, p. 108.
([20]) Counter-Memorial, p. 111.
([21]) Reply, p. 145.

« certain minimum standards of protection under international law, including protection from unlawful interference with management and control » (22).

It seems clear that the rights in question are granted within the framework of existing Italian legislation. In the case in point, the right to organize Italian corporations and associations does not appear to have been taken into consideration by the Applicant. This is explained by the fact that ELSI was already organized when the Raytheon and Machlett companies became its shareholders. Control and management are instead concepts that refer to all those powers which may be exercised by majority shareholders, as member of the company's Assembly, i.e. to elect the members of other company organs, to approve the financial report, to supervise the company management. In effect, all these powers were exercised by Raytheon and Machlett from the time they became majority shareholders of ELSI. And this has never been challenged with reference to the activity carried on by these companies in the period preceding the requisition. As to the later period, if it is admitted that management and control are protected by the Treaty in conformity with the applicable local laws and regulations, all the interference the public authorities may exercise under these laws and regulations must be deemed to be compatible with the degree of protection afforded under the Treaty. Indeed such protection cannot be considered to be extended to the point that the United States shareholders are exonerated from the application of imperative measures, which are binding for all subjects; some of these measures may have an effect on the powers to manage and control an Italian company. In this regard it should be noted that the Italian legal provisions on the basis of which the requisition decree of 1 April 1968 was issued without doubt pursues public policy aims and could be characterized as police regulations.

What must be anyway ruled out is that Article III, paragraph 2, includes a minimum standard of protection as established by customary international law. No such standard is in fact provided by paragraph 2. Moreover, it has been seen that general international law gives no protection to foreign shareholders in national companies (there is no need to make any further reference to the *Barcelona Traction* case). Furthermore, the Applicant itself asserts that the standard in question includes the « protection from unlawful interference with management and control » (23), and certainly not protection from interference based on local laws.

It remains to compare the fact which the Applicant alleges to be unlawful with the provisions of Article III, paragraph 2. In the Counter–Memorial it was firstly noted that the requisition decree of 1 April 1968 did no affect the shareholders' control of the ELSI company, but only the company's control of the requisitioned assets (24). Secondly, it was pointed out that the effect of this decree was only to temporarily suspend, and not to curtail definitively, the company's control of the requisitioned assets (25). Thirdly, it has been emphasized that the invalidity of the requisition decree, as ascertained by the decision of the Prefect of Palermo, does not alter the fact that it was issued by the competent authority on a regular legal basis (26).

The Applicant contends in its Reply (27) that only the United States companies which were ELSI's shareholders had the right to decide upon its liquidation, and that the requisition deprived all potential purchasers of access to the plant, thus making it impossible to sell it as a going concern. Furthermore, according to the Applicant, the illegitimacy of the requisition insofar as it was not capable of achieving the purpose declared by the Mayor of Palermo would mean that it was not in accordance with Italian law. Lastly, the alleged interference by the Italian Government in the bankruptcy proceeding further diminished Raytheon and Machlett's right to receive any of the benefits of a normal bankruptcy sale.

These contentions appear to be largely irrelevant and in any case groundless. The unlawful act alleged to have been committed by the Italian Government is to have prevented the United States shareholders from managing and controlling the ELSI company. It has already

(22) Reply, p. 146.
(23) Reply, p. 146 and nt. 19.
(24) Counter–Memorial, p. 111.
(25) Counter–Memorial, p. 111.
(26) Counter–Memorial, p. 111.
(27) Reply, p. 144.

been explained that the requisition of the ELSI company was directed towards its plant and equipment, which thus became temporarily unavailable to the owner. At the same time, the United States shareholders continued to exercise management and control over the company. This is shown by the fact that they allowed the Board of Directors to file a petition for bankruptcy during the period that the requisition was in force.

There are two logical and legal flaws in the arguments advanced by the Applicant: the tendency to confuse the rights of the shareholders, which are protected by the Treaty, with those of the Italian company ELSI, and the tendency to present as effects of the requisition what were in actual fact effects of the bankruptcy. If these two flaws are removed, the situation becomes clear. In particular: it is true that the shareholders had the right to wind up the company, but it was the bankruptcy petition resulting from insolvency and not the temporary requisition, which prevented this right from being exercised. With regard to the right of access to the plant by potential purchasers, suffice it to say that until 30 September 1968 this entailed obtaining the approval of the custodians of the requisitioned assets, and after that date, of the Receiver in the bankruptcy proceeding; in either case, however, they were replacing ELSI's company officials and not its shareholders. As to the rights of Raytheon and Machlett companies to receive any benefit from the bankruptcy sale, these could come into being only at the end of the bankruptcy proceeding. They could have no possible relation with the right to manage and control ELSI. In any case, the « interference » by the Italian Government in the bankruptcy proceeding has not been proved.

Moreover, the temporary nature of the requisition cannot be overlooked when discussing the effects of the decree by the Mayor of Palermo on the availability of the requisitioned assets. The fact that these effects ceased on 30 September 1968 cannot be denied; it emerges from the text of the decree and was clearly taken by the Court of Palermo as one of the factors, when calculating the compensation to be paid to the ELSI bankruptcy Receiver. In its attempt to support its allegation that the requisition completely prevented the United States shareholders from managing and controlling ELSI, the Applicant has added to the requisition period that of the bankruptcy, without any concern for the fact that the latter was not caused by the Italian Government.

Finally, the circumstance that the requisition in question was considered to be illegitimate under Italian law does not produce a conflict between the said measure and the phrase « in conformity with applicable law and regulations » contained in Article III, paragraph 2, of the Treaty. As stated above, this phrase is used to impose a general restriction on the scope of the powers of managing and controlling Italian companies attributed to United States shareholders. Although the Prefect of Palermo ultimately quashed the Mayor decree on the ground of its inefficacy in obtaining its stated purpose, the requisition was nevertheless the act of an authority duly empowered to take such a measure. In any case, Article III, paragraph 2, can certainly not be used to assert an obligation, under international law, for the Italian Government to respect the Italian laws governing requisition; the Italian Government is only under an obligation to recognize certain powers to foreign shareholders — in particular to manage and control Italian companies — within the framework of Italian legislation. Moreover if it is correct that the requisition did not affect those powers, the issue of the specific relevance of the phrase « in conformity with applicable laws and regulations » cannot be of any use to the Applicant's assertion.

4. *Was there a violation of Article VII, paragraph I of the Treaty?*

It has already been recalled that, according to the United States Government, interference by the Respondent in the powers of management and control of ELSI held by the two shareholding companies allegedly violated Article VII of the 1948 Treaty, and paragraph 1 of this article in particular. It was pointed out in the Counter-Memorial ([28]) that this provision grants to the

([28]) Counter-Memorial, p. 110.

nationals, corporations and associations of each Party the right « to acquire, own and dispose of immovable property or interests therein » in the territory of the other High Contracting Party, under condition of reciprocity. A preliminary objection addressed to the Applicant was that the ELSI plant belonged to ELSI, and certainly not to its United States shareholders; the only relevant assets possessed by the latter companies may be said to be the shares themselves.

The Applicant's Reply ([29]) is based on two points. On the one hand it points out that Article VII refers to « immovable property or interests therein », and asserts that the term « interest in property » is sufficiently broad to include also the hypothesis of property owned indirectly through a subsidiary company. Furthermore, the Applicant points out that even if Raytheon and Machlett could claim protection only for their shares, one should take into account the fact that their value was allegedly reduced to zero by the requisition.

With regard to the first point it must be remarked that the terms contained in the English version of Article VII, paragraph 1 — « immovable property or interests therein » — corresponds in the Italian text to the words « beni immobili *o altri diritti reali* », thereby referring to the right of ownership of immovable property and to other absolute rights of a more limited extent. This must lead anyone interpreting them to exclude completely that the term « interests » can have in the Treaty the meaning attributed to it by the Applicant. The fact that Italian law does not recognize any « indirect » ownership of immovable property (of which the two United States companies would be the owners in the present case through an Italian subsidiary owned by them) leads to the conclusion that if the United States actually did intend, at the time of the 1948 Treaty, to protect property in the sense indicated by the Applicant, this intention did not emerge or prevail. This is shown by the difference observed in the two texts, which are equally authentic according to Article XXVII of the Treaty.

Therefore Article VII, by guaranteeing the availability to Raytheon and Machlett of immovable property *o altri diritti reali* in Italian territory, certainly protected the availability of the ELSI shares to them but not that of the plant, of which the latter company was sole owner. As for the allegation that the market value of ELSI shares was reduced appreciably as a result of the requisition, it must be pointed out that the protection afforded to the United States shareholders under the 1948 Treaty could not be extended to the point of guaranteeing the market value of their investments!

5. ... *or of Article I of the* 1951 *Supplementary Agreement?*

The alleged violation by Italy of the obligation to allow the United States shareholders of Italian companies to exercise the management and control of such companies is, according to the Applicant, an act which is incompatible also with Article I of the Supplementary Agreement of 26 September 1951 between the United States and Italy.

Under the provisions of this article the nationals, corporations and associations of each Party « shall not be subjected to arbitrary or discriminatory measures within the territories » of the other Party whenever such measures would have the effect of: « (*a*) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein ». A different effect is considered in section (*b*), but this will be discussed in the following paragraph. By requisitioning the ELSI plant, Italy is alleged to have violated the above-mentioned prohibition.

The first objection raised in the Counter-Memorial was that the requisition decree was addressed to the Italian company ELSI and not to its shareholders ([30]). It was also pointed out that although the requisition temporarily deprived ELSI of the availability of the requisitioned assets (plant and equipment), it did not prevent management and control of the company from continuing to be freely exercised by the statutory company organs with regard to all aspects of management other than those requiring on immediate need to have access to the requisitioned

([29]) Reply, pp. 147-148.
([30]) Counter-Memorial, p. 111.

assets (31). The Applicant responded to these arguments above all by a dogmatic statement: « Raytheon and Machlett were most certainly subjected to measures in Italy resulting in the prevention of their effective control and management of ELSI » (32). With regard to the fact that the effective control and management continued to be exercised by the company organs even during the requisition period, the Applicant preferred to make the apparently ironical remark that « the company organs could still function, but there was nothing left for them to control and manage » (33). What was within the functions of these organs and was in fact decided by them were two acts of considerable importance: the appeal against the requisition decree and the filing of the bankruptcy petition!

In any case, even if the requisition measure adopted by the Italian Government had been addressed to the Raytheon and Machlett companies and not to the Italian company ELSI, it would have come under the provisions of Article I of the 1951 Supplementary Agreement only if it had had the characteristics of an « arbitrary or discriminatory » measure. In the Italian Counter-Memorial the interpretation of these two terms was discussed at some length (34). It was pointed out that the term « arbitrary » only refers to a measure that is completely unjustified, which can be explained only as a means used by the authorities to damage and oppress a person subject to their power; subsequently, the term « discriminatory » was defined as covering any measure introducing an unfavourable distinction between the person to which it is applied and other subjects in a similar situation, for no other reason than to intentionally damage that person. The Applicant replied that the arbitrary nature of the requisition in question is demonstrated by the fact that the Prefect of Palermo declared it to be illegitimate, on the grounds that any means that do not fit the expressed goal are either legally impermissible or allegedly arbitrary and unreasonable (35). Furthermore, according to the Applicant, the requisition was discriminatory, because it was aimed at favouring an enterprise controlled by the Government. (36) The Italian Government insists on this point of view and will try now to illustrate it more fully.

A significant comparison can be made, as it was already done in the Counter-Memorial, between the prohibition of « arbitrary or discriminatory measures » mentioned in Article I of the 1951 Supplementary Agreement between Italy and the United States, and the prohibition of « unreasonable or discriminatory measures » contained in other Treaties of Friendship, Commerce and Navigation stipulated by the United States (e.g. the Treaty with Ireland of 21 January 1950, Article V; the Treaty with the Netherlands of 27 March 1956, Article VI, paragraph 3). This implies a high degree of correspondence between the concept of arbitrary and that of unreasonable. But quite apart from this observation, the concept of « arbitrary measure » by the public authorities implies not only the absence of any reason, but the total lack of any justification and therefore the impossibility of including the act in any one of the categories adopted by the domestic legal system. Therefore, it is not enough for a measure to be illegal under such a system in order to be able to infer automatically that the measure is « arbitrary » in the light of an international treaty. It may well be that an act is formally illegal without being arbitrary. In the case in point, the requisition decree was quashed by the Prefect of Palermo on the grounds that it was not a suitable means of ensuring the safeguard of jobs for the ELSI employees. Nevertheless, common sense tells us that this does not make it an « arbitrary » act. The authority which issued the decree, the Mayor of Palermo, did actually have the power under Italian Law to adopt emergency measures concerning private property (37); he gave reasons for his decision and considered that the circumstances of urgency and serious public necessity existed. The legality of his behaviour under any of these aspects was not criticized or reviewed by the superior authority. On the other hand, the difficult situation to which the reasons for his action are related — a situation characterized by the dismissal of the work force, social unrest, the possible damage

(31) Counter-Memorial, p. 112.
(32) Reply, p. 146.
(33) Reply, p. 146.
(34) Counter-Memorial, pp. 112-114.
(35) Reply, p. 147.
(36) Reply, p. 147.
(37) See Article 7 of the Law N. 2248 of 20 March 1865, Annex E, Memorial, Annex 34.

to the regional economy, substantial risk for law and order — seems to indicate that, despite the formal irregularity of an improper use of power, the requisition decree was not the result of any intention by the administrative authorities to harass ELSI (or its shareholders), but was instead justified by a number of circumstances.

Last but not least, it is necessary to examine whether the measure in question can be considered discriminatory. It was already noted that, in the context of Treaties of Friendship, Commerce and Navigation, which are mostly based on the principle of national treatment, a discriminatory measure is essentially equivalent to a malicious distinction based on the nationality of the beneficiaries. According to McKean ([38]): « the word discriminate alone is commonly used in the restricted sense of an unfair, improper, unjustifiable or arbitrary distinction, and it is this meaning that has come to be employed in international law ». The same author insists on the « special meaning » acquired by the term « discrimination » in international legal use, pointing out that « it does not mean any distinction or differentiation, but only arbitrary, invidious or unjustified distinctions ». In the case in point, even if one assumed that the requisition had directly affected the United States shareholders, nothing authorizes one to believe that it may have implied the intention to apply a different and unfair treatment to the United States investors. It is recalled here that a large number of examples of the requisitioning of plants of Italian companies for reasons related to employment crises was mentioned in Part I of this Rejoinder. On the other hand, the Applicant, realizing that it is impossible to assert that the requisition was « discriminatory » in the sense defined above, asserted the existence of discrimination in favour of the Italian company controlled by IRI, which purchased the ELSI assets at the bankruptcy auction. However, it seems unnecessary to dwell on this flight of fancy. It would mean that an alleged « plot » hatched by the Italian Government, the bankruptcy proceeding officials and the IRI group had already been arranged in view of depriving Raytheon and Machlett of their supposed technological jewel! Such a method of presenting the facts of the case is another clear example of the superficiality with which the Applicant has approached both the problem of the causal connection and that related to the notion of act of the State when speaking of the wrongful acts allegedly committed by Italy.

6. *The alleged impairment by Italy of the United States companies' rights and interests.*

The second act by the Italian Government deemed to have violated the obligations imposed to it by the 1951 Supplementary Agreement with the United States consists in the alleged impairment of the interests of the Raytheon and Machlett companies. This complaint is based on Article I of the Agreement, which has been examined above, with specific reference to Article I (*b*). When read together, the provisions put nationals, corporations and associations of either High Contracting Party in a position not to be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party, resulting in impairing the *other* legally acquired rights and interests in the enterprises « which they have been permitted to establish or acquire herein » or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise. The measure which the Applicant asserts to be incompatible with these provisions is again the requisition.

The main objection to this contention consists in the remark that, if the requisition measure was neither arbitrary nor discriminatory, as the Italian Government submits, none of the provisions contained in the said Article can be applied to the present case. Moreover, the Claimant asserts that all the rights and interests impaired by the bankruptcy fall within the scope of the above-mentioned Article I (*b*). This makes it necessary to repeat once again that the bankruptcy, for which a petition was filed by ELSI, was not caused by the requisition. No proof whatsoever of a causal link has been produced by the Claimant because its argument is unfounded. In fact the bankruptcy was the result of ELSI's insolvency, which preceded the requisition. In any

([38]) The meaning of discrimination in international and municipal law, in the *British Yearbook of International Law*, 1970, p. 177 *et seq.*

case, however, the action of the organs conducting the bankruptcy proceeding cannot be referred to the Italian Government, and this is even more true if one considers the actions of Raytheon's creditors! It is quite absurd that the Claimant should attempt to include within the scope of application of Article I (*b*) of the 1951 Supplementary Agreement even the financial losses suffered by Raytheon in defending itself in the suit brought against it by the Italian banks to which it owed money!

7. *The alleged Italian taking of interests in property of Raytheon and Machlett.*

According to the Claimant the third of the alleged wrongful acts by the Italian Government consists in the « taking of interests in property » to the detriment of the Raytheon and Machlett companies. The provision invoked in this connection is Article V, paragraph 2, of the 1948 Treaty, with reference to paragraph 1 of the Protocol. Under Article V, paragraph 2, the expropriation of property belonging to national corporations and associations of either High Contracting Party within the territories of the other is inadmissible « without due process of law and without the prompt payment of just and effective compensation ». The Protocol, which bears the same date as the Treaty, establishes in its first paragraph that « The provisions of paragraph 2 of Article V providing for the payment of compensation shall extend to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party ».

In the Counter-Memorial three arguments have been clarified: firstly, that the effects of the requisition of ELSI assets were quite different from those of an expropriation; secondly, that on the basis of an interpretation which takes into account also the Italian text of the Protocol, the provisions of Article V, paragraph 2, shall extend to the *rights* and not to the mere interests of United States companies in property which is taken in Italy, lastly, that the Protocol cannot be interpreted as giving to the assets of an Italian corporation controlled by United States shareholders the same protection as is granted to an United States corporation under Article V ([39]). The Applicant's reply to these arguments may be summarized as follows: a taking of property is generally recognized as including not merely outright expropriation but also any unreasonable interference with the use, enjoyment or disposal of property; the English term « interests » properly reflects the meaning of « *diritti* », (and in any case the Protocol refers to interests held directly or indirectly by nationals, corporations and associations of either Party in property taken within the territories of the other Party); lastly, the standard of protection guaranteed by the Protocol is exactly the same as that provided by Article V, paragraph 2 ([40]).

The three arguments outlined above may be further elaborated upon. It is a known fact that, in the decree of 1 April 1968, the Mayor of Palermo provided for « the requisition with immediate effect and for the duration of six months, unless further extended, and without prejudice to the rights of the parties and third persons » of the ELSI plant and equipment. The decree referred to Article 7 of Law N. 2248 of 20 March 1865 Annex E, as well as to Article 69 of the regional law governing local authorities (Decree N. 6 of the President of the Sicilian Region of 21 October 1955). It must be pointed out here that a temporary requisition is quite different from expropriation, while the Italian text of Article V, paragraph 2, of the 1948 Treaty only concerns « beni espropriati » (*expropriated* property) and « esproprio dei beni » (expropriation of property). Furthermore, under Italian law, Article 7 of Law N. 2248 of 20 March 1865, Annex E, empowers the administrative authorities to « dispose without delay of private property in the case of serious public necessity », while making no reference at all to expropriation (which is regulated by another legislation act — Law N. 2359 of 25 June 1865). In its turn, Article 69 of the Decree of 21 October 1955 of the President of the Sicilian Ragion empowers mayors to take the steps deemed necessary to cope with emergency situations, again without mentioning expropriation. Therefore, if the characteristics of the case in point are compared with Article V, paragraph 2, of the 1948 Treaty, taking into account the Italian text, it is clearly to be excluded that this provision applies to the temporary requisition of the ELSI assets.

([39]) Counter-Memorial, p. 109.
([40]) Reply, pp. 150-153.

Logically, in order to introduce a claim based on Article V, paragraph 2, the United States would have to assert that only the English text of the Treaty should be considered, and also that the expression « taking of property » has actually such an extension as to include a temporary requisition. However, the dominance of the English text is denied by the above–cited Article 27 of the 1948 Treaty, according to which the Italian and English texts are « both equally authentic ». Under Article 33 of the Vienna Convention on the Law of Treaties this means that, except in the case of specific mutual agreement to the contrary, « the text is equally authoritative in each language ». However, Article 33, paragraph 4, of the said Vienna Convention establishes that when the comparison of identical texts reveals a difference in meaning which cannot be removed by applying Articles 31 and 32, « the meaning which best reconciles the texts, having regard to the object or purpose of the treaty, shall be adopted ». In the light of this principle the only way to reconcile the English and Italian texts of Article V, paragraph 2, of the 1948 Treaty, is that to assume that a taking of property under Article V, paragraph 2, must be considered to occur only when it possesses the characteristics of a definitive deprivation of property. In the Italian text, this characteristic is indicative of expropriation and is found in the majority of cases where a « takin gof property » in a wider sense is involved. This would lead to the exclusion from the scope of Article V, paragraph 2, of all cases of any temporary requisition « in use » such as that applied to the ELSI asserts on 1 April 1968.

However, even if one assumes that the use of the expression « taking of property » should be accepted (which would amount to subordinating the Italian text to the English text!), a requisition in use, which has the nature of a temporary form of Government control over private property, could not be said to be equivalent in any case to a « taking of property » as set out in the English text of Article V, paragraph 2, of the Treaty between United States and Italy. The vast amount of literature on the subject written in English seems to indicate that the above–mentioned forms of control should rather be defined as « indirect takings» ([41]) and that only the interferences in physical property « which significantly deprive the owner of the use of his property » amount to a taking of that property ([42]). One must rule out that an interference limited to six months, i.e. a short suspension of the availability of the assets, could be defined as a significant deprival of the owner's use of property.

In conclusion, there are good reasons for sharing the view expressed by the United States Arbitrator George Aldrich in the case *ITT–Islamic Republic of Iran* ([43]): « while the taking of control over private property by a government does not automatically and immediately justify the conclusion that the property has been taken by the government ... such a conclusion is warranted whenever events show that the owner was deprived of fundamental property rights and it appears that such privation is not merely ephemeral ». In the case in point, the deprival of the use of the ELSI plant for the duration of six months cannot be equated to the deprivation of fundamental property rights.

Certainly, the Mayor of Palermo was exercising a power granted to him for reasons of public necessity in order to remedy temporarily a situation of social unrest and to prevent disorders. In other words, he was using a regulatory power, more precisely a police power, and the exercise of such a power can hardly be assimilated to an expropriation measure ([44]).

In a study ([45]) based on practice, the following conclusion was reached: « A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so–called « police power » does not preclude an international tribunal from making an independent determination of this issue. But if the reasons given are valid and bear some plausibile re-

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([41]) See Rosalyn HIGGINS, The Taking of Property by the State, in *Collected Courses of The Hague Academy of International Law*, 1982 III, p. 322 *et seq*.

([42]) *Ibidem*, p. 324.

([43]) This opinion, concurrent with that of the Tribunal, is cited by SWANSON, Iran – U.S. Claims Tribunal: A Policy Analysis of the Expropriation Cases in *the Western Reserve Case*, *Journal of International Law*, 1986, p. 327.

([44]) *Ibidem*, p. 334.

([45]) See CHRISTIE, What Constitutes a Taking of Property under International Law, in *The British Yearbook of International Law*, 1962, p. 338.

lationship to the action taken, an attempt may be made to search deeper and see whether the State was activated by some illicit motive ».

Even in the case law of the United States' courts, there are some precedents that are interesting in the present context. In particular it is worth referring again to a case concerning the seizure of a coal mine by ordre of the highest authorities of the executive power, *Pewee Coal Company v. the United States Government* (46).

In its judgment of 30 April 1951 on that case, the Supreme Court said: « Where President issued Executive Order directing Secretary of Interior to take immediate possession of all coal mines in which a strike or stoppage has occurred or was threatned, and to operate or arrange for operation of such mines, and the Secretary of Interior issued order for taking possession of mine and required mine officials to agree to conduct operations as agents for the government, there was a « taking » of private property for public use with the meaning of the Fifth Amendment ».

Thus, noting that there had been a strike, which had stopped the normal operation of a coal mine, the judgment stressed the fact that the order was justified by public use, that is to say, by a motive which is equivalent the public purpose which justified the requisition decree adopted by the Mayor of Palermo on 1 April 1968.

In his concurring opinion in the same case, Judge Reed said that « ... the relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties (...) may be subjected to public operations *only for a short time* to meet war or *emergency needs*, and can then be returned to their owners ». About the issue of compensation to be attributed to the owners, Judge Reed, after considering the uncertainty of the measure of market value, concluded that: « The reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case ».

Account should also be taken of a case decided on 29 April 1952 by the United States District Court in the *Youngstown Sheet and Tube Company v. Sawyer* (*Secretary of State for Commerce*) and others, in which an Executive Order issued by the President of the United States related to a dispute between a number of steel producing companies and their work force. The judgment noted that the dispute had not been settled by means of collective bargaining, or as a result of the efforts of the Government, and that the workers had therefore gone on strike. The Court also recalled the reasons underlying the President's Executive Order, stating, *inter alia:* « In order to ensure the continued availability of steel it was necessary that the United States take possession of and operate the plants ». Another reason underlined the gravity of the situation, in that « ... The breakdown of collective bargaining negotiations created an immediately impending national emergency because interruption of steel manufacture for even a brief period would seriously endanger the well-being and safety of the United States in a critical situation ». Thus, even if one assumes that the requisition of the ELSI plant was a taking of property, one could not deny that it was fully justified under the circumstances.

8. *Discrepancy between the English and Italian texts of Article V, paragraph 2, of the Treaty.*

Another problem arises, as it was previously noted, out of the discrepancy between the English and Italian texts of paragraph 1 of the Protocol of the 1948 Treaty in which the provisions of Article V, paragraph 2, are extended to « the rights » (to the diritti in the Italian text or to the interests in the English text) held directly or indirectly by nationals and corporations or associations of either Party in property taken in the territories of the other Party. Also in this case, reference has already been made to Article 33 of the Vienna Convention or the Law of Treaties from which the conclusion was drawn that only the more restrictive meaning corresponding to the Italian text may be taken as reconciling both texts. The Applicant has stressed that also the rights *indirectly* held by nationals of either Party are protected under the Protocol and considered that the United States shareholders in question held « indirect rights » over the ELSI

(46) See *supra*, Part I, nt. 20 and 21.

plant, which could therefore be taken by Italy only in conformity with the provisions of Article V, paragraph 2. However, under Italian law, the shareholders can hold rights only towards the company and have no rights on the assets of the latter. The international significance of the distinction between the rights of a company and the rights of its shareholders appears to be supported by the above-cited *Barcelona Traction* judgment. « Indirect » rights of shareholders in a company can only be those which will accrue at a later step, for instance, after the company has been wound up, when the compensation initially granted to the company accrues to those who were shareholders in it. This is related to the interpretation of paragraph 1 of the Protocol as a norm essentially governing the payment of compensation for expropriated property; indeed, reference is made in the text to the provisions of Article V, paragraph 2, « which provide for the payment of compensation ».

Nor can it be said that the provisions concerning the property of United States companies in Italy, contained in Article V, paragraph 2, can be extended to the United States shareholders of the Italian companies controlled by them. This does not amount to a discussion of the level of protection granted by the Protocol, which explicitly extends certain provisions of Article V, paragraph 2. It is an assertion that the owners of rights over the property taken, which are protected by paragraph 1 of the Protocol, do not include the United States shareholders of controlled Italian companies but only refer to United Sates nationals, corporations and associations holding rights over the taken property other than ownership (e.g. usufruct). In other words, it is anything but certain that paragraph 1 of the Protocol is one of the rules intended to « lift the corporate veil » of an Italian company to which the taken property belongs. In any case, this is by no means explicitly provided for.

It should also be noted that no investigation of the conditions prescribed by Article V, paragraph 2 (« due process of law and prompt payment of just and effective compensation ») was made in the Counter-Memorial for the simple reason that the plant requisitioned belonged to ELSI, which, as is known, was of Italian nationality and therefore not entitled to any protection for its property in Italy under the Treaty. Even if one assumed that they were recognized under paragraph 1 of the Protocol, the only relevant rights of the United States shareholders would concern the payment of compensation for the « expropriated » property. The advent of the ELSI bankruptcy after the requisition also had the effect that the compensation for damages awarded by the Court of Appeal of Palermo (in replacement of the compensation for the requisition of the plant) was paid to the bankrucpy receiver.

9. *The alleged failure by Italy to provide protection and security for ELSI.*

The last of the four unlawful acts for which the Respondent was allegedly responsible has been defined by the Applicant as « failure to provide protection and security », with reference to Article V, paragraph 1 and Article V, paragraph 3 of the 1948 Treaty. Paragraph 1 guarantees the protection and security of nationals and their property of either Contracting Party in the territories of the other Party. It also guarantees full protection and security as provided for under international law (with reference to property, these guarantees are extended from the nationals to corporations and associations). Paragraph 3 repeats the promise of protection and security with respect to the matters enumerated in paragraphs 1 and 2 « upon compliance with the applicable laws and regulations » under conditions of reciprocity and most favoured nation treatment. The facts which, according to the Applicant, denote the violation of these norms by the Italian Government were essentially the occupation of the plant by the work force and the Prefect's delay in upholding the appeal made by ELSI against the requisition decree (47). But in addition to these two circumstances, the Applicant also again raises the issue of the requisition, which referred to « the entire entity of ELSI ». Furthermore, he complains in this respect of the failure to protect ELSI because « the property of Raytheon and Machlett in Italy was ELSI itself » (48).

(47) Reply, pp. 152-153.
(48) Reply, p. 153.

In the Counter-Memorial it was already pointed out that the occupation of the ELSI plant by the work force began prior to the requisition ([49]) and that the Prefect's delay in rendering his decision on the appeal against the requisition lies totally outside the scope of Article V, paragraphs 1 and 3 ([50]). It was also pointed out that Raytheon and Machlett have no right to complain of any failure to protect ELSI and the ELSI plant because ELSI was an Italian company and the plant belonged to it ([51]). In its Reply, the Applicant argues that paragraphs 1 and 2 of Article V (referred to in paragraph 3) guarantee the protection and security of « persons and property », and not of immovable property. ([52]) This is correct, but is here irrelevant (also because it is obvious that immovable property represents a category of property). What does appear relevant and therefore must be repeated, is that, in the present case, the protection and security provided for in Article V, paragraphs 1, 2 and 3, could only refer to the property of the United States companies Raytheon and Machlett in Italy, but that this property obviously did not include ELSI nor the equipment and plant of this separate corporate entity.

In conclusion, the reference to Article V, paragraphs 1, 2 and 3, in the case in point does not add any further arguments to the Applicant's defence. It may therefore be replied simply that the protection and security of the Raytheon and Machlett companies, and of the property they possessed in Italian territory (i.e. money and ELSI shares) are basically extraneous to the subject of the present dispute.

([49]) Counter-Memorial, p. 86 and 109.
([50]) Counter-Memorial, pp. 87-88 and 109.
([51]) Counter-Memorial, p. 108.
([52]) Reply, p. 152.

PART V

ISSUES RELATING TO THE CLAIM FOR REPARATION

1. *The admissibility of the request for reparation.*

The Italian Government's Counter–Memorial highlighted the entirely subsidiary character of the comments expressed by the Respondent in relation to the claim for reparation advanced by the United States Government (1).

The Applicant takes for granted, in Part VI of the Reply, the responsibility of the Italian Government for its alleged « wrongful conduct », and therefore asserts to be entitled to compensation « in the full amount of the losses » resulting from that conduct (2).

On the contrary, the arguments put forward by the Respondent justify the assertion that no violation of the 1948 Treaty and of the 1951 Supplementary Agreement was committed by Italy with regard to the requisition of the ELSI plant, the bankruptcy requested by ELSI and its final liquidation; therefore, no reparation is due for the losses suffered by the United States shareholders of ELSI. This explains what was defined as the subsidiary nature of the Respondent's comments about reparation: they are made for the hypotesis that the Applicant's point of view would be accepted by the Court.

2. *Decisions handed down by the Italian Courts.*

In the Italian legal system, an issue of compensation for damages resulting from the requisition was raised by ELSI and was settled by a judgment of the Palermo Court of Appeal, dated 24 January 1974, which was confirmed on a further appeal by the Court of Cassation (3). As it was stressed earlier, the requisition decree of the Mayor of Palermo (1 April 1968) was appealed against by ELSI (on 19 April 1968), with result that the Prefect of Palermo, by a decision of 22 August 1969, declared the decree to be illegitimate, because it did not fit the goal pursued (4).

In this regard, it must be underlined that the requisition decree only referred to the plant and the equipment belonging to ELSI, and not to the company as a whole. This is relevant, because it explains that the judgment of the Court of Appeal of Palermo could not, and at all events would not, have been permitted to make a global assessment of the state of the company taken as a whole: in fact the claim submitted to the Court referred to a decree whose content was clearly defined.

Furthermore, it was logical that when establishing the amount of compensation, the Court should have worked on the basis of the value attributed to the assets by the Technical Consultant appointed by the receiver in bankruptcy. This value amounted to 4,560,588,440 lire. (5).

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(1) Counter–Memorial, p. 115.
(2) Reply, p. 155.
(3) Memorial, Annexes 81 and 82.
(4) Memorial, Annex 81, p. 22.
(5) Memorial, Annex 81, p. 22.

Using this value as a parameter, the Court calculated the damages occasioned to the company over the six–month period during which the requisition decree was in force to be 114,014,711. lire This was based on a rate of 5 per cent of the aforementioned value throughout the said period, plus interest accruing from 1 October 1968 when the requisition had ended.

3. *Unlawful conduct by the State and the obligation to make reparation for any damage.*

It was recalled from the outset of this Rejoinder, that no claim for reparation could have be advanced, unless a direct link is demonstrated to exist between the alleged wrongful act and the alleged damage, to the effect that the former was the cause of the latter. On the contrary, the foregoing account of the facts summarizing the dispute clearly shows that the conduct attributed to the Italian Government does not appear to be the cause of the alleged damage. The first conclusion to be drawn is therefore that these facts or acts — mainly the requisitioning of the ELSI plant, then the bankruptcy and the resulting liquidation — cannot be deemed to have given rise to responsibility on the part of the Italian Government, and to its alleged obligation to make reparation to the Government of the United States.

On this subject, there is a principle which is inherent in the general theory of responsibility, in domestic as well as in international law: the principle of causality. To be able to impute responsibility to a person or corporation, it is not sufficient that that person performed a specific action and that a damage subsequently occurred. It is also essential to show that the action itself actually caused that damage. This is not merely a logical requirement, but a practical need, which is recognized and affirmed in municipal and international judicial practice.

There are quite numerous cases in which judicial decisions have stated that the causal relationship between a wrongful conduct and the damage is the essential condition for responsibility, and hence for the obligation to indemnify the injured State.

Examining the concept of causality has sometimes led the courts to see whether, in individual cases, the causality was adequate to justify a claim for reparation. The practice of adequate causality is based on the following consideration: only those conditions which made the damage probable, and hence attributable to the agent, at the very moment they came into being, may be considered as conditions of the damage. The adequate causality criterion is mainly applied in complex cases, where the judge has more freedom to evaluate the facts. It seems to be particularly appropriate for clarifying the many elements that are involved in the present case.

The Respondent certainly shares what the United States Memorial states ([6]); relying on the doctrine it refers to (Reuter, Yntema),: « ... the injury for which reparation is due is that which is tied by a chain of causality to the wrongful act ». But, this obviously implies that a damage which is not tied by an adequate chain of causality with a wrongful act attributed to a State cannot justify a claim for reparation against that State.

4. *Causality nexus and the measure of reparation.*

About the measure of the reparation claimed for the alleged unlawful acts attributed to Italy, the United States Reply adds nothing particularly new, and mainly re–states the arguments set out in the Memorial. With reference to the « duty to pay », in particular, the United States do no more than restate general principles, almost as if they were applicable without taking into account the specific facts of the present case.

According to the Reply, it is an established principle of international law that « ... Damages should be awarded ... to compensate for all losses or injury caused by a State's wrongful acts » ([7]); the conclusion is drawn that « ... [a]ll the injuries suffered by Raytheon and Machlett should be

([6]) Memorial, p. 59.
([7]) Reply, p. 155.

included in the measure of compensation » (8). But it is an equally unchallengeable principle of international law that an injury shall be linked in some way to an act of the State having violated an international obligation — and the violation shall be proved as existing and attributable to that State — in order to entitle the injured State to reparation. As was stated by Anzilotti (9), « [o]n the basis of the principle that in order to claim compensation for an injury, the injury must be the result of an unlawful act, it is necessary to see whether the causality relationship exists and the relevance of it in conjunction with the other causes ». In any case, it is essential to demonstrate that there exists a sufficiently close cause-and-effect relationship between the act alleged to be at the origin of the obligation to indemnify and the injury itself.

The international judicial practice is firm in excluding the obligation to make reparation for an injury that has not been « éprouvé avoir été une conséquence réelle et inévitable » (10) of the injurious act, or when the latter act « was not in legal contemplation the proximate cause of such a damage » (11).

To more accurately appraise the United States' claims and the specific aspects of this case, it is certainly an interesting exercise to recall some of the grounds on which international courts have ruled that a sufficient causality nexus between the alleged damage and a State's unlawful (or allegedly unlawful) act did not exist.

One of these reasons is that the act attributed to the State, while giving rise to a situation that was favourable to the occasioning of an injurious event, cannot be considered the direct cause because the event in question or the damage would have occurred in any case, due to other circumstances not attributable to the State.

In the *Rémy Martin* case (12), for example, the joint Franco-German Arbitral Tribunal refused to award damages for the lost profits to a French distillery as a result of an interruption of its activities following seizure by the German authorities during the war, because — even without the unlawful act of seizure — the distillery would in any case have remained inactive as it was impossible for it to receive during the war the French grapes needed for its products. The joint German-Romainian Arbitral Tribunal, in the *Carnabatu* case (13) also concluded that the requisition of an asset cannot be considered the cause of the loss of profits which might have been earned from selling that asset, considering that the state of war made the latter course of action impossible. Even more telling is the *Guillemot-Jacquemin* case (14), in which a French national sued for the return of two apartments in Rome which she had rented to an Italian public corporation and had been seized during the war. The Franco-Italian Conciliation Commission concluded that as rents in Italy had been frozen at that time by law, even « sans le séquestre et sans les mesures prises par le séquestrataire, Madame Guillemot-Jacquemin se trouverait, vis-à-vis de ses deux locataires exactement dans la même situation que celle dont elle se plaint ... Tout lien de causalité fait donc défaut entre les restrictions que le gouvernement français voudrait voir lever et les mesures prises par le gouvernement italien à l'égard des deux appartements en tant que biens ennemis » (15).

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(8) Reply, p. 155.

(9) *Corso di diritto internazionale*, Padua, 1955, p. 431.

(10) « Proved that it had been a true and inevitable consequence » (unofficial translation), *Affaire Yuille et Shortridge* (21 October 1861), Lapradelle et Politis, *Recueil des Arbitrages internationaux*, II, Paris, 1932, p. 78.

(11) Mexico-U.S. Claims Commission, *Armando Cabos Lopez Case* (2 March 1926), *Reports of International Arbitral Awards*, Vol. IV, p. 20. See also the arbitration decision in *Responsabilité de l'Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre* (30 June 1930), *Reports of International Arbitral Awards*, Vol. II, p. 1035; and the Italy-USA Conciliation Commission, *Hoffman Case*, (11 April 1952), *Reports of International Arbitral Awards*, Vol. XIV, p. 100.

(12) *Recueil des Tribunaux Arbitraux Mixtes*, Vol. IV, p. 415; see also the *Lazare Dreyfus Case*, *ibidem*; p. 393; the *Rousseau Case*, *ibidem*, p. 379; and the *Lazare Case*, *ibidem*, Vol. VIII, p. 495.

(13) *Recueil des Tribunaux Arbitraux Mixtes*, Vol. V, p. 228; and *Klotz*, *ibidem*, Vol. II, p. 758.

(14) *Reports of International Arbitral Awards*, Vol. XIII, p. 70.

(15) « Without the requisition and without the measures taken by the sequestrator, Madam Guillemot-Jacquemin would have found herself in exactly the same situation vis-à-vis her two tenants as that of which she complains ... Any casual link is therefore missing between the restrictions which the French Government would like to see removed, and the measures taken by the Italian Government with respect to the two apartments as enemy property » (unofficial translation).

5. *Adequate causality and the obligation to make reparation.*

In certain cases, the reason why the causality link between the unlawful act of the State and injury caused to a private person has been deemed too remote has been the fact that the victim's own conduct (or a situation created by the victim himself) had exposed him to the influence of the unlawful act which, without that conduct or that situation, would not have caused any injury at all. An example of this is the *Dame Simone Reverand* case ([16]), relating to a house that had been auctioned in Italy during the war as a result of allegedly unlawful obstacles placed in the way of the owner, a French citizen, and preventing her from transferring to Italy the necessary funds to pay the interest due on a mortgage on that house. Since « la situation pécuniaire de Madame Reverand était avant le 10 juin 1940 obérée à tel point que depuis mai 1939 elle n'avait pu acquitter les arrérages de sa dette hypothécaire » ([17]), the Franco–Italian Conciliation Commission concluded that « l'on ne peut soutenir dans ces conditions que c'est dû au fait de la guerre que l'intéressée s'est trouvée hors d'état de payer les arrérages en question » ([18]).

There are other cases, in which the refusal to grant compensation has been determined not only by « le lien trop lointain qui rattache la perte au fait générateur », but also « par le caractère *trop alèatoire* du bénéfice espéré » ([19]). This happened particularly in cases where the damage for which compensation was claimed depended on loss of an income which was wholly contingent, even if the allegedly unlawful act on the part of the State had not been committed.

One may cite on the same line of thought, the *Rudloff* case, in which the umpire held that « le cas présenté ici n'est pas celui de la perte de profits prévisibles provenant d'une affaire en marche ou de bénéfices certains provenant d'un contrat inexécuté; c'est seulement le profit espéré d'une affaire aventureuse injustement empêchée dans son accomplissement par le gouvernement défendeur. Pour cette raison, les gains escomptés par les réclamants ne peuvent pas être retenus parce que ces derniers sont totalement impuissants à démontrer qu'un profit serait résulté de l'affaire » ([20]). Similarly, the umpire in the *Rice* case concluded that « As to the portion of damages claimed which may be imagined to arise out of consequential damages, the umpire desires to lay down as one of the requisites for consequential damage that there must be a manifest wrong, the effect of which prevents the direct and habitual lawful pursuit of gain, or the fairly certain profit of the injured person, or the profit of an enterprise judiciously planned, according to custom and business. A mere device of speculation, however probable its success would have been or may appear to the projector, cannot enter into the calculation of consequential damages » ([21]). All these conclusions were even more concisely summed up by the umpire in the *Mora and Arago* case, in the following words: « The loss is in the present case of a very speculative character as depending upon most uncertain contingencies » ([22]).

In other words, with all the differences possibly resulting from the different aspects of the cases in point, international arbitration awards confirm the need to take into account, when deciding on the obligation to make compensation and on the amount of reparation due, not only the link between each wrongful act attributed to the State and each injury for which reparation is sought, but also of the influence of circumstances or acts not attributable to the respondent State on bringing about that injury.

([16]) *Reports of International Arbitral Awards*, Vol. XIII, p. 276; see also the *Roger Sudreaw Case*, *ibidem*, p. 680.

([17]) « The financial situation of Madam Reverand before 10 June 1940 was burdened with debt to such a degree that since May 1939 she had not been able to pay the arrears of her mortgage debt » (unofficial translation).

([18]) « In this situation it cannot be maintained that it is due to the war that the party concerned found herself unable to pay the arrears in question » (unofficial translation).

([19]) « The too distant link between the loss and the generating event » ... « by the *too chancy* character of the benefit hoped for » (unofficial translation), LAPRADELLE et POLITIS, *op. cit.* p. 284.

([20]) « The case presented here is not that of a loss of the foreseeable profits of a deal in progress or of the certain benefits coming from a contract which has not been performed; it is merely the benefit which was hoped to come from an adventurous deal, the fulfilment of which has been unjustly prevented by the respondent Government. For this reason the profits expected by the claimants cannot be held back as the latter are totally unable to demonstrate that a profit would have resulted from the deal » (unofficial translation). The Rudloff case may be found in English in *Reports of International Arbitral Awards*, Vol. IX, p. 244 *et seq.*

([21]) MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, IV, Washington 1898, p. 3248.

([22]) MOORE, *op. cit.*, IV, p. 3783.

6. *Methods for assessing the damage. They are unsafe in the instant case.*

The Applicant shows little concern about the existence of an adequate casual link between the alleged unlawful acts which it attributes to Italy and the damage for which reparation is claimed. From the part of the Reply dealing with compensation it would appear that it was solely the Mayor's requisition decree that gave rise to the alleged injury(23). This decree allegedly prevented the orderly liquidation of ELSI, forcing the company to ask for bankruptcy, and thus making Raytheon liable for payment of ELSI's debts which had been guaranteed by Raytheon. Because of this decree, Raytheon suffered the loss of the loans made to ELSI(24), as well as the charge of all the legal and allied expenses relating not only to the bankruptcy proceedings and the present dispute, but also to the defence of Raytheon in civil suits instituted against it by some banks.

The previous pages have amply demonstrated that no evidence whatsoever was given of the chain of causality which the Applicant alleges. Furthermore, it must be recalled that this alleged chain of causality seems to be mainly based on the mere hypothesis that Raytheon would have been able to obtain a quite different financial result in the event of an orderly liquidation. The United States Government maintains that ELSI's creditors would have obtained total satisfaction if this had been possible, and Raytheon would have avoided the aforementioned repercussions stemming from ELSI's ruinous state. According to the Applicant, all this would have been possible because « had the Respondent not interfered with the liquidation, Raytheon and Machlett would have recovered the market value of ELSI as a going concern in 1968 » (25).

In the previous pages, as well as in the Counter-Memorial, the Italian Government is confident to have fully demonstrated that all the allegations put forward by the United States Government against Italy are unfounded. We could therefore stop here, not seeing any purpose in commenting evaluation of damages which, in the opinion of the Respondent Government, did not exist or were not imputable to the Italian authorities' behaviour. However for the only sake of wholeness, the Italian Government will offer in the following pages some few comments on the criteria used by the Applicant to evaluate the damages allegedly suffered by Raytheon and Machlett because of Italian wrongful acts.

The Applicant contends that the *whole* book value of ELSI would have been realized in the liquidation process, the book value being considered as the closest to its going concern value(26). This seems hardly practicable for the purposes of valuating the injury allegedly caused to Raytheon, because according to the principle accepted by international law judicial practice, the onus is on the claimant for reparation to prove that « soit en consultant le cours ordinaire des choses, soit en s'attachant aux affaires de la partie lésée ou des dispositions prises par elle, il est *probable — non pas seulement possible* — que celle-ci aurait réalisé tel ou tel profit si le fait illicite ne s'était pas produit » (27).

The hypothesis of realizing ELSI's *entire* book value through liquidation must, however, have appeared utterly improbable at the time, and even impossible to Raytheon itself, because ELSI's own management had envisaged a quick-sale value which was far lower than the book

(23) Reply, p. 155.

(24) According to the Applicant, account should also be taken, when computing the damages, of what Raytheon would have earned as a result of the orderly liquidation. In the attempt of showing that the compensation requested is relatively modest, the Applicant stresses how their amount would at all events be insufficient « to recoup Raytheon's and Machlett's investment in ELSI, since they would have lost over US$ 11 million in investments made since 1956 » (Reply, p. 156). On what conceivable basis should the Italian Government be liable for these sums?

(25) Reply, p. 156.

(26) Reply, p. 157. It should be noted that in the United States Government's view, unspecified « actions of the Respondent » « made it impossible for ELSI to become self-sufficient »; therefore it would have made it impossible to compute « the future profits of the company's continued operations » in the valuation of ELSI as a going concern.

(27) « Both by taking into consideration the ordinary course of events and by considering the business of the injured party of the provisions it took, it is *probable – not merely possible* –, that it would have made such or suchother profit if the illicit event had not occurred » (unofficial translation). The quotation is drawn from the arbitral award in the *Fabiani Case*, to which the Applicant referred on several occasions in the Memorial and the Reply.

value, and insistently sought — without success — an agreement with ELSI's main creditors based on the payment of only 50 % of the amounts owing to them.

The truth, as demonstrated earlier, is that the scenario of realizing ELSI as a ' going concern ' was wholly at odds with reality ([28]). In this connection, it is worth noting that, while the Memorial considered this as the most optimistic scenario, the Reply surprisingly credits it with being the only possibility! The proof that this does not correspond to reality, despite the contentions of the Applicant, may be found (beyond what is said in the relevant parts of the Counter-Memorial and this Rejoinder) in the fact that in the 1974 Claim, Raytheon's own valuation of ELSI fell very far short of the so-called ' quick-sale ' value.

Now, the United States Government contends that such valuation was the « worst case scenario » presented « for purposes of internal corporate planning by ELSI's shareholders » ([29]). However, the United States Government now rejects what had been depicted as « a worst case scenario » by saying that it was used in the 1974 Claim *introducing* negotiations « in a spirit of compromise » ([30]). This statement is really hard to swallow, and one cannot neglect considering that two different valuations — one by the bankruptcy receiver, and one by ELTEL — show far lower figures!

Having noted this, in passing, the onus is certainly not on the Respondent — who denies that anything unlawful has been done and hence rejects any obligation to pay any reparation for the alleged injury — to suggest any alternative method of valuation. As indicated already in the Counter-Memorial ([31]), Italy's remarks are offered solely as a means of showing up « the dubious contentions of law and the distortions of facts » in the Applicant's submissions.

7. *Further arguments on refunding legal costs and computing interest.*

In addition to the considerations expressed in the Counter-Memorial ([32]), some further comments may be made on the issue of the legal expenses allegedly incurred by Raytheon. Despite what the United States Government maintains, the legal costs sustained by Raytheon for proceedings instituted in Italy against it by ELSI creditor banks cannot, at all events, be deemed to be « a direct consequence of the Respondent's actions » ([33]). On the contrary, they were a consequence of ELSI's insolvency.

Anyway these costs, as granted by the Italian Court must be considered as final, without any further possibility of claims on the part of the Applicant.

The need to take account of the Applicant's delay in submitting its claim to the Court, in order to decide whether or not the Applicant is entitled to interest on the amounts requested by it in reparation, is confirmed by international cases. It has been affirmed in international decisions that the failure of the allegedly creditor State to take action may affect the awarding of interest, or at least, the determination of the date from which the interest is calculated as accruing ([34]).

This appears to be fully justified if, in line with the prevailing doctrine, interest is considered as a possibile element of the reparation and as such, as a lump-sum valuation of the loss of profit

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([28]) CLAGGETT, *The Expropriation Issue before the Iran-United States Claims Tribunal: Is 'Just Compensation' Required by International Law or Not?*, in 16 *Law and Policy in International Businnes*, 1984, pp. 884-885, referred to « ... the settled and fundamental principle that the value of an asset depends not on its cost or past usefulness, but on its future usefulness ». He further commented: « An asset may have cost millions of dollars to produce, or may have yielded tens of millions of dollars of profit in the past, but may have no present value if investors believe that the asset will produce no profit in the future ».

([29]) Reply, p. 159. It is quite irrelevant to say that the quick-sale value does not reflect the full value of ELSI because it does not « take into account the significant intangible value of ELSI's business », considering that according to the Claimant, the intangible value is not even taken into account in the book value (p. 155).

([30]) Reply, p. 159.

([31]) Counter-Memorial, p. 115.

([32]) Counter-Memorial, p. 116.

([33]) Reply, p. 156.

([34]) See the *Macedonian Case*, LAPRADELLE et POLITIS, *op. cit.*, II, pp. 203-205.

stemming from the fact that the unlawfully injured party could not dispose of a sum equivalent to the damage occasioned to it ([35]). From this point of view, the computation of the interest must certainly take account of the obligation of the injured party, also sanctioned by international case law ([36]), to reduce to a minimum the prejudicial consequences of the unlawful act of which it claims to be victim.

In pratical terms, it should be noted that the decisions of international arbitration tribunals about interests were often influenced by considerations of equity. This happened especially in cases in which the amount involved would be far higher than the « principal » amount due in reparation because of the long period of time with regard to which the interest would have to be calculated ([37]).

Therefore, bearing in mind that international case law is virtually unanimously in refusing to acknowledge a right to interest — let alone compound interest ([38]) — the claim of the Applicant on this point is to be considered as lacking of a sufficient justification.

([35]) ANZILOTTI, Sugli effetti dell'inadempienza di obbligazioni internazionali aventi per oggetto una somma di denaro, in *Rivista di diritto internazionale*, 1913, p. 54 *et seq.*

([36]) See, for example, the *Coipwer Case*, LAPRADELLE et POLITIS, *op. cit.* I, p. 348. And the cases cited by DERAINS, L'obligation de minimiser le dommage dans la jurisprudence arbitrale, in *Revue du Droit des Affaires Internationales*, 1987, p. 375 *et seq.*

([37]) See the *Macedonian Case* and particularly the *Yuille et Shortridge Case*, cited above.

([38]) The Iran–U.S. Claims Tribunal « has never awarded compound interest » *Sylvania Technical Systems v. Iran, cit.*).

SUBMISSIONS

The Italian Government makes the following submissions:

« May it please the Court,

To adjudge and declare that the Application filed on 6 February 1987 by the United State Government is inadmissible because local remedies have not been exhausted.

If not, to adjudge and declare:

(1) That Article III (2) of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;

(2) That Article V (1) and (3) of the Treaty has not been violated;

(3) That Article V (2) of the Treaty has not been violated;

(4) That Article VII of the Treaty has not been violated;

(5) That Article I of the Supplementary Agreement of 26 September 1951 has not been violated;

and, accordingly, to dismiss the claim ».

18 *july* 1988.

Professor LUIGI FERRARI BRAVO
Agent of Italy

DOCUMENTS

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27. Federal Reserve Bank of New York, Circular N. 6102 of January 25, 1968.
28. D. Lgs. 12 February 1948, N. 51 « Approval of the New Statute of Istituto per la Ricostruzione Industriale (IRI) ».
29. « The only answer from IRI and Finmeccanica is: Hands off GIE. Ansaldo is bitter over its rejection ». *Il Sole–24 Ore*, October 3, 1987.
30. « ELSI repudiates Union Agreements. Rejects requests to withdraw dismissal notices », *L'Ora*, March 10, 1968.
31. R.D.L. N. 5 of January 23, 1933 setting up of the « Istituto per la Ricostruzione Industriale », with headoffice in Rome.
32. Statement by Professor Pier Giusto Jaeger, dated June 17, 1988.
33. Articles 41 and 42 of the Italian Constitution.
34. Law N. 835 of October 6, 1960: « Reservation of supply and manufacturing orders for government offices, in favour of industrial plants in the Southern regions and Lazio, and definition of the areas to be considered included in Southern Italy and the islands »; Article 16 of Law N. 717 of June 26, 1965: « Regulation of actions for the development of the South ».
35. Law N. 1589 of December 22, 1956: « Institution of the Ministry of State Economic Par ticipation ».

YEAR 1989

Public sittings of the Chamber held at the Peace Palace,
President Ruda presiding
in the case concerning Elettronica Sicula S. p. A. (ELSI)
(United States of America v. Italy)

VERBATIM RECORDS

ANNEE 1989

Audiences publiques de la Chambre tenues au palais de la Paix,
sous la présidence de M. Ruda, Président
en l'affaire de l'Elettronica Sicula S. p. A. (ELSI)
(Etats-Unis d'Amérique c. Italie)

COMPTES RENDUS

Present :

President RUDA Judges ODA, AGO, SCHWEBEL, Sir ROBERT JENNINGS.
Registrar Valencia–Ospina.

The Government of the United States of America is represented by :

The Honorable Mr. ABRAHAM D. SOFAER, Legal Adviser, Department of State,
Mr. MICHAEL J. MATHESON, Deputy Legal Adviser, Department of State,
as Co–Agents ;

Mr. TIMOTHY E. RAMISH,
as Deputy–Agent ;

Ms. MELINDA P. CHANDLER, Attorney/Adviser, Department of State,
Mr. SEAN D. MURPHY, Attorney/Adviser, Department of State,
The Honorable Mr. RICHARD N. GARDNER, Ambassador to Italy (1977–1981); Professor of Law and international Diplomacy, Colombia University; Counsel to the Law Firm of Coudert Brothers,
as Counsel and Advocates ;

Mr. GIUSEPPE BISCONTI, Studio Legale Bisconti, Rome,
Mr. FRANCO BONELLI, Professor of Law, Genoa University; Partner, Studio Legale Bonelli,
Mr. ELIO FAZZALARI, Professor of Civil Procedure, Rome University; Partner, Studio Legale Fazzalari,
Mr. SHABTAI ROSENNE, Member of the Israel Bar, Member of the Institute of International Law, Honorary Member of the American Society of International Law,
as Advisers.

The Government of Italy is represented by :

Mr. LUIGI FERRARI BRAVO, Professor of International Law at the University of Rome, Head of the Legal Service of the Ministry of Foreign Affairs,
as Agent and Counsel;

Mr. RICCARDO MONACO, Professor Emeritus at the University of Rome,
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Mr. IGNAZIO CARAMAZZA, State Advocate, Secretary–General of the Avvocatura Generale dello Stato,
as co–Agent and Advocate;

Mr. MICHAEL JOACHIM BONELL, Professor of Comparative Law at the University of Rome,
Mr. FRANCESCO CAPOTORTI, Professor of International Law at the University of Rome,
Mr. GIORGIO GAJA, Professor of International Law at the University of Florence,
Mr. KEITH HIGHET, Member of the Bars of New York and the District of Columbia,
Mr. BERARDINO LIBONATI, Professor of Commercial Law at the University of Rome,
as Counsel and Advocates;

Assisted by :

Mr. DAVID CLARK, L.L.B. (Hons), Member of the Law Society of Scotland,
Mr. ALBERTO COLELLA, Assistant Legal Adviser to the Ministry of Foreign Affairs,
Mr. PIER GIUSTO JAEGER, Professor of Commercial Law at the University of Milan,
Mr. ATTILA TANZI, Assistant Legal Adviser to the Ministry of Foreign Affairs,
Mr. ERIC WYLER, Maître assistant of Public International Law at the Faculty of Law of the University of Lausanne
as Advisers.

C 3/CR 89/1
Monday 13 February 1989, at 10 a. m.

MR. SOFAER – MR. MATHESON – MR. ADAMS

The PRESIDENT: The sitting is open.

Before proceeding to the business of this sitting of the Chamber formed to deal with the case concerning *Elettronica Sicula S.p.A.* (*ELSI*), I would like to take this opportunity as President of the Court to record the sad losses suffered by the Court in recent months, with the deaths successively first of one of its Members, my immediate predecessor as President, secondly of a retired Member and former President of the Court, and thirdly of a judge *ah hoc* sitting in a case before a Chamber of the Court.

On 11 December 1988, Judge Nagendra Singh, Member and former President of the Court died in The Hague. It has already been my melancholy duty to pay tribute to the memory of Judge Singh at the public sitting of the full Court held on 20 December 1988, and I shall not repeat what I said on that occasion. Since however Judge Singh was also President of this Chamber, formed to deal with the *Elettronica Sicula Case*, it would not be right to let the present sitting pass without recalling once again the loss that we have suffered with his untimely demise.

On 11 January 1989, José Luis Bustamante y Rivero, former Member and President of this Court, died in Lima, Peru. Judge Bustamante had been a Member of the Court from 1961 to 1970, and was President of the Court from 1967 to 1970. Prior to his election to the Court he had had an exceptionally distinguished career, culminating in the Presidency of the Republic of Peru. In the academic sphere, he had not only held chairs in legal procedure and civil law, but also taught philosophy, American archeology and social geography. He practised at the bar in Peru from 1918 to 1934 and was Substitute Judge and Deputy Public Prosecutor at the Supreme Court of Arequipa from 1920 to 1934. He entered public affairs as a member of the Arequipa City Council in 1921 and became Minister of Justice and Education in 1930; he subsequently entered the Peruvian Foreign Service and served his country as Ambassador and as a Member of the Delegation to several international conferences. From 1945 to 1948 he was President of the Republic of Peru. Twelve years later he was elected to the Court, to which he made a notable contribution deriving from his sound legal approach and wide experience of public and international affairs. Elected President soon after the decision in the *South West Africa Case* in 1966, which had given rise to very strong feelings on both sides, he was able to do much to restore serenity within the Court by the quiet dignity with which he discharged the duties of his office.

At the end of January 1989 the Court learned with regret of the death, on 27 January 1989, of Professor Michel Virally, who had been appointed to sit as judge *ad hoc* in the Chamber formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras. One of the most distinguished of his generation of French jurists, Judge Virally was Professor at the University of Law, Economics and Social Sciences in Paris and at the Graduate Institute of International Studies in Geneva, and Honorary Professor at the Faculty of Law at the University of Geneva. In addition to an active and distinguished career in the academic field, he had also served as a member of the French delegation to various sessions of the United Nations General Assembly, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, and the Vienna Conference on the Law of Treaties. The proceedings in the case in which he had been appointed judge *ad hoc* had only reached an early stage and his friends and colleagues will greatly regret that he was not to be given the opportunity of demonstrating his great legal gifts in the capacity of an international judge.

May I invite all present to rise and observe one minute's silence in memory of the judges whom I have mentioned.

(All stand).

Thank you; please be seated.

The Chamber constituted to deal with the case concerning *Elettronica Sicula S.p.A.* (*ELSI*) sits today to hear the oral arguments of the Parties in that case.

The proceedings were instituted on 6 February 1987 by an Application filed by the United States of America alleging against Italy violations of the Treaty of Friendship, Commerce and Navigation signed by the two States on 2 February 1948 and the Supplementary Agreement to that Treaty. The United States requested that the case should be dealt with by a Chamber of the Court, and that proposal was agreed to by the Government of Italy. By an Order dated 2 March 1987 the Court decided to accede to the request of the two Governments to form a special Chamber of five judges to deal with the case, and declared that at an election held that day President Nagendra Singh, Judges Oda, Ago, Schwebel and Sir Robert Jennings had been elected to the Chamber. Time-limits for pleadings were fixed and in due course the United States filed a Memorial, Italy a Counter-Memorial, the United States a Reply and Italy a Rejoinder. Following the death on 11 December 1988 of Judge Nagendra Singh, President of the Chamber, the Court proceeded to fill the vacancy in the Chamber by election in accordance with Article 17, paragraph 3, of the Rules of Court. At that election, held on 20 December 1988, my colleagues did me the honour of electing me to fill the vacant seat in the Chamber.

In accordance with Article 53, paragraph 2, of the Rules of Court, the Chamber, after ascertaining the views of the parties, has decided that copies of the pleadings and documents annexed shall be made accessible to the public with effect from the opening of the present oral proceedings.

I note the presence in Court of the agents and counsel of the two parties and declare the oral proceedings in the case open. I now give the floor to the Agent of the United States, the Honorable Judge Abraham Sofaer.

Mr. ABRAHAM D. SOFAER:

Introduction

Mr. President, distinguished Members of the Court. It is a great honour to appear before this Court on behalf of the United States. We greatly appreciate the Court's willingness to constitute a chamber of judges in this dispute. The United States is pleased to be part of this significant — and positive — development in international dispute resolution. The parties are also particularly grateful for the President's willingness to serve on this Chamber on short notice, following the death of Judge Singh. Judge Singh was a prodigious and exceptional scholar, a man of integrity and dedication. His death is a great loss to us all.

With the permission of the President, the United States will present its case in the following manner. I will make a brief introductory statement describing the nature of this dispute, the claim of the United States and the principal issues raised by the pleadings. My Co-agent, Mr. Matheson, a Deputy Legal Adviser at the Department of State, will present to the Court an overview of the undisputed facts and then explain certain areas where the facts are disputed. I will then conduct the direct examination of Mr. Charles Adams, and Ms. Chandler will conduct the examination of Mr. John Clare. Professor Bonelli will then address issues of Italian bankruptcy law as applied to the facts of this case. Mr. Murphy will explain to the Court the position of the United States regarding the jurisdiction of the Court and the objection of the Respondent as to the admissibility of the claim. Professor Gardner, who served as US Ambassador to Italy between 1977 and 1981 will relate the facts of this case to the violations of the 1948 Treaty of Friendship, Commerce and Navigation between the United States and Italy. Mr. Ramish will discuss the issue of relief. Mr. Lawrence will provide expert testimony as to the valuation of the property harmed by the Respondent in this case. Finally, Mr. Matheson will sum up our position.

Mr. President, the case now before this Court is most important. It concerns an investment by two companies of one country in a European country during the post-World War II era, a time when rebuilding Europe was critical in establishing a lasting global peace. It concerns

measures taken against that investment by the host country contrary to the provisions of a bilateral treaty.

Economic development and social progress are the common concern of the whole international community. By establishing legal norms that encourage economic prosperity and the well-being of all nations, we help strengthen peaceful relations and co-operation globally. Chapter 9 of the Charter of the United Nations acknowledges that the development of economic and social relations creates the conditions of stability and well-being necessary for friendly relations among nations.

Of course, the public sector — government — plays a critical role in economic development everywhere. But the private sector also plays an important role in economic development, primarily through overseas investment and international trade. Without a reasonable expectattion of security, investors will be less inclined to venture outside the favourable environments of their own countries. Without effective legal protection, investors will be less inclined to risk their capital, and the cost of capital will be proportionately greater.

Thus, in pursuing this suit, the United States is not merely advancing the private interest of one of its nationals. Rather, it is engaged in assuring the conditions necessary to enable citizens and governments of all States to pursue economic development in the most effective manner possible.

The United States and many other nations have worked hard to establish a legal framework for trade and investment of capital both by US companies abroad and by foreign companies in the United States. The corner stone of this legal framework has been the commercial treaty. While commercial treaties have been part of US policy since the beginning of the American Republic, they have played a major role in this century. In the decade following the Second World War, the United States completed the negotiation of new commercial treaties with 16 countries. Among the countries that entered into treaties of Friendship, Commerce and Navigation with the United States at that time were the Republic of China, Denmark, the Federal Republic of Germany, Ireland, Japan, the Netherlands and Italy.

These new FCN treaties overhauled pre-existing commercial treaties. They sought to improve and strengthen the protection of investments. Since international investment in modern times is predominantly by corporate rather than by individual enterprise, the FCN treaties devised ways of providing adequately for the protection of companies, not just individuals. For the first time many of these protections extended, not only to the operations of the companies themselves in the foreign country, but also to the operations of their subsidiaries incorporated or chartered under the laws of the foreign country. The phenomenal economic growth in the world economy in the post-War era is in no small part attributable to these types of commercial treaties.

The 1948 FCN Treaty between the United States and Italy is especially notable. In the aftermath of the war, both countries saw great significance in normalizing bilateral commercial relations. For the United States the FCN Treaty was the first treaty of its kind negotiated with any European country following the war, indeed the first since 1934. It encouraged US investment and business activities in Italy, by assuring certain fundamental protections in the face of the extensive involvement of the Italian Government in the private sector that had existed during the Second World War, much of which remained intact in the post-war era and thereafter.

For Italy, this Treaty was one of many steps in the resumption of Italy's customary position in the family of nations. At the time the Treaty was concluded its protections were predominantly applicable to activities of US nationals and companies in Italy. But the protections involved are granted with almost complete reciprocity, and today Italian activities within the United States benefit extensively from the existence of the Treaty. In fact, at the present time Italian investment in the United States has grown to the point that the current flow of such investment to the United States approximates or exceeds that of the United States to Italy. Italy has prospered, like many other countries in the world, due predominantly to the ingenuity and industry of the Italian people. But the FCN Treaty played its part in facilitating capital investment in Italy and it now serves and protects Italian entrepreneurs operating in the United States.

This case is the story of two US corporations — Raytheon Company and Machlett Laboratories — that invested heavily in the Mezzogiorno region of Southern Italy. Their investment began in the form of minority ownership, but then grew to 100 per cent ownership of an Italian electronics company, located in Palermo, Sicily, named Elettronica Sicula S.p.A., commonly referred to as « ELSI ». Raytheon and Machlett tried to make ELSI financially self-sufficient by investing large amounts of capital and expertise, but ELSI unfortunately never became financially self-sufficient. Raytheon and Machlett tried to persuade the Respondent to help by becoming a partner in ELSI, and by enforcing Italian laws favouring investments in Southern Italy. The Respondent refused to do so.

In March 1968, Raytheon and Machlett reluctantly decided to put ELSI through an orderly liquidation process, whereby — either as a whole or by individual product lines — ELSI's plant and assets would be sold off, thus minimizing Raytheon's and Machlett's loss in their investment. As owners, these US companies had the right to end their business in the manner they believed was best suited to obtain the highest possible return on their investment. After careful study, they concluded that the best return would be obtained from an orderly liquidation.

The Respondent, however, refused to allow Raytheon and Machlett to accomplish this orderly liquidation. On 1 April 1968, the Respondent requisitioned the plant and assets of ELSI for an extendable six-month period, apparently fearing the political and economic effect of a liquidation. This act prevented Raytheon and Machlett from exercising a fundamental right under the FCN Treaty, that of protecting their capital through the sale of their property interests. Moreover, the requisition placed ELSI in a position of not being able to pay its bills as they came due, unless substantial further investments were made by Raytheon and Machlett.

Raytheon and Machlett urged administrative officials to rescind the requisiton. On 19 April 1968, however, President Carollo of Sicily announced that the requisition would be maintained indefinitely unless Raytheon abandoned its liquidation plan. He could not have been clearer in stating his aim of damaging ELSI unless Raytheon submitted to his demand that operations continue and the liquidation be abandoned. Pres'dente Carollo stated:

« Nobody in Italy shall purchase, that is to say IRI shall not purchase neither for a low nor for a high price, the Region shall not purchase, private enterprise shall not purchase. Let me add that the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favour any sale while the plant is closed ».

The Respondent is clearly responsible for the actions of its officials, which led to the consequences President Carollo explicitly predicted.

ELSI appealed the Mayor's order to the Mayor's administrative superior, the Prefect. But the Prefect failed to act. Meanwhile, no steps were taken by the authorities in control of ELSI's plant and assets to continue ELSI's operations. ELSI's assets and work-in-progress immediately began to deteriorate in value. With debts coming due and no prospect of regaining custody of ELSI's plant and assets, ELSI's Italian counsel advised ELSI's Board of Directors that it should file a petition in bankruptcy. A petition in bankruptcy was filed, and on 7 May 1968 ELSI was declared bankrupt.

Four auctions were held during the bankruptcy, but no bidders appeared, just as President Carollo had threatened. The Respondent in this case claims that this fact establishes that ELSI had no value. But this claim ill befits the very authorities that precluded Raytheon and Machlett from implementing its planned liquidation and thereafter effectively prevented any meaningful bids to be made. As the evidence shows, before the first notice of auction in bankruptcy, on 11 December 1968, Italy had taken several steps to signal its determination to take over ELSI, at a price of its own choosing. On 25 July 1968 the Italian Minister of Industry, Commerce, and Crafts indicated in Parliament that the Government of Italy would take over ELSI's plant. On 3 November 1968 the Respondent issued a press release that IRI-STET would take over ELSI. On 30 November 1968 a « STET » sign was placed over the ELSI plant entrance. During December 1968, IRI formed ELTEL for the express purpose of taking over ELSI.

While ELSI officials received enquiries from prospective purchasers of its product lines and other assets, they could do none of the normal things that a seller does to bring about sales

since they lacked control of the very assets being sold. And when notice of sale in bankruptcy was issued, the notice called simply for the sale of all of ELSI's assets, a commercially untenable proposition for any possible purchaser other than IRI, and completely at variance with the method of sale which ELSI and Raytheon officials had planned.

Given these preliminary arrangements, IRI's subsidiary ELTEL was able to take its time in deciding when to purchase ELSI. It allowed three auctions to go by, with the price dropping after each ended without a bid. Then, in the fourth auction, ELTEL bought ELSI's assets at a far lower price than could have been obtained through an orderly liquidation.

When this deed had been done, and some 16 months after ELSI had appealed the requisition order, the Prefect found that the requisition was after all illegal. Even then the Respondent refused to pay for the damages it had caused. Instead, it paid an amount described by the Italian courts as the rental value of ELSI's plant for a six-month period.

We believe that a review of the evidence reveals that this is a simple case. The relevant facts and the controlling law are straightforward, and largely undisputed. Differences do exist between the parties, however, about a few material issues of fact and concerning some aspects of the governing law. In accordance with Article 60 of the Rules of this Court, our oral presentation will be directed primarily to the issues that still divide the parties, and we will not repeat the facts and arguments contained in the written pleadings. Hence, the fact that we do not address some of the Respondent's arguments should not be construed as implying a waiver of our position as stated in our written pleadings.

The Respondent raises an objection that the United States claim is inadmissible, due to a failure by Raytheon and Machlett to exhaust local remedies. In its pleadings the Respondent devotes considerable attention to proving the existence of the local remedies rule, but fails to sustain its burden of showing that the rule applies in this case and that remedies exist which were not exhausted.

The claim in this case, which is based on violations of a treaty between two governments should not be found inadmissible. The rights of the United States under this treaty should be vindicated by the declaration of this Court that the treaty was violated and that reparation is due. Indeed, Article XXVI of the FCN Treaty states that where disputes cannot be satisfactorily adjusted by diplomacy, either party may submit the dispute to this Court for interpreation or application.

Even if the local remedies rule is applicable to this dispute, the rule is satisfied. Raytheon and Machlett pursued all reasonable methods of overturning the requisition and mitigating the damage caused during the bankruptcy process. The Italian courts were provided several opportunities to order the Respondent to pay compensation for its acts once the requisition had been declared illegal by the Prefect.

Left with no further remedy under Italian law, Raytheon and Machlett turned to the United States Government. When the United States presented a claim to the Respondent in 1974 we asserted that all local remedies had been exhausted and that the Respondent had violated its international obligations to the United States. The Respondent answered this diplomatic note four years later. In its response, as well as in subsequent diplomatic communications, the Respondent argued that no violation of international law or Italian law had occurred, but it never claimed until this action was commenced that other remedies existed and should be pursued in Italian courts. The Respondent should be precluded at this point, on this record, from asserting that such remedies existed and should have been pursued.

The governing law makes clear, moreover, that the Respondent denied to Raytheon and Machlett several rights to which they were entitled under the FCN Treaty. These rights have been carefully identified in our written pleadings and include: the right to manage and control ELSI; the right not to have their legally acquired investment interests in ELSI impaired by the Respondent; the right to receive from the Respondent protection and security for their property; and the right to prompt payment of just and effective compensation for the wrongful taking by the Respondent of interests in property.

The breach of these international obligations by the Respondent creates a duty to make reparations to the United States. Reparation in this case should be measured by the injury

actually incurred by Raytheon and Machlett. Since ELSI never became financially self-sufficient, we do not seek reparation in the form of lost future profits of Raytheon and Machlett. Rather, we have assessed the value of ELSI at the time of the requisition, essentially according to its adjusted book value, taking into account certain intangible values as well. On this basis, the United States seeks reparation for injuries suffered by Raytheon and Machlett with respect to loan guarantee payments, return of investment, open accounts, and legal expenses and costs. To aid the Court in the assessment of these damages the United States will present an accounting expert to analyse the available documentation and to present the methodology relied on in our computations.

The total amount of damages suffered by Raytheon and Machlett, which is claimed by the United States, is US$ 12,679,000. The Court is requested to order payment to the United States in this amount. In addition, the United States requests that the Court award interest on this amount, at the average annual rate of the United States prime rate, compounded annually from the date of the injury to the date compensation is paid. For purposes of simplification, the United States has in its annexes calculated interest from the end of the calendar year in which the injury occurred.

In conclusion, I would mention that a sound resolution of the questions in this case is no more important to the nationals of the United States than it is to the nationals of the many nations now engaged in international investment under the protection of FCN treaties or similar agreements. Investment outlays in the United States by foreign beneficial owners have recently reached about us $ 40 billion per year. Companies from countries in Europe, the Middle East, and Asia are investing heavily in the United States, often under the protection of FCN or similar agreements. It is essential that nothing be done to imperil the stability and integrity of the legal régime in which all these international investments are made. In short, we are here, your Honours, to protect not only a US company and US interests, but the interests of all investors who rely upon FCN treaties and similar agreements for protection.

This finishes my opening remarks. Following what I understand is the practice in this Court, during the course of our oral statements we shall not read all our detailed references and citations. These references and citations will be given to the Registry and I ask that they be included in the transcript of these proceedings in full. I trust that this will meet with the approval of the Court and will not cause any inconvenience to the Respondent.

I now request that the President invite Mr. Matheson to address in more detail the facts of this case.

The PRESIDENT: Thank you Judge Sofaer. I call the Co-Agent of the United States, Mr. Michael Matheson.

Mr. MATHESON:

Facts

Thank you Mr. President, distinguished Members of the Court. It is my honour to present to you today the argument of the United States on the facts of the case which is before you. Although it may not be apparent from the Respondent's written pleadings, the vast majority of the facts relevant to this case are not in dispute. In a number of instances where the Respondent does dispute a particular fact asserted by the United States, it has yet to present documentary evidence of its position. Finally, there exist a few categories of factual evidence which the Respondent has placed on the record but which are irrelevant to the basic dispute before the Court.

I will not attempt to repeat the material that appears in our written pleadings. Rather, I will begin by summarizing the more important facts which in our view are not disputed. I will then deal briefly with certain facts asserted by the Respondent which are essentially irrelevant to this case. Finally, I will explore in greater detail the two important questions of fact which are disputed.

Undisputed facts.

To begin with, we believe that it would be useful for the Court to have before it as complete an indication as possible as to which facts are not disputed. I will therefore present a brief summary of the more important facts which we believe to be in this category. If the Respondent disagrees with any of these facts we invite the Respondent to specify them and identify any documents before the Court which support its position.

First, there is no dispute with respect to the nationality of each of the parties that play a part in this proceeding. Raytheon Company (known as « Raytheon »), Machlett Laboratories, Incorporated (known as « Machlett »), and Raytheon Europe International Company (known as « Raytheon Europe ») are all United States nationals. Raytheon Europe is the European management subsidiary of Raytheon and is wholly owned by Raytheon. *Elettronica Sicula S.p.A. (ELSI)* (commonly known as « ELSI »), and Istituto per la Ricostruzione Industriale (IRI) (often known as « IRI ») are Italian nationals. ELSI was organized in May 1954 and was wholly owned by Raytheon and Machlett; IRI is a holding company owned by the Government of Italy.

The second area of undisputed fact lies in ELSI's financial performance. It is undisputed that although Raytheon and Machlett provided financial, managerial, and technical support for ELSI, ELSI never became financially self-sufficient. As of 31 March 1968, ELSI's accumulated losses were at least 8.5 billion lire (US$13,680,000).

It is further undisputed that ELSI's shareholders decided to liquidate ELSI's assets by means of an orderly liquidation under Italian law. During March 1968, in accordance with its decision, ELSI ceased full-scale production, dismissed employees except for approximately 130 needed for wind-up operations, and took steps to commence an orderly liquidation of assets.

It is undisputed that the Respondent prevented the implementation of this plan by its requisition of ELSI's assets. On 1 April 1968 the Mayor of Palermo, acting on behalf of the national government, issued an order, effective immediately, requisitioning ELSI's plant and related tangible assets for « the duration of six months, except as may be necessary to extend such period ».

It is undisputed that the requisition was found to be illegal under Italian law. Immediately following the requisition, ELSI representatives sent cables to the Mayor and other Italian authorities asking them to revoke the requisition, but received no response. On about 11 April 1968, ELSI again petitioned the Mayor of Palermo to lift the requisition order; the Mayor never responded. On 19 April 1968, ELSI filed a formal appeal of the requisition order to the Prefect of Palermo. The Prefect ruled on 22 August 1969 that the requisition was illegal. The ruling was issued approximately 16 months after the requisition order — but only a short period after ELSI's assets had been purchased in bankruptcy by the Respondent.

It is undisputed that officials of the Italian Government made a series of statements, beginning before the requisition, that evidenced its intention to prevent the orderly liquidation and to take over ELSI for itself. I will give you a few examples of these statements. On 31 March 1968, the President of the Sicilian Region told ELSI's Managing Director that the Italian Prime Minister had said that the Government of Italy would requisition ELSI's plant in order to prevent the liquidation. On 20 April 1968, following a meeting with Raytheon officials in which he advocated additional investment in and continued operation of ELSI, the President of the Sicilian Region delivered a memorandum to Raytheon stating that liquidation was impossible for the time being. That memorandum stated that:

> « nobody in Italy shall purchase [ELSI] neither for a low nor for a high price, the Region shall not purchase, private enterprises shall not purchase ... [T]he region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favor any sale while the plant is closed ».

On 25 July 1968, the Minister of Industry, Commerce and Crafts announced the intention of the Government of Italy to take over ELSI's plant through one of IRI's subsidiaries. On 13 November 1968, the Italian Government announced that an IRI subsidiary, known as IRI-

STET, would take over ELSI's plant. In December 1968, IRI formed a new subsidiary — Industria Elettronica Telecomunicazioni, S.p.A. (commonly known as « ELTEL ») — to take over ELSI's plant and assets.

It is undisputed that ELSI's bankruptcy petition was filed on 26 April 1968 and that ELSI was declared bankrupt on 7 May 1968. Most of the ensuing events in the bankruptcy process are also undisputed. Although I will not belabour the Court with a long diversion into the intricacies of the bankruptcy process, it is important to note a few key events. Despite the Respondent's announced intention to take over ELSI, neither IRI nor ELTEL attended the first three bankruptcy auctions. ELTEL acquired ELSI's assets in another manner.

A week after the second auction, ELTEL proposed to the Trustee that it be allowed to lease and reopen the ELSI plant for an eighteen–month period at an annual rental charge of 150 million lire (US$240,000). The creditors committee, which included Raytheon Europe, opposed the proposed lease, but it was approved by the bankruptcy judge on the terms requested. Raytheon Europe's appeal of the lease to the Civil and Criminal Tribunal was denied. In fact, the lease lasted less than four months, since ELTEL acquired ELSI outright in July 1969. The total amount in rent collected by the bankruptcy judge was only 48 million lire (US$77,000). (Memorial, Annex 30, Attachment B of Schedule A.).

In April 1969 ELTEL notified the bankruptcy court that it was willing to purchase ELSI's plant and equipment, with the exception of certain supplies that were not essential for the administration of the plant. ELTEL indicated that it would bid at the third auction if it could bid 3.205 billion lire (US$5,128,000) for the plant and equipment only. The bankruptcy judge did not alter the terms of the third auction and ELTEL did not bid.

In May 1969 ELTEL offered to purchase the plant, equipment and inventory for 4 billion lire (US$6,400,000). On 9 June the bankruptcy judge ordered a fourth auction and set a base price of 4 billion lire (US$6,400,000). Raytheon Europe appealed this decision, but that appeal was denied.

On 12 July 1969 the fourth auction was held; only ELTEL attended. ELTEL purchased ELSI's plant and remaining assets for 4.006 billion lire (US $6,409,600). On 13 July the Civil and Criminal Tribunal of Palermo approved the purchase and assigned ELSI's remaining assets to ELTEL.

It is undisputed that the Trustee in bankruptcy was granted only 114 million lire (US $171,000) in damages for the illegal requisition. On 22 November 1969 the Trustee brought suit in the Court of Palermo on behalf of ELSI's bankrupt estate against the Minister of the Interior of Italy and the Mayor of Palermo for damages resulting from the requisition. The Trustee sought damages of 2.395 billion lire (US$3,834,500) plus interest for the difference between the book value of ELSI's fixed assets [plantand electronic equipment] on the date of the bankruptcy and the evaluation made by a court–appointed appraiser at the end of the requisition period on 11 October 1968, and also requested the same for ELSI's inability to dispose of the plant and equipment during the requisition period. The Court of Palermo denied the Trustee's request. Memorial, Annex 79. The Court of Appeals reversed this decision and awarded damages to the Trustee, but it limited those damages to the rental value of ELSI for the six–month period in the amount of 114 million lire (US$171,000). Memorial, Annex 81.

It is undisputed that, after the sale of the remaining materials and collection of receivables, a total of only 6.374 billion lire (910,192,000) was realized from the sale of ELSI's assets in bankruptcy. Memorial, Annex 30, Attachment B of Schedule A. Because the proceeds from the sales in bankruptcy were insufficient to pay all of ELSI's obligations, Raytheon lost the full value of the open accounts and was required to pay all the guaranteed loans, at a total cost to Raytheon of more than 6.931 billion lire (US$11,113,600).

Finally, it is undisputed that the United States made extensive efforts to recover compensation for the Respondent's actions through diplomatic channels. On 7 February 1974 the United States sent a diplomatic note to the Respondent seeking compensation for its actions against Raytheon and Machlett's subsidiary. The Respondent replied on 13 June 1978 that the claim was groundless. On 18 April 1979 the United States sent another diplomatic note questioning the basis for the Respondent's position. The Respondent sent a letter to the United

States on 18 April 1980 repeating that it was juridically impossible for the Respondent to pay compensation for the claim. Finally in November 1985 the parties agreed that the United States should file application with this Court to initiate proceedings in this case.

This concludes my review of the most important undisputed facts. As I stated at the outset, if the Respondent takes the position that any of these facts is disputed, the Respondent should indicate which specific fact it disagrees with, and should refer to the documentary evidence before the Court which supports its position. This process will narrow the dispute and assist the parties and the Court in focusing on the real issues in this case.

Irrelevant facts.

I will next deal briefly with the considerable amount of factual material in the Respondent's written pleadings that is essentially irrelevant to this case. The Respondent places great weight on ELSI's asserted unprofitability and the reasons for this situation. The state of ELSI's profitability is not disputed in this case, nor is it relevant to this proceeding. Regardless of the state of ELSI's profitability, the Respondent wrongfully prevented ELSI's shareholders and creditors from realizing the full value of the company through the orderly liquidation of its assets.

Nor are the reasons for ELSI's financial performance relevant. ELSI's geographic location, the mix of ELSI's product lines, and similar material to which Respondent refers, are all essentially irrelevant to the basic issue before this Court: whether the illegal requisition and other acts and omissions by the Respondent constitute a violation of the FCN Treaty. While the United States has provided complete responses to Respondent's allegations in this regard — because in our view the Respondent is wrong — the Court simply need not reach these issues. Whatever the reason for ELSI's financial performance Raytheon and Machlett were wrongfully deprived of the right to liquidate ELSI's assets in an orderly fashion.

Nonetheless, to give the Court an accurate picture of these matters, I would like to review very briefly the events which led up to the planned liquidation of ELSI.

Beginning in 1967, when Raytheon decided that ELSI had to be made financially self-sufficient, they repeatedly met with Italian Government officials and offered a number of proposals to avoid the necessity of a liquidation of ELSI. These proposals are outlined in our pleadings (Memorial, p. 8; Reply, pp. 128–129) in some detail. The proposals had several common elements: ELSI's shareholders would upgrade ELSI's plant and production systems and improve managerial techniques; new products and markets would be developed in order to expand and diversify ELSI's business and make full use of its operating capacity; an influential Italian partner would be found for ELSI; and the co-operation of the Italian Government would be secured. Beginning in April 1967 Raytheon provided 4 billion lire (Memorial, Annex 15, para. 21) to ELSI in recapitalization and guaranteed credit which it believed would be sufficient to continue ELSI's operations for another 12 months. By December 1967 much of ELSI's facilities and operations had been upgraded. Improved quality, production and scrap control systems were implemented. A worker training programme was established. Production facilities were restructured.

Raytheon also identified several new product lines into which ELSI could expand. This included the government-dominated telecommunications products — including telephone switching equipment — which are the very products that are now being made by the government-owned company that acquired ELSI's assets in bankruptcy.

However, Raytheon was not successful in finding an influential Italian partner that could assist ELSI in competing in Italian markets. An important government-backed Italian partner would have opened up new markets and access to the Italian business network and would have assured a rightful place in the future of the Italian electronics industry which was dominated by government-backed companies.

One possibility ELSI and its stockholders explored was partnership with IRI, which had extensive commercial and banking interests and which dominated the telecommunications, electronics and engineering industries and markets in Italy. In fact, Raytheon had already successfully entered into just such a partnership with IRI and the private company FIAT in an electronics company on the Italian mainland. Raytheon also explored a relationship with ESPI,

the Sicilian governmental entity responsible for finding and promoting Sicilian development. But neither of these Italian entities were interested.

Likewise, Raytheon was unable to secure the support of the Italian Government. The Italian Government was a dominant customer, and through IRI a dominant supplier, in the Italian electronics industries including the telecommunications industry. It was also dominant in related support industries, such as the transportation system and the Italian banking system. With government support — and with IRI as an Italian partner — Raytheon and Machlett also hoped to secure for ELSI the transportation and procurement benefits for investors in the Mezzogiorno region that had been much publicized but never realized by ELSI.

For nearly a year, between February 1967 and March 1968, Mr. Adams, Mr. Clare, and several senior Raytheon officials held some 70 meetings with cabinet–level officials of the national government, with officials of the Sicilian Region, and with representatives of IRI. They presented them with a central plan and with numerous specific proposals for Italian Government participation. These proposals are fully described in the United States Memorial (Memorial, Annex 22).

However, neither the Italian Government nor IRI accepted any of these proposals to invest in or establish a commercial relationship with ELSI. Mr. Adams and Mr. Clare expressly told Italian governmental and industrial officials that unless ELSI acquired an influential Italian partner and support from the Italian Government, the stockholders could not justify contributions of additional capital to ELSI, and ELSI would have to cease operations early in 1968.

By February 1968, the 4.5 million dollar recapitalization (Memorial, Annex 13, Schedule A) that Raytheon had contributed to ELSI in 1967 was running out. When neither an Italian partner nor Italian Government support had materialized, Raytheon and Machlett decided in March 1968 to place ELSI in voluntary liquidation at the highest possible price to obviate the need to make substantial further capital contributions to ELSI and to minimize their losses. On 16 March 1968, ELSI's Board of Directors voted to cease full–scale production and to liquidate ELSI. On 18 March, ELSI's shareholders, Raytheon and Machlett, voted to affirm this decision.

The national government, the regional government, IRI and ESPI were all extended every opportunity to keep ELSI alive and to keep the workers employed through normal and lawful means. The Respondent chose, however, not to pursue these opportunities and chose instead to take the extreme step of requisitioning the company in an unlawful manner and acquiring ELSI for itself under the distress conditions of a bankruptcy sale.

Disputed facts.

Let me now turn to the central issues that are in dispute in this case: first, whether Raytheon's plan for the orderly liquidation of ELSI was reasonably calculated to maximize the proceeds of the sale of ELSI's assets, and to pay ELSI's creditors; and second, whether the unlawful requisition of ELSI's assets precluded an orderly liquidation of ELSI and caused its bankruptcy.

The United States has already submitted substantial documentary evidence of its views on these two disputed issues. Today and tomorrow, we will present testimony by witnesses who had direct, personal knowledge of these events. Specifically, Mr. Charles Adams and Mr. John Clare will testify to relevent events associated with the management of ELSI, the preparation of the orderly liquidation plan and the effect of the requisition on the orderly liquidation.

We will also call on an eminent professor of Italian bankruptcy law, Professor Franco Bonelli, to explain in detail the content and effect of Italian law with regard to these events.

The Orderly Liquidation Plan

The first of the two key disputed issues deals with the viability of the orderly liquidation plan. As both Mr. Adams and Mr. Clare will attest, the plan was reasonably calculated to sell

ELSI as a live business in order to maximize the sales proceeds. Morevoer, the plan was reasonably calculated to pay all of ELSI's creditors.

In early 1968, Raytheon and Machlett had appointed Raytheon's Vice President, Joseph Oppenheim to become ELSI's Chairman. Mr. Oppenheim, himself an electronics engineer, was an expert on international sales and transactions and was thus ideally qualified to plan and carry out the orderly liquidation. To assist him, officials of the stockholders and ELSI were to be divided into working groups to conduct the liquidation. One group was to co–ordinate the entire plan; another was to deal with the banks and other creditors; another had the responsibility to handle commitments to customers and to collect receivables; and a final group would co–ordinate the sale of assets.

The cornerstone of the plan was to sell ELSI or its product lines as going businesses. At the end of March 1968, ELSI had orders in hand, work in process, customer lists, and a list of experienced suppliers of raw materials and components, all of which could have been transferred to a buyer as going business lines. In addition, ELSI and its stockholders selected 130 employees to maintain a light assembly operation to complete work in process and thereby maintain relationships with customers. This combination gave reasonable assurance that the plan would have been carried to a successful conclusion.

Sale of ELSI as a going business also entailed sale of ELSI's substantial intangible assests. ELSI or its product lines would be offered with an established name and reputation, and with customer and supplier relationships intact. This is known as «goodwill» and was a substantial, recoverable element of ELSI's assets. In addition, Raytheon and Machlett would supply necessary patent and trademark licences to purchasers. They would also provide technical assistance to the new buyers of the ELSI lines, thereby backing ELSI's purchasers with their own world–renowned expertise in the electronics field. This assured that purchasers would, in turn, produce high–quality products. Inclusion of these intangible assets in the ELSI package would obviously attract a wider range of potential buyers and maximize ELSI's sales proceeds.

The experienced team which put together the liquidation plan planned to use its knowledge of the electronics components industry to advertize ELSI world–wide, to seek out potential buyers, and to match one or more of ELSI's product lines with each of these buyers. Mr. Oppenheim had world–wide connections with potential buyers, and already had been in touch with Japanese and other firms regarding the possibile sale of ELSI's product lines, including the work–in–process and raw materials.

Sale to a company or to a combination of companies in Italy, including IRI, was not to be overlooked. The Respondent's interest in ELSI is evidenced by the statements made by the national government before and after the requisition, by the extraordinary steps it took to seize ELSI's assets through the requisition, by its lease through IRI–STET, and by the eventual purchase in bankruptcy by ELTEL. In sum, the sale of ELSI or its product lines as live businesses was not only feasible, it was nearly a reality.

This brings me to the second aspect of the orderly liquidation plan: the payment of creditors. Would the sale of ELSI's assets have realized sufficient funds to pay ELSI's creditors? Again, the answer is yes. ELSI had three types of creditors: small creditors; large secured and guaranteed creditors; and large unsecured, unguaranteed creditors. Agreement with the plan was to be obtained with all three classes.

Prior to the receipt of any proceeds from the liquidation, Raytheon planned first to pay the debts owed the small creditors to minimize the administrative effort during liquidation. Raytheon transferred 150 milion lire to the First National City Bank branch in Milan to pay the small creditors in full. Memorial, Annex 17, para. 14 (I should point out that this transfer was accomplished without any difficulty under US foreign direct investment regulations). Raytheon would satisfy ELSI's debts with the remaining creditors from the sale of ELSI's assets. Secured and preferred creditors would, of course, take priority. To the extent that funds from the sale of the assets were insufficient to pay guaranteed loans in full, Raytheon would be called upon to make up the difference.

In the orderly liquidation, Raytheon and Machlett would have received the value of ELSI's assets to be sold as going business lines — at a price likely to be greater than the book value of 17.05 billion lire (US$27,200,000) (Memorial, Annex 13, Schedule C1). Realization of book value would have been sufficient to pay off ELSI's liabilities of 16.66 billion lire (US$26,656,000) (Memorial, Annex 13, Schedule E) in full, including amounts owed by ELSI to Raytheon. This would have left 391 million lire (US$625,600) (Memorial, Annex 13, Schedule E) which could have been distributed to Raytheon and Machlett as a recoupment of a small portion of their total investment.

The liquidation team also prepared a worst-case scenario. They calculated that as an absolute minimum, ELSI's assets would command no less than 10.8 billion lire (US$17,280,000). (Memorial, Annex 13, Schedule C1). This so-called quick-sale value was not to be used to establish an offering price, but only to set the lowest possible figure which could be used by Raytheon in its own internal corporate planning. It is not to be confused with the proceeds Raytheon would actually have obtained had the orderly liquidation been allowed to continue. The quick-sale value artificially discounts ELSI's assets and does not take into account the substantial intangible value of ELSI's product lines.

Mr. Lawrence of Coopers and Lybrand will discuss the actual value of ELSI's assets in more detail. Suffice it to say for now that even if Raytheon and Machlett had realized only the quick-sale value of 10.8 billion lire, the orderly liquidation would still have proceeded successfully. Raytheon and Machlett could have paid ELSI's preferred and secured creditors and all of ELSI's smaller unsecured creditors in full. Raytheon would have honoured its guarantees to pay any guaranteed creditor not fully paid from asset sale proceeds. The major unsecured unguaranteed creditor class would have been paid on a prorata basis from the funds realized from the sale of the assets.

It is impossible to state precisely how payment of the remaining creditors would have progressed, because the illegal requisition arbitrarily terminated the orderly liquidation. One possibility was that Raytheon and Machlett could have settled ELSI's credits with the large unsecured, unguaranteed bank creditors. It would have been reasonable to expect that the unsecured, unguaranteed bank creditors would have settled their claims at approximately 30-50 per cent of value. As Professor Bonelli will describe, in Italy it is common knowledge that settlement brings creditors prompt and substantial payment as contrasted to the lesser amounts the creditors are likely to realize through a court-supervised sale bankruptcy. It is thus common practice in Italy for bank creditors to make such settlements of their claims with failing companies.

Raytheon and Machlett fully intended to allow all large unsecured, unguaranteed creditors to participate in whatever proceeds would have been recovered from ELSI's assets. As Mr. Adams will tell you in a few moments, Raytheon and Machlett would have been willing to negotiate a type of revenue-sharing plan with the creditors. If the sale of ELSI's assets had generated sufficient revenue to pay off creditors at greater than 50 per cent, Raytheon and Machlett would have shared that revenue prorata with the unsecured, unguaranteed creditors.

Accordingly, if Raytheon and Machlett had recovered book value or more from the sale of ELSI's assets, they would have been willing to negotiate an arrangement under which all creditors — including themselves — would have been paid at 100 per cent of value notwithstanding any prior settlement commitments for lower amounts. Creditor settlements never came to fruition, however, because the illegal requisition of the ELSI assets intervened to make their sale, as well as settlement from sale proceeds, impossible.

The critical point, however, is that even assuming for the sake of argument that ELSI's assets had recovered only 10.8 billion lire, the quick-sale value, as the Respondent suggests (Counter-Memorial, p. 82; Rejoinder, pp. 237-238), the orderly liquidation would still have been successful. And even assuming that ELSI's assets had recovered only this quick-sale value Raytheon and Machlett would have been in a much more favourable position financially than they were following the sale in bankruptcy. If the bank creditors with large unsecured, unguaranteed loans had settled their claims at 50 per cent of value or less, the liquidation would have cost Raytheon no more than 3.79 billion lire (US$6,082,600) (Memorial, Annex 13, Schedule F).

Mr. President, it is our intention next to ask that Mr. Char'es Adams be called to testify. I note that the hour is approaching 11.30. May I ask the Court's preferences as to whether we should proceed with that testimony now?

The PRESIDENT: We are going to have the break now and will call the witness after the break, in ten or fifteen minutes.

The Court adjourned from 11.20 *a.m. to* 11.42 *a.m.*

The PRESIDENT: Please be seated. I call upon Mr. Charles Adams to make the solemn declaration, the text of which I assume you have been provided with.

Mr. ADAMS: I solemnly declare on my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth.

The PRESIDENT: Thank you. Mr. Sofaer.

Mr. SOFAER: Thank you Mr. President, Your Honours. Mr. Adams served in 1947 as Executive Vice–President of Raytheon and in 1948 became President of Raytheon. In 1964 he became Chairman of Raytheon's Board of Directors, a position he held until 1975. He still serves as a Director of Raytheon and is Chairman of Raytheon's Finance Committee.

Mr. Adams was awarded the medal of commendation of the Order of Merit of the Italian Republic for his advancement of the electronics industry in Italy.

Mr. Adams, could you tell us, Sir, the reasons for the Raytheon company's investment in ELSI.

Mr. ADAMS: Raytheon was interested in using its technology to develop, hopefully, a profitable activity in Italy. We had the experience of another company where we were joint owners, where we had developed on the equipment side — ELSI was the components part of the business. We felt that we had the technology to succeed in this and that over a period of time we were doing something, by operating in Palermo, that was consistent with the objectives of the Italian Government in helping employment and industrial activity in the Mezzogiorno area. In our own interests we hoped to develop a profitable business; we thought we were consistent with the interests of the Government.

Mr. SOFAER: Were there any factors that made you feel that your company, ELSI, would succeed or needed to succeed?

Mr. ADAMS: We felt, as we understood the conditions in Italy from our experience elsewhere, that we needed to have the help of the Government and the Government's industrial activity area. This was so important in developing, broadening our sales that we felt that we should have the help, not only in developing markets, but that we should have the help of the subsidies for transportation for some of our products and the so–called 30 per cent law which would mean that we would have a certain fraction of the sales of certain kinds of products in this situation.

Mr. SOFAER: Had Raytheon trained any people to operate the ELSI plant?

Mr. ADAMS: Yes, we used American people to enhance the technical training of the workforce at the ELSI plant. We also provided management people from time to time to help in the organization and development of it as a business. So it was both technical training and management training that we provided — management assistance.

Mr. SOFAER: Did Raytheon provide other assistance to ELSI?

Mr. ADAMS: We did. Outside of our financial contributions to ELSI, we went out of our way to provide additional sales. I think perhaps a good example of that was the effort that we made to provide for a components work for the NATO Hawk system. I just take this as an example. In 1959 I was in Paris negotiating with five nations a production programme for the Hawk anti–aircraft missible system for NATO and the question came up of who would make

the tubes that were involved in this — the magnetrons, klystrons, and other technical types of tubes. I said that we had one licensee and that was ELSI and that we wanted to see that work done at ELSI. General Reyneirse, who was the representative of the five nations, said that we cannot put this whole programme in a position where it depends on one small company in Palermo — that is a risk that I cannot accept. I said, General, I can assure you that ELSI can produce these tubes, they are state-of-the-art technology, very difficult and, in order to back that up, I will assure you that for any tubes that ELSI produces that do not meet the specification and pass inspection we will substitute for them tubes made by the corresponding Power Tube Division of the parent company in the United States. That was accepted and ELSI did the work and its tubes passed every inspection; in fact if anything, exceeded the quality of the tubes we made in the United States.

Mr. SOFAER: you mentioned that Raytheon had extended financial assistance to ELSI. Could you tell us the extent of that assistance, if you know?

Mr. ADAMS: We made a capital investment of approximately US$12 million and an additional US$8 million in guaranteed loans for which we were responsible — a total of approximately US$20 million.

Mr. SOFAER: There came a time that Raytheon decided to end its investment and to liquidate ELSI. Could you tell us the reasons for those decisions?

Mr. ADAMS: We had made every effort to turn ELSI into a profitable activity. We decided, in 1967, that we would give this one last good try and we agreed to put up another 4 billion lire, (US$4.5 million), the last of the capital investment that we put into it. And during that time we had some added management people that we were able to bring to bear on the problems there. We decided that we would go around to all the Government agencies, to IRI, to try to get some help to give us added business, to give us some business that had a consistency and stability to offset the ups and downs of some of the military work such as Hawk. We found at the end of that period, as we came into the spring of 1968, that it just did not work. We could not get the help that we needed, we were not able to have enough volume of business to support the workforce there and since we were not in the business of being what I think you could call « permanent investors », if something could not be turned to a profitable condition then it was the inclination of our Board to dispose of it. We could not continue to carry losses for an indefinite period. So a decision was made that we should sell ELSI, either as a whole or by various product lines, the latter being the more probable approach to this. I think that we had every reason to believe that this would work. After all, businesses are bought and sold around the world between one country and another and within countries; some organization is offered a fair price, they may dispose of an activity because there is another organization that is convinced that they can do better with it. Therefore we felt that we had reached the end of the line, our patience had run out, we were a tired investor, if you will, and the time we felt had come to liquidate.

Mr. SOFAER: In your discussions with IRI during that period did you make any proposals to encourage IRI to participate in ELSI?

Mr. ADAMS: We did, we had a meeting with the senior management of IRI and we suggested that they join with us in the ownership of ELSI as they did with us in Selenia where we had that kind of an arrangement and the answer was firmly no. They said that they couldn't make any plans. That they were developing a plan for the electronics industry and that would take a year or so to develop and they could do nothing in the meantime. Beyond that, they said they had no money available. At this point, we said, look, perhaps we can buy some of your share in Selenia which will give you some money which you could then put into ELSI. That was turned down flat too. So it was perfectly clear to us that this was a total turn-down of our suggestions neither would they join with us in this business nor would they give us any help.

Mr. SOFAER: So, do I understand you correctly to say that just before your decision to proceed with an orderly liquidation you offered an opportunity to the Italian Government's company IRI to participate through monetary investments in the ELSI operation?

Mr. ADAMS: That is correct.

Mr. SOFAER: And they turned you down?

Mr. ADAMS: That is correct.

Mr. SOFAER: Did the balance of payments programme in the United States play any role in bringing you to the decision to choose an orderly liquidation?

Mr. ADAMS: No, it did not.

Mr. SOFAER: Could you explain why?

Mr. ADAMS: Well, an orderly liquidation would have provided us with assets with which we could pay off our obligations there so that there was no need for the money to move from the United States to Italy. There were mechanisms by which we could invest. And we did invest the 4 billion lire (US$ 4.5 million) of our last investment in that period of time and that US Government balance of payments programme had no effect at all and our decision was not based on that.

Mr. SOFAER: Why did you believe, and your company had believed, that the orderly liquidation programme would be successful?

Mr. ADAMS: We felt that there was great promise in each segment of the business of ELSI. We hadn't been able to make it work but we felt that there were others who would. We felt that there were companies that could add these product lines to existing product lines; companies that were competitors of ours that might do that, and there was also the possibility of sales outlets that we had that would like to add the production to their activities and we found these product lines to have real promise and therefore real value. The military magnetron line, in the power–tube line, would be brought back up to a high level shortly after this by the so–called Hawk improvement programme which was an add–on to the original Hawk programme that I have spoken on. There were other ongoing businesses there, we were making tubes for commercial marine radars for example, which was a growing business and we had introduced the technology of microwave cooking down there at that time. That became in the United States a very large activity. Our own subsidiary in the United States by 1980 had reached the volume of 500,000 units a year which at a value of 200 dollars per unit would be something like US$ 100 million. This was a field in which somebody who wanted to go that way in the appliance business could have found very attractive because Raytheon pioneered microwave cooking. We held the original patents and the license that would have gone with that line offered a really quite exciting opportunity for profit for somebody who went with that. The other lines were in different positions but we felt that there were companies that could be identified that would be interested in each of these lines and that if we could go ahead with an orderly liquidation that would do fine by us. We would get enough return from these varios sales to meet our obligations and we had people out there with experience in this kind of things, who were familiar with the markets of Europe and whom we felt could do this very effectively. They reported back to us in turn, having looked into it, if they could do it effectively, and gave us reason back at the Company headquarters in the United States to believe that this plan could indeed be carried out successfully. Just one other product line aspect of this: we were making cathode–ray tubes for televisions there; they were black-and-white. In the United States colour had come in and we helped ELSI to provide some engineering staff that could have converted the black-and-white line to a colour line, depending on which colour systems were chosen in Europe. Actually, that was delayed a bit but we had staffed that activity so that it would be attractive to a buyer.

Mr. SOFAER: Now, do I gather correctly then that you are saying that Raytheon as a result of its control of patents and various other types of technology was in a position to extend to purchasers, either of individual product lines or of the company in general, commitments to provide those purchasers with the opportunity to manufacture those products?

Mr. ADAMS: Yes, the licenses and know–how agreements that went with each product line would have been carried on. With each product line we had an ongoing organization. We had

suppliers, a network of suppliers that had been developed, that could provide the high quality materials that we needed for these high technology products. We had sales organizations. We had customers in place. Each of these businesses was a going business. And yet altogether they weren't profitable in our hands but we felt that they were attractive to buyers and that with the very productive work force that we had down there and the ability to deal with these difficult products that these were almost unique opportunities for a variety of buyers who could have appeared on the scene if we had been able to deal with that.

Mr. SOFAER: And do I understand you correctly to be saying that Raytheon was in a position to offer any particular buyer substantial sales that you were expecting from the Improved Hawk programme with NATO?

Mr. ADAMS: Yes, indeed we were. That lay just ahead and would have enhanced the sales of the kinds of power-tubes that we had produced in considerable volume in the early sixties. That volume had dropped off as the productions was completed and the flow of tubes was only for spare parts and so on. But with the Improved Hawk there was a requirement for new equipment with new tubes and whoever bought into that business would have had that assured in the years immediately ahead.

Mr. SOFAER: Did Raytheon expect to make a large profit as a result of the sale of ELSI or its lines?

Mr. ADAMS: No, we didn't expect to make a large profit but we did hope to and expect in fact to liquidate at something like our book value. We felt that book value was quite secure if we had been allowed to go ahead and dispose of these assets. This would have ended our losses and let us get out of the thing with no write-off beyond what we'd already taken.

Mr. SOFAER: Did you feel that the amount you could obtain in an orderly liquidation would be sufficient to pay off ELSI's creditors?

Mr. ADAMS: We did. We felt if we could have gone ahead with that the way we wanted to, we could have paid off all the creditors. If it didn't go quite as well, if we took a sort of worst case, a quick-sale kind of solution, we could have paid off the people that worked there. We could have paid off the small creditors and we could have made a deal with the major creditors at the 40-50 per cent minimum of what was owed to them so that we felt that in the worst case that was where we would have come out.

Mr. SOFAER: So it was the business judgment of your company, yourself included, that the best interests of Raytheon and Machlett required you to end your losses in ELSI by selling in an organized, orderly liquidation of the ELSI assets.

Mr. ADAMS: That was our conclusion.

Mr. SOFAER: Why did you then put ELSI into bankruptcy at some point?

Mr. ADAMS: We were forced to put ELSI into bankruptcy when the plant was occupied when the requisition took place. At that point we were no longer able to bring customers in to show them a going business, to show them machinery and equipment, let them talk to the people and get a detailed feel for the line. We were blocked completely from doing that and as long as we could no longer conduct the orderly liquidation that I just tried to describe to you, we were forced by the requisition into bankruptcy. A course of action that we never considered until the requisition took place.

Mr. SOFAER: So did the stockholders of Raytheon and the Board of Directors of Raytheon ever consider putting ELSI into bankruptcy before the requisition had been implemented?

Mr. ADAMS: No we did not.

Mr. SOFAER: After the requisition you noted that you were unable to show people the plant and discuss with them the assets of the company. Do you mean to say that your company lost possession and control of the ELSI plant and its physical assets?

Mr. ADAMS: Yes, that is exactly what took place, and when that took place the values began to decline because we could no longer maintain the machinery in good operating condition, we could no longer work out the conversion of work-in-process into final product and get that out, we could no longer deliver to our customers the material that they had ordered, that we had finished or had almost finished there. So that from that moment on — the requisition — we completely lost control and were forced into an untenable position which again put us into the bankruptcy condition.

Mr. SOFAER: Do you feel that that situation had an impact on the value of the physical assets and the inventory and other aspects of ELSI?

Mr. ADAMS: It certainly did. As I've said, with the machinery not maintained, equipment not properly taken care of, no proper house keeping, and all the rest of it that goes with a going concern situation, even at less than a full-scale operation, we could not preserve the values which we were anxious to preserve.

Mr. SOFAER: On that basis, would you conclude that any valuation, set on ELSI after the requisition had occurred and this process had continued, would necessarily lack the bases upon which you had made your judgments concerning the orderly liquidation?

Mr. ADAMS: Without question. The value that we could realize was rapidly disappearing and the situation, months after the time when we were hit by the requisition, was a period of declining value, unrealizable value from our point of view.

Mr. SOFAER: Mr. President, that ends my questions of this witness. If the Court has any questions at this time, the Court would be, of course, free to ask those questions. I have previously discussed with my distinguished colleague, Professor Ferrari Bravo, the question of Italy's examining this witness and as you know, your Honours, we have agreed to permit Italy to examine tomorrow, if they wish to do so. But at this point I would make the witness available for either examination by the Court or by my distinguished colleagues in the Italian Delegation.

The PRESIDENT: Well I understand that the Italian Delegation will put questions to the witness tomorrow morning. Now it seems to me appropriate for the Judges that may want to put questions, to put questions after the Italian Delegation have put their own questions to the witness. So I beg Mr. Adams to remain at the disposal of the Court.

Mr. SOFAER: Very well. Mr. Adams you will please remain at the disposal of the Court until tomorrow morning when the examination will continue.

The PRESIDENT: Thank you very much Mr. Adams. As I inderstand now you are going to call Mr. John Clare.

Mr. SOFAER: No, Mr. President with your indulgence I would like the Court to call upon Mr. Matheson now to continue his recitation of the essential facts that relate to this delegation.

The PRESIDENT: Very well, I call Mr. Matheson.

Mr. MATHESON: Thank you Mr. President and distinguished Members of the Court.

As Mr. ADAMS has now testified, the orderly liquidation plan was commercially viable: ELSI or ELSI's product lines would have been sold as going businesses and the sale of the assets was reasonably calculated to pay of all of ELSI's creditors. Mr. Adams has testified that the requisition was the sole event that prevented the orderly liquidation and that the orderly liquidation precipitated the bankruptcy of ELSI.

Tomorrow with your indulgence we will call John Clare to give further testimony on these matters. In addition, Professor Franco Bonelli will establish the shareholders' entitlement to an orderly liquidation under Italian law and he will demonstrate that prior to the requisition ELSI's management was under no obligation to place it in bankruptcy. He will also explain how the requisition caused the bankruptcy as a matter of Italian law.

Thus, Raytheon and Machlett had developed a liquidation plan that was financially sound and legally feasible. However, as they took the first step to implement the plan, the Respondent intervened. One event and one event alone prevented the orderly liquidation: the unlawful requisition of ELSI's plant and assets on 1 April 1968.

The requisition cause ELSI's bankruptcy

This brings me to the second issue which I mentioned at the outset: that the requisition directly and proximately caused ELSI's bankruptcy. We will show that the requisition in fact prevented the sale of ELSI's assets, that without proceeds from the sale of ELSI's assets ELSI's shareholders could not settle ELSI's debts with its creditors, and that bankruptcy became, as a result, inevitable.

Again, I would like to step back for a moment and refer to the circumstances that led to and directly followed the requisition. It was the Respondent's stated intention to requisition ELSI's assets to prevent the orderly liquidation. On 27 March, the President of the Sicilian Region, President Carollo, stated that the Italian Government would seize ELSI's plant and related assets if the shareholders persisted in liquidating ELSI. He stated « the plant would almost certainly be requisitioned if ELSI sent out letters of dismissal to its emplyoes » (US Memorial, Annex 15, paras. 56–57 and Exhibit F). But President Carollo still made no definite commitment to Raytheon and Machlett for the future of ELSI.

On 29 March the General Manager of the Ministry of Industry, Commerce and Crafts, speaking for the Prime Minister of Italy, told Mr. Clare that Raytheon would incur the Prime Minister's « severe displeasure » if the plant were closed (US Memorial, Annex 15, paras. 58–59 and Exhibit G). Like President Carollo, however, he would make no written commitment regarding any Government assistance if Raytheon and Machlett were to keep the plant open. Without such a commitment Raytheon and Machlett sent out letters of dismissal to ELSI's employees.

On 31 March the President of the Sicilian Region reported that the Prime Minister had indicated that an ESPI company would acquire ELSI's assets and that the Government would requisition the plant in order to prevent the liquidation (Memorial, Annex 15, paras. 61–62 and Exhibit H).

Consistent with his stated intention, on 1 April 1968, the Mayor of Palermo, acting as an official of the central Government, issued an order, effective immediately, requisitioning ELSI's plant and related tangible assets for a period of six months « except as may be necessary to extend such period ». On 2 April acting upon legal advice, ELSI's management relinquished control of the company's plant and assets.

Now it is not disputed that the requisition was patently illegal under Italian law. When the Prefect ultimately ruled, he found in unambiguous terms that the requisition was illegal because it could not possibly have achieved its stated purposes (Memorial, Annex 76). He stated « the order is destitute of any juridical cause which may justify it or make it enforceable ».

Just how unlawful this requisition was can be seen from the plain language of the relevant statutes. The requisition order was based on two statutes that bestowed extraordinary power on Italian administrative authorities to dispose of private property for reasons of grave public necessity (Memorial, Annex 34). The first statute, enacted in 1865, is only a few lines long:

« When, because of grave public necessity, the administrative authorities must dispose of private property without delay or, pending a court case for the same reason, proceed to enforce a measure whose legal consequences are the subject of the dispute, the administrative authorities will proceed by means of a decree indicating the reasons, without prejudice to the rights of the parties ».

The second statute established the Mayor authority to issue « emergency and urgent orders of this character » (US Memorial, Annex 35). The statute states:

« The Mayor issues emergency and urgent orders in matters of civil works, local police and health for reasons of public health and safety ».

The Mayor of Palermo, invoking both of these statutes, cited several bases for requisitioning ELSI (Memorial, Annex 33). Among the stated reasons for the requisition were that ELSI's action « caused a wide and general movement of solidarity of all public opinion which has stongly stigmatized the action taken considering that about 1,000 families are suddenly destituted », that « because of the shutdown of the plant a serious damage will be cause to the district », that « the local press is taking a great interest in the situation and ... is being very critical toward the authorities and is accusing them of indifference to this serious civic problem » and that « there is a grave public necessity and urgency to protect the general economic public interest (already seriously compromised) and public order ».

The reasons offered by the Mayor for the requisition are significant because they are completely at odds with the conduct of the Mayor and other Italian authorities following the requisition. Despite his statements concerning the serious consequences of a shutdown of the plant, the Mayor of Palermo took no effective actions whatsoever to reopen, operate or maintain the plant. Further, Italian authorities did nothing to prevent ELSI's former employees from occupying the plant grounds or to terminate that occupation. The Respondent's suggestion (Rejoinder, p. 184) that the aim of the requisition was not to deprive the shareholders of the ownership of the plant but merely to regulate ELSI's assets does not square with the events that actually occurred.

It is also clear that the requisition prevented the orderly liquidation of ELSI. As a result of the requisition, ELSI's owners and management were, as a matter of law, deprived of possession and control of ELSI's assets and the right to dispose of them. They could not use the plant in order to minimize growing losses. They could not complete work-in-process to finished products. They could not sell any or all of ELSI's assets, including ELSI's inventory or its work-in-process. Barred from physical access to ELSI, it was impossible to invite potential buyers to view ELSI's facilities. They could take no steps which would in any way generate operating income to pay the inevitable bills that would come due. At the same time, ELSI's relationships with its suppliers and customers were terminated abruptly. ELSI's market position was quickly seized by its competitors. Any possibility of selling ELSI's product lines as live businesses diminished rapidly.

It is equally clear that the requisition forced ELSI to file a petition in bankruptcy. The Respondent made it clear to Raytheon and Machlett that the requisition would be indefinite. Faced with no prospects of generating income to pay ELSI's creditors, bankruptcy was inevitable

Notwithstanding the patent illegality under Italian law of the requisition, the Mayor and other Italian governmental authorities did not revoke the requisition. Initially, Raytheon and Machlett hoped that the requisition would be promptly quashed and that they would be able to resume their plans for the orderly liquidation of ELSI. Raytheon and Machlett immediately cabled the Mayor (Memorial, Annex 26, para. 9), requesting him to rescind the requisition, but the Mayor never responded. On 19 April, ELSI appealed the Mayor's order to the Prefect of Palermo (Memorial, Annex 36) but the Prefect delayed ruling for 16 months until after ELSI's assets had been sold to the Respondent.

At the same time, it became increasingly apparent to Raytheon and Machlett that the requisition would last indefinitely. On 20 April 1968, President Carollo delivered a memorandum to Mr. Oppenheim. This memorandum is attached as Exhibit 38 to the United States Memorial and it clearly showed the Respondent's intentions. The memorandum stated in part:

« On the premise that the intent of [Raytheon] is that of liquidating ELSI, I shall herein explain the reasons why it is absolutely impossible that this can take place for the time being.

1. Nobody in Italy shall purchase, that is to say IRI shall not purchase neither for a low nor for a high price, the Region shall not purchase, private enterprise shall not purchase. Let me add that the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favour any sale while the plant is closed.

4. In the event that the plant shall be kept closed, waiting for Italian buyers who will never materialize, the requisition shall be maintained at least until the courts will have resolved the case. Months shall go by ».

Following receipt of this memorandum, it was clear that the requisition would not be promptly quashed and the orderly liquidation would not be resumed. In this posture, ELSI's counsel advised ELSI to file a petition in bankruptcy. ELSI's shareholders had been relying on the sale of ELSI's assets to generate revenue to pay ELSI's creditors in an orderly manner. The requisition, however, essentially froze ELSI's assets and prevented their sale. It was obvious from President Carollo's statements that this was exactly its intended purpose. After the requisition, creditor demands intensified substantially. Unable to generate income, ELSI was no longer able to remain sufficiently liquid to pay its creditors and was unable to make payments when due.

Had there been no requisition, funds certainly would have been made available from the business of the company to meet payment obligations. Alternatively, if the assets were free, Raytheon and Machlett could have extended additional funds to the company to allow it to meet foreseeable payment obligations with the expectation of obtaining repayment from asset sales. However, under the circumstances, it was clear that this money would be lost forever. In consideration of its own shareholders, Raytheon and Machlett decided that they would not advance funds to make this payment. Thus, on 26 April, ELSI's Board of Directors voted to file a voluntary petition in bankruptcy, citing the requisition which deprived the company of liquid assets as the principal cause (Memorial, Annex 43). ELSI was found bankrupt on 16 May 1968 (Memorial, Annex 44).

I would like to return to a thought that we raised at the outset. The Respondent clearly wanted ELSI for itself yet was unwilling to participate in ELSI on a lawful commercial basis. The Respondent's tactics continued following the requisition. Despite renewed statements that the Respondent intended to acquire ELSI for itself, the Respondent did not promptly pay a market price for ELSI's assets.

Moreover, the Respondent's repated statements that it wanted ELSI for itself effectively deterred all other potential purchasers from the bankruptcy sales. Although the Trustee in bankruptcy received inquiries from parties interested in purchasing ELSI's assets, these parties had no incentive and received no encouragement to pursue their interest. In addition, so long as the plant was occupied by former ELSI employees, it would have been difficult, if not impossible, for the Trustee to show the plant and assets to prospective purchasers. IRI was thus effectively insulated from having to compete for ELSI at a freely determined market price.

On 25 July 1968, the Ministry of Industry, Commerce and Crafts announced to the Parliament that the Italian Government intended to take over ELSI's plant through one of IRI's subsidiaries. He further indicated that Italy was considering a general creditors' settlement outside the bankruptcy process (Memorial, Annex 46). On 13 November 1968, the Government of Italy announced that an IRI subsidiary, called IRI–STET, would take over ELSI, without a creditor settlement (Memorial, Annex 27). In December IRI formed a new subsidiary in Palermo — Industria Elettronica Telecomunicazioni (known commonly as « ELTEL ») — to take over ELSI's plant and assets.

One would have thought that the newly–formed company would have bid on ELSI at the first bankruptcy auction. But it did not. Subsequent events suggest that this too was part of a national government plan. In April 1969 the President of the Sicilian Region — President Carollo — explained that ELTEL's decision not to bid was part of a national government plan dating back to October 1968. Under this plan IRI would purchase ELSI for a sum of 4 billion lire. It was even agreed that IRI would be absent from at least the first auction, and would participate only when the price was precisely 4 billion lire (Memorial, Annex 59).

In fact, IRI did not appear at either the first or the second bankruptcy auctions. On 18 March 1969, a Sicilian newspaper reported that IRI and the Trustee in bankruptcy agreed that IRI would acquire ELSI's assets beginning with a lease of the plant for 150 million lire followed by a negotiated purchase of the assets (Memorial, Annex 56). Interestingly, the Prefect, who had pending before him Rahtheon and Machlett's appeal of the requisition took an active part in the negotiations of this lease agreement. Conveniently for IRI, he continued to delay ruling that the requisition was unlawful until after IRI had completed its acquisition.

A week after the second auction, ELTEL publicly proposed that it be allowed to lease the plant for an annual rental charge of 150 million lire (US$ 240,000). Although the creditors' committee expressed what the bankruptcy judge called an « essentially negative » opinion of the proposed lease, the bankruptcy judge agreed to the lease on the terms requested by ELTEL. Raytheon promptly appealed the lease to the Civil and Criminal Tribunal of Palermo, but the appeal was rejected.

In April 1969 ELTEL proposed to buy ELSI's work in process for 105 million lire, which was only 48 per cent of what it had been appraised by a court-appointed valuator. ELTEL's proposal was accepted by the bankruptcy judge on the same day as the third auction. In the spring of 1969 ELTEL submitted its own appraisal of ELSI's plant and assets at a mere 2.4 billion lire.

Having acuired ELSI's work-in-process and having acquired control of ELSI's plant through the lease, ELTEL's only remaining obstacle was the purchase of ELSI's rema ining assets. ELTEL then offered to buy the remaining plant, equipment and inventory for 4 billion lire (US$ 6,400,000). These items were sold to ELTEL at the fourth bankruptcy auction for 4.006 billion lire (US$ 6,409,600).

Raytheon Europe promptly appealed the sale of ELSI's assets to the Civil and Criminal Court of Palermo, but its appeal was denied on 20 June, thus removing the last obstacle to ELTEL'S acquisition of ELSI's assets. On 13 July 1969, the bankruptcy court approved the sale of ELSI's work-in-process at the price proposed by ELTEL (Memorial, Annex 74).

ELTEL's acquisition of ELSI was now complete, at a price vastly less than the book value of ELSI and less than the price established by the judicial valuator. IRI's subsidiary Italtel now uses ELSI's plant to manufacture telephone equipment. Let me recall that telephone equipment was one of the new products proposed by ELSI in its 1967 Report to Italian officials.

Following the requisition, five of ELSI's unsecured bank creditors filed suit against Raytheon to recover the unsecured unguaranteed debts. All of the judicial decisions at all levels of the Italian judiciary cleared Raytheon of any explicit or implicit misconduct in its actions with respect to the bank loans for ELSI.

Now, as I previously mentioned, ELSI appealed the Mayor's requisitions to the Prefect of Palermo on 19 April 1968. Although on 22 August 1969, the Prefect found the requisition to be unlawful (Memorial, Annex 76), it was a hollow victory for Raytheon and Machlett. ELSI had long since been declared bankrupt, its plant and assets sold, and the Respondent's acquisition of ELSI was complete. Had the Prefect ruled promptly on the appeal, the damage could have been averted. Instead, the Prefect delayed until a mere 40 days after the Respondent, through ELTEL, had successfully acquired ELSI's assets.

Two points should be made about the Prefect's ruling. First, the illegality of the requisition was patent. Second, the Prefect unreasonably delayed in declaring its illegality. The Respondent neglected to mention in its written pleadings (Counter-Memorial, pp. 84-85; Rejoinder, pp. 191-192) that the requisitions it cites were almost uniformly annulled or set aside.

Further, appeals of these requisitons to the Prefect were usually set aside within days — not months — within days of the requisition order. The Respondent has submitted as Annex 30 to the Counter-Memorial a statement that prior to 1971 the average administrative appeal took about one year to decide. The Respondent has not provided evidence for this proposition and our study of the record indicates that the Respondent is incorrect. Virtually all of the requisition orders cited by the Respondent were annulled in far less than one year. In Société Terites, to name just one, the Prefect annulled the requisition order in three days. In cases not cited by the Respondent, the annulment period is similarly short. The 1964 requisition of Sbordoni Ceramica requisition was annulled in one day; the 1966 requisition of SCAC was annulled in one day; the 1961 requisition of Borsalino was annulled in six days (Memorial, Annex 26, para. 10).

Several of the requisitions cited by the Respondent occurred after 1971 and therefore do not support the statement made in Annex 30. After 1971 requisition orders could alterntely be appealed to a *Tribunale Amministrative Regionale*, a judicial court. Appeals to this judicial court are by their nature a more protracted judicial process and therefore are not relevant to the average time period in which prefects would rule.

Respondent also finds fault with Raytheon and Machlett for delay in filing a motion requesting the Prefect to expedite its ruling with regard to the requisition. Raytheon and Machlett did exercise this right under Italian law. Doing so sooner, however, would in no way have affected its position with regard to the dispute. Raytheon and Machlett appealed the requisition to the Prefect on 19 April 1968. The first oppurtunity Raytheon and Machlett would have had to request the Prefect to expedite his decision would have been 120 days following the appeal, i.e., in mid–August 1968. At this time, the sale of ELSI's product lines as viable businesses was an impossibility. Moreover, even if Raytheon and Machlett had requested an expedited decision at an earlier point in time, this does not guarantee that the Prefect would in fact have heeded the request and issued a ruling. Thus, the timing of Raytheon and Machlett's request for an expedited decision from the Prefect is immaterial to the dispute before the Court.

Had the Prefect quashed the requisition within the typical time frame for actions of this type, Raytheon and Machlett could have resumed the orderly liquidation. If the Prefect had overturned the requisition shortly after the filing of the petition in bankruptcy, ELSI could still have withdrawn the petition.

The trustee in bankruptcy brought suit on behalf of ELSI's bankrupt estate based on the Prefect's ruling. The Court of Appeals of Palermo found that the Trustee was entitled to compensation, but only for the loss of use and possession of ELSI's plant and assets during the six-month requisition period. This decision was upheld by the Supreme Court of Appeals. The rental value awarded by Italian courts to compensate for the illegal requisition falls far short of the actual losses sustained by the shareholders as a result of the Government's illegal requisition. Indeed, on its face, the compensation awarded does not purport to compensate for anything other than the six–month rental value.

Finally, I would like to respond to the Respondent's allegations that Raytheon, Machlett, and ELSI officials acted in violation of Italian law. Respondent in this case has levelled serious accusations and has gone so far as to accuse the management of these companies with reprehensible criminal conduct. As Professor Bonelli will discuss, Respondent has not established a single violation of Italian law by Raytheon, Machlett, or ELSI management. Professor Bonelli will demonstrate that ELSI's shareholders were entitled to liquidate ELSI's assets as a matter of Italian law, that prior to the requisition ELSI was under no obligation to file a petition in bankruptcy, that the requisition caused ELSI's bankruptcy, and that in other respects Raytheon, Machlett and ELSI management were in compliance with Italian law.

Mr. President, I now note that our intention in the order of the case was next to ask Mr. Bonelli to make an extensive statement with respect to the Italian law which governs these matters. I note that the time probably will not allow him to get very far into that statement if we begin now. Could I suggest that perhaps we can begin with that statement tomorrow morning?

Mr. PRESIDENT: Yes, we will begin with the statement of Professor Bonelli tomorrow morning at 10 o'clock. Thank you very much.

The Court rose at 12.23 p.m.

Mr. FERRARI BRAVO – Mr. HIGHET – Mr. ADAMS – Mr. MATHESON – Mr. CLARE – Ms. CHANDLER – Mr. BONELLI – Mr. FAZZALARI – JUDGE SCHWEBEL

The PRESIDENT: Please sit down. The sitting is open.

I understand that there is an agreement between the parties to call Mr. Adams first this morning, to be cross-examined by the Italian delegation. Therefore I call upon Mr. Adams to come into the Grande Salle de Justice.

Good morning Mr. Adams. You will be cross-examined by the Italian delegation.

Mr. FERRARI BRAVO: Mr. President, with your permission I would like to ask Mr. Keith Highet, Counsel for the Italian Government, to put some questions to this witness.

The PRESIDENT: Mr. Highet, please.

Mr. HIGHET: Thank you Mr. President, Mr. President and Members of the Court.

If I may, Mr. Adams, I would like to thank you most warmly for your willingness to remain at the disposition of the Court of course and of our delegation so that we could put our questions to you this morning.

First, if I may, let me ask you one or two background questions. I noticed reading over the material again last night that you have been at Raytheon for about 42 years almost, and I would suggest that you probably have very little question in your own mind that Raytheon is one of the finest companies in the United States.

Mr. ADAMS: Of course, I have that view.

Mr. HIGHET: And wouldn't it be true, Mr. Adams, really, to say that Raytheon has accomplished over the years certainly since World War II many things that have set it at the top — in the first rank — of the high technology companies in the world?

Mr. ADAMS: I think that is a reasonable statement.

Mr. HIGHET: Would you say also that there was a special quality about Raytheon — a certain independence, flexibility, intelligent use of human resources, whatever it is — that there was a certain quality about Raytheon in the way it handles business affairs and has done so over the years both in the United States and abroad?

Mr. ADAMS: We like to think that we have conducted ourselves correctly and properly.

Mr. HIGHET: That's excellent. That's what I thought. Again, it is a pleasure to have you here.

As a general matter in Europe, in the mid-1960's or possibly in the 1950's verging into the 1960's, how many real competitors did Raytheon have in the electronics field in Europe, just roughly?

Mr. ADAMS: I couldn't tell you, I am not familiar enough with them, the principal field in which we competed was doing work for the various governments and that was our more important areas; the number of large companies I could'nt give you the precise number.

Mr. HIGHET: Let us say more than five or more than ten? I mean major companies.

Mr. ADAMS: Oh not more than ten.

Mr. HIGHET: So, Raytheon was in the lead both in the United States and in Europe of electronics and high technology work at that time as it is today?

Mr. ADAMS: I think that is a fair statement.

Mr. HIGHET: Now if I may turn, Mr. President, to the question of the so-called « orderly liquidation », your testimony, Mr. Adams, yesterday included a description of the effects of the requisition of 1 April 1968 as you saw it.

I will make, Mr. President, if I may, references to the verbatim records in context; this is to page 260. You stated that as « long as we could no longer conduct the orderly liquidation that I just tried to describe to you, we were forced by the requisition into bankruptcy » — that is at page 260, Mr. Adams — and you concluded by saying, « So that from that moment on — the requisition — we completely lost control and were forced into an untenable position which again put us into the bankruptcy condition » (pp. 260-261).

Now, were you aware, Mr. Adams, that on 2 March 1968 ELSI's books of accounts and accounting documents were moved to Milan?

Mr. ADAMS: When you ask questions about the detailed schedule of what happened in Italy you should refer it to the next witness Mr. Clare who was on the spot.

Mr. HIGHET: Thank you. All right, I will make a note of that. And that will take me right along. You will remember of course, you were present at the Board meeting of 16 March 1968 which was held in Rome, which was the Board meeting that determined, from the point of view of ELSI's Board, the decision to handle the liquidation. Did you ever hear, or were you aware, that his Board meeting or the decision taken at the Board meeting had any subsequent effect on the employees of ELSI?

Mr. ADAMS: No, I would not comment on that.

Mr. HIGHET: Were you generally aware of the occupations of the plant in early 1968?

Mr. ADAMS: In early 1968? At what time?

Mr. HIGHET: Say in March 1968, and possibly earlier, were there any protest meetings by the workers?

Mr. ADAMS: I have no clear recollection of that.

Mr. HIGHET: Thank you. Now, turning back to your testimony Mr. Adams, yesterday you said, and the reference is to p. 260, you said yesterday that on the « worst case » or « quick-sale » analysis, you could still have paid off the people who worked at ELSI.

And you also said, at p. 258 in part of your general background, that « we were not able to have enough volume of business to support the workforce there ». Do you have any knowledge as to whether ELSI ever met the March payroll?

Mr. ADAMS: No.

Mr. HIGHET: Do you remember at any point learning that the Region of Sicily paid the workers from the month of March through August 1968?

Mr. ADAMS: March through August, I can imagine that they might have paid them from 1 April.

Mr. HIGHET: And you don't remember?

Mr. ADAMS: Not after we were out of the picture.

Mr. HIGHET: I would like to refer again to your testimony on p. 258 and, if I may, I would like to quote it. You said:

> « After all, businesses are bought and sold around the world between one country and another and within countries; some organization is offered a fair price, they may dispose of an activity because there is another organization that is convinced that they can do better with it. Therefore we felt that we had reached the end of the line, our patience had run out, we were a tired investor, if you will, and the time we felt had come to liquidate ».

And you remember the meeting that you did attend in Rome in February, 20 February 1968, with Mr. Clare and Mr. Profumo and Mr. Hillyer with Mr. Carollo?

Mr. ADAMS: Yes, that is the one of which we have a memorandum from Mr. Hillyer.

Mr. HIGHET: That is correct, Sir. And he kept hand-written notes of that meeting. In those hand-written notes, or minutes, it shows that you said, as a quote given to you I think by your initials, « while we can continue [we being Raytheon] to provide ELSI with management and technology we cannot provide money, without which ELSI will shortly disappear ». Do you remember that generally? I know it is a long time ago.

Mr. ADAMS: I see it in Hillyer's notes.

Mr. HIGHET: Good, excellent. It is also in the hand-written notes, but not in the typed versions, that « the date of 8 March was stressed repeatedly as the absolute limit for a shut-down due to a total financial crisis ». This doesn't appear in either of the typescript notes but it does appear in the hand-written minutes — this was Mr. Hillyer's characterization of what the discussion was. He says in his notes that this view was expressed « repeatedly ». Do you have a recollection of the view being expressed repeatedly that this was a total financial crisis?

Mr. ADAMS: We are attempting to make it clear that this money, the last money that we would put in, was going to run out somewhere along this period of time. 8 March was picked as the date, but it may have been later than that by a certain amount. We had emphasized, by repeating it, that the determination of our management was that we could not put more money into continuing ELSI in operation, as the outlook was at that time; and the emphasis was to make that point.

Mr. HIGHET: That is very understandable.

Mr. ADAMS: That was a decision by Mr. Phillips, the President, and myself and had been referred to the Board of Raytheon.

Mr. HIGHET: I see, because yesterday you did say, in the passage I quoted a bit earlier, about when you realized you were a tired investor and stated that « we felt we had to liquidate ». Obviously that comment really should be seen in the context of possibly a less than voluntary feeling — that possibly this feeling that you had to liquidate was caused by circumstances. Would you think that would be a fair characterization?

Mr. ADAMS: Well if you run out of money with which to operate, the time has then come to do something, and the something was to liquidate, to sell the business in effect.

Mr. HIGHET: Do you have any knowledge, Mr. Adams, whether Raytheon or its agents could have sought to place the assets, the product-lines, the plant, in an executory manner even, by discussing it with the Mayor of Palermo or his appointed manager in that period between 1 April 1nd 26 April, when the bankruptcy was voted?

Mr. ADAMS: I was not on the scene and the decisions as to how one would proceed in a tactical sense — if I can use that expression as compared to a strategic sense which were the major decisions made back in the headquarters of the Company, — were made there on the spot by people who were aware of the relationships with the Mayor and so on, which I was not. So there again, that was beyond the reach of my responsibility. We were not attempting to micro-manage this situation, if you will, from afar in the United States. We were dependent on the very able people we had on the spot, who were headed by Mr. Clare, from whom you will hear later.

Mr. HIGHET: I understand that. Nonetheless, it certainly appears from the record, does it not Mr. Adams, that there were an extraordinary volume and intensity of meetings in the first three months of 1968? I think the figure 80 has come into the record. And for many of these meetings you made some trips, did you not?

Mr. ADAMS: I believe I made only this one, which I see in the record that I was present, recorded by Hillyer.

Mr. HIGHET: I see. May I ask you if you had an impression, either from on-the-spot observation or from Lexington, when the real decision was made to liquidate? This relates to your testimony yesterday and also relates generally to your affidavit, but it is difficult to actually find out when the decision was made. Part of Mr. Clare's affidavit seems to imply that after the Selenia swap acquisition was turned down by IRI, which would have been roughly September 1967, it seems to imply that that was the time that top management in Raytheon made the decision to pull out.

Mr. ADAMS: The clear decision that Raytheon management made was that we would put no more money in, and as we began to approach the date at which the money would run out — which wouldn't be determined with all that degree of precision — we began to consider what to do at that point. I can't put a precise date on it without going back to a lot of records that I haven't got with me.

Mr. HIGHET: In general, the decision not to put more money in, if it were made in September or the fall of 1967 or even December, theoretically would have left a two to three to four-month period, would it not, in which senior management, one way or another, would have seen to the commencement, even internally, of an orderly liquidation process?

Mr. ADAMS: It was important for us to keep the operation running as efficiently and as effectively as we could up to the date where it was clear that the decision to liquidate could be implemented, and therefore the decision to do that was kept very confidential so that the workforce would not fall apart and get concerned, and that lower management people would keep on going. We felt it was in the interests of ourselves, and probably of everybody else — it would do them no harm at least — that we keep the decision to liquidate confidential amongst our own people until the moment came when we were prepared to go ahead and do that.

Mr. HIGHET: Thank you Mr. Adams. Would you say that even if the decision to liquidate were kept confidentially amongst the senior executives or in the senior echelons of Raytheon, was there any deal, do you remember, in that period of late 1967 or early 1968; do you recall at the moment whether any bids were received or whether any indications of interest were received by competitors, by firms who were not already in the business but possibly saw an opportunity? Also do you remember anybody going out and trying to encourage this kind of piecemeal disposition of ELSI?

Mr. ADAMS: As I said a moment ago, you cannot put the word out that you are going to liquidate before you arrive at that moment. If the word isn't out that you are going to liquidate who is to know and who is to come and ask you if you are interested in selling?

Mr. HIGHET: But there were not any confidential discussions that you recall?

Mr. ADAMS: No there were not.

Mr. HIGHET: Earlier this morning you confirmed my understanding of what an excellent company Raytheon is. Now you talked yesterday about how ELSI's product-lines could have been sold off, and possibly in a very beneficial manner — or possibly even ELSI herself — yet, if Raytheon could not succeed in making a success out of ELSI, what might have led you to believe that anybody else, any other company, could have made a go of it?

Mr. ADAMS: Over a period of time Raytheon itself, the parent company, disposed of operations, some of them perhaps set up as subsidiary companies, where we could not succeed and where there were buyers who felt there was real value in adding this to their activities, and we negotiated sales. So this is not an unfamiliar course of action. We disposed of one very recently. If you look at the American scene, at least, you see people disposing of activities to others. If you are a very small player in a large scene and you haven't got a big enough place to really be able to make it work, someone who is a larger player on the scene, if you will, by adding that, may be adding some real value and productivity to their own operation. It's this sort of line of thought that led us to see what we thought was a very promising outlook for disposing of these operations at ELSI.

Mr. HIGHET: In your testimony yesterday (I am referring to p. 258), you referred to your attempt to interest IRI in joining with you in ELSI as it had joined you in Selenia. I found this difficult to understand, Mr. Adams, and I wonder if you could help me. Why would IRI have been interested if ELSI was in a state of financial crisis?

Mr. ADAMS: IRI was not unused to loss operations. I think if you study the activities of IRI over a period of time you will see that they were supporting, in their various divisions or operations or whatever, activities that were losing money, and they were carried on for the benefit of the Republic of Italy, as I have understood it. It didn't seem to us out of order that they might take on another one here, particularly since it was supposed to be helpful to the economic situation in the Mezzogiorno.

Mr. HIGHET: One of the points that was made here (p. 258 again) was that you referred to the possibility of IRI buying in and using cash, but because it didn't have any cash it would use cash from the sale of Selenia to Raytheon, a portion of Selenia. But if Raytheon had been offered to swap its interest in a very profitable company for an interest in a very unprofitable company, that was also a competitor of the profitable company, would Raytheon have done the same?

Mr. ADAMS: Let me get that straight. What is the profitable company that you are referring to?

Mr. HIGHET: I would believe Selenia.

Mr. ADAMS: Selenia was marginal.

Mr. HIGHET: Marginal, but it was not in a state of total financial collapse as was ELSI.

Mr. ADAMS: Selenia, I think would be fair to say, was better off financially than ELSI.

Mr. HIGHET: Well, I seem you take my point. You said yesterday that Raytheon and ELSI could have offered license and know-how agreements to prospective purchasers and you said that, p. 260, « these were almost unique opportunities for a variety of buyers who could have appeared on the scene if we had been able to deal with that ». Now these buyers could have been anybody, including your competitors?

Mr. ADAMS: Yes.

Mr. HIGHET: Subject, of course, to problems of anti-trust and other things, but there would be no problem with licensing, making agreements with companies in Europe?

Mr. ADAMS: Companies that were in Europe and were competitive with ELSI is what I am talking about, not necessarily competitors of Raytheon.

Mr. HIGHET: But, as I remember, there was a lot of Raytheon know-how and technology which essentially you referred to as being capable of accompanying any transfer of technology and licenses. Would the royalties and expenses and other costs for these elements have been substantially on the same level as they were to ELSI from Raytheon?

Mr. ADAMS: We would assume that we would have received some continuing licensing income from these activities in the hands of others. After all, we would have had some control over to whom we were selling, as we dealt with this situation. We did feel that to enhance the value of the activity that we were selling, the opportunity to have some Raytheon continuing assistance to carry on the technical development of that activity and give it real life, would be a reasonable way to go. If we cut off the continuing license and so on, the operation of that part of ELSI that we were dealing with, would have had a lesser value to a prospective buyer.

Mr. HIGHET: Mr. Adams, you indicated in your testimony, pp. 258-259, that « other companies could have been interested in buying some or all of ELSI's product lines and plants », and I also remind you or refresh your recollection about the Clare Report, the 1967 report, the « Project for Financing and Reorganization of the Company », which as the Court will recall is Annex 22 to the United States Memorial. And in your affidavit, which was Annex 9 to the

Memorial you then stated that you agreed with the conclusions of the Clare Report. You still hold that opinion, I take it?

Mr. ADAMS: I haven't reviewed this.

Mr. HIGHET: You have no reason to have changed it?

Mr. ADAMS: No. Not that I am aware of.

Mr. HIGHET: Thank you. In page 40 of the Clare Report, and it is probably the most concise part I can refer to this point, it says that for a promising expanding future for ELSI, Raytheon's own experts had concluded in that report that it would be necessary: (1) to have additional capital investment of 6 billion lire from the Italian State; (2) new product line; and (3) financial help, which would be essentially the social benefits of the transport costs and Mezzogiorno benefits in the training allowances.

The Report also stated that it is therefore necessary to make effective the laws governing the financial help in these areas, from both the regional government and the central government, and to have them favourably interpreted. You remember this?

Mr. ADAMS: In general.

Mr. HIGHET: In general. No, I am not trying to hold you to it ... in principle you have the idea. That's at p. 41 of the Clare Report, Mr. President. Now, your affidavit also summarized those requirements at paragraphs 21 to 28, and you said in your affidavit that ELSI had no choice but to develop new product lines if it was to be self-sufficient. That's paragraph 26. You also said in paragraph 24 that if ELSI was going to be successful it has no choice but to obtain a major Italian partner. And finally you commented — you picked up the point from the Clare Report — in your paragraph 27, and you said

> « as a result of Italian laws which required that shareholders supply additional capital or cease operations upon the occurrence of specified events, it was evident that an infusion of capital was necessary to sustain ELSI until it received the benefits of having an Italian partner, Mezzogiorno benefits, and new product lines ».

Now my question to you is this. Would the same problems not have confronted any other purchaser of the plant or the product lines of ELSI?

Mr. ADAMS: Not necessarily, it depends on the nature of the other business. If one found another firm, for example, if it was interested in the X-ray tube line it would be highly likely that they would have an associated activity to which this was an incremental add-on and that that, added to their existing business, would become economical and be profitable. That would have put them in quite a different position than we were in.

Mr. HIGHET: It really depended, in other words, on the facts and circumstances of the case and on the particular qualities of the prospective purchasers.

Mr. ADAMS: Yes, it would.

Mr. HIGHET: But the point I am trying to make, Mr. Adams, and I think that I feel us converging on this, is essentially that there would have had to have been special characteristics for a potential purchaser of ELSI's product line and plant, would there not?

Mr. ADAMS: It was a very wide spectrum of potential possibilities, depending on the line. As I tried to make the point yesterday, it would be an add-on to anybody's business. But whether it could be a supplier who then had his own source instead of buying from us, whether it could be a customer who would like to add his own production, whether it could be a competitor, there was a very broad spectrum of people whom we felt could be interested in these various activities. You must remember that the opportunity to explore this in detail would have involved making it known that these activities were for sale, being able to bring these people in to show them the activity, to show them the product, to discuss it in detail. But all that was not possible. It was never possible for us because the moment between the time when it could be known that we were going to do this, as I tried to say earlier, and the moment that we could have started to show them, came the requisition which made this impossible.

Mr. HIGHET: Were there any discussions during the month of March when the Board decision had been taken and when the senior management of ELSI, as I recall, had been spoken to by Mr. Clare and the others? Do you remember if there were any discussions with potential buyers at all?

Mr. ADAMS: No, there were none that I was aware of.

Mr. HIGHET: Turning to a different point, Mr. Adams, you recall you were then, of course, Chairman, you were still Chairman of the Finance Committee and you have doubtless, as many of us do, a sharp and melancholy memory of the Foreign Direct Investments Programme instituted by President Johnson on 1 January 1968. As you recall, that programme really had a very limiting effect for a couple of years on American business, particularly those dealing with their wholly owned or majority owned subsidiaries in Western Europe. It was particularly harsh on investments in Western Europe and Japan and it contained all sorts of irritating and very costly provisions for certifying guarantees, additional draw downs, additional borrowings for making investments, even as you will recall, going so far as penalizing or at least limiting transfers on open account which happen to go across a year end accounting period. Now you said yesterday, and that was at p. 259, in response to a question from Judge Sofaer, that the balance of payments programme which was brand new at that time, — you remember it was only three months, old — did not play any role in bringing you to the decision to choose an orderly liquidation?

Mr. ADAMS: No, it did not.

Mr. HIGHET: Indeed in the 1968 annual prospectus, which was filed with your 1968 10K with the SEC, in a footnote I think a comment said that — this is quoted in the Rejoinder,—«the planned operations of Raytheon's foreign subsidiaries and affiliates are dependent to an unpredictable degree on United States Government regulations on foreign investments». And then later on, two or three years later, before the programme was finally terminated, much to nobody's sadness, in your 10K, Raytheon acknowledged « the continuation of this payments programme might restrict Raytheon's ability to develop its international operations». My question is this: even if the OFDI Programme might not have had a negative effect on the transactions concerning ELSI in 1968, isn't it true that it would necessarily have had to have a negative effect on Raytheon had ELSI continued in operation?

Mr. ADAMS: Yes, but there was a decision not to go on, so we had no problem. The decision had been made that the amount of capital that we put in was the end. Now if Raytheon had been in an expansionist mood, if we were going to fund large activities at ELSI, or if we were going to acquire other foreign companies, if we were going to do things of this kind, then this exchange control, might have been considered. However, you must remember that my memory of events of 20 years ago is perhaps not quite as precise as you have suggested that it is, and with respect to the amounts of money involved with ELSI (for example if we had had to advance the money in order to pay off some of the smaller creditors, or do something of this kind, these were small amounts) and under the terms of that regulation, as I remember it, we would have had no difficulty with that, so that the decision that we had made to no longer invest in ELSI was not because we no longer could move the money to invest in ELSI, but we made it because we didn't think that this was a promising place to put our shareholders funds.

Mr. HIGHET: Now I come to my last line of questioning, Mr. President. The impression has been given and we will be commenting later of course; that there has been little if any public assistance, or State benefits, to ELSI. I am not saying that you can answer this question, Mr. Adams, but do you recall the public assistance given by the Italian State in the form of low interest loans in 1956–1966? Do you remember very large loans?

Mr. ADAMS: You are going back a long way.

Mr. HIGHET: Well, just to refresh your recollection, because there was about 7 billion lire made in 1956 to 1966 by the regional agency, I refer to Annex 11, p. 2 and Annex 22, pp. 33 and 35. Turning from that kind of assistance to the other kind which is the Italian Govern-

ment benefits that were more immediate, and were that required to help ELSI succeed, I refer to the testimony you gave yesterday at p. 257. This included the so–called *Mezzogiorno* benefits which contained a preferential 30 per cent purchase requirement for finished goods from the South of Italy. I also refer to transportation subsidies. Did anybody ever suggest to you or any other senior executives of Raytheon that ELSI had a right, a legal right to get those benefits?

Mr. ADAMS: Well, I would put it this way, that we understood that a legislation existed that said that these benefits would be available to companies operating in the *Mezzogiorno* area. We therefore assumed that they would indeed become available to us and the facts of the matter were that they did not. It is my understanding, for example, in respect of the 30 per cent law, that we were suffering from a very low volume of sales of–ray tubes that were made in Palermo in the *Mezzogiorno* when at the same time–ray tubes of that nature were being bought from Philips or other suppliers outside of Italy, so we thought that this was an unfortunate circumstance.

Mr. HIGHET: Do you remember checking or having counsel check or having somebody run it down as to whether or not those benefits were only for finished products?

Mr. ADAMS: I don't remember that. I believe that those benefits, I am now talking about the transportation benefits, I think that it should have involved, as I remember, and my memory is not that precise of all of these events 20 odd years ago, that the raw material coming to the plant in Palermo, as exemplified by cathode ray tubes, would have some transportation subsidy and then the shipment of the finished product would have some transportation subsidy. In the case of cathode ray tubes, as I think I said yesterday, they were very heavy and very bulky and this is what gets you into a maximum transportation cost. They take a lot of room in whatever vehicles, and they were heavy at the same time and they had to make a round trip if your market was Northern or Central Europe, as was the case.

Mr. HIGHET: I understand that, Mr. Adams. What I am really groping towards is if ELSI thought that ELSI, or Raytheon thought that ELSI, had a right to claim these benefits, and the benefits were not obtained, what was done to remedy that?

Mr. ADAMS: You would have to ask other witnesses or our other witness, Mr. Clare, who was there in Italy working on these problems.

Mr. HIGHET: I see. Mr. President I have no further questions. Thank you, Mr. Adams.

The PRESIDENT: Thank you. Do any of my colleagues, the Judges want to put a question to Mr. Adams? Judge Schwebel.

Judge SCHWEBEL: Mr. President, I should like to ask Mr. Adams the following: Would it not have made sense for ELSI to have remained in operation and for its product lines or for the business as a whole to be sold while it was operating? Wouldn't it have been easier to sell the assets of a company which was functioning than to sell the assets of a company whose operations had been suspended and placed in the hands of a caretaker force, and if so, why didn't Raytheon pursue that option?

Mr. ADAMS: It would have been possible only to do that at an earlier date before the money ran out. We had this sort of terminal date of our operations dependent on when our capital funds ran out and after that we couldn't operate. So it was a difficult decision and we tried to keep it going up to that point. And we felt that not in full operation but in a sort of caretaker status where we had a small work force which was not draining us with the full payroll, who could maintain the machinery, who could convert some of the work–in–process into finished product, but there could have been a period of time like that where we would have been at a very low level of operation, where it would have been possible for us to be in touch with potential buyers, to let it be known that we were selling and to let them see something which if not in full operation was at least alive and well in the sense that everything was being taken care of, that finished products had been moved out and sold, that our customers could be told that we were searching for buyers who may continue to deliver to you or can pick up deliveries at a

later date. If we had been able to do something of that kind, we could have taken advantage at least of some of the points that you have suggested.

Judge SCHWEBEL: Thank you.

The PRESIDENT: I will put a question to you, Sir. How much was the total amount in American dollars that Raytheon invested in ELSI?

Mr. ADAMS: At that point, I think, yesterday, as I remember the figures that I gave, there were 12 million dollars in capital and 8 million dollars of guaranteed loans, which in a sense were another form of capital because the guaranteed loans we would have had to pay off anyhow. The reasons for the guaranteed loans as part of the capital, if you want to look at it that way, Sir, is that we avoided some of the foreign exchange risks by borrowing money within the country where we were operating. Twenty million dollars was the total.

The PRESIDENT: These 12 million dollars.....

Mr. ADAMS: Twenty million dollars.

The PRESIDENT: No, I mean the first 12 that you put, this was for buying shares or what? How does these 12 million dollars operate?

Mr. ADAMS: I havn't got the schedule with me, Mr. President.

The PRESIDENT: Roughly.

Mr. ADAMS: We had an Italian partner earlier and the time came when more financing was required and we arrived at a certain moment where when the additional money was put in, he did not want to put more money in, so we put it in and gradually we arrived at the stage where we owned, Raytheon and Machlett together, 100 per cent of the shares, as compared to smaller earlier investments.

The PRESIDENT: I would like to put another question. You said yesterday, at p. 260, that you expected « we could have paid off the small creditors and we could have made a deal with the major creditors at 40–50 per cent minimum of what was owed to them ». I suppose that the major creditors were the banks. Do you think that they would accept 40–50 per cent of your credit?

Mr. ADAMS: Yes, we all believe that. We had considerable discussion of that, and as it was, they got nothing. If we had been able to sell at book value they would have been paid off completely. In the sort of worst case, which is not what we expected to happen but the worst case as we saw it, we felt that, and there was some discussion with some of the banks that gave us real reason to believe that–Mr. Clare, the later witness who was closer to this than I was could confirm this point–we did have good reason to believe that banks under that set of circumstances, based on experience of other banks in other similar circumstances, would have quite reasonably be expected to accept 50 per cent and perhaps lower.

The PRESIDENT: Thank you very much, Mr. Adams, for your assistance.

Mr. ADAMS: Thank you, Sir.

The PRESIDENT: I understand now that the American delegation is going to call Mr. Clare.

Mr. MATHESON: Yes, Mr. President, we would like to do that, and I therefore would ask that you invite Mr. Clare into the room to testify and that Ms. Melinda Chandler be invited to question him.

The PRESIDENT: Would you call Mr. Clare, please.

Ms. CHANDLER: Mr. President, distinguished Members of the Court. In 1966 Mr. Clare became Vice–President of Raytheon Company and General Manager of its European management subsidiary, Raytheon Europe International Company. The principal objective of Raytheon Europe was to furnish European companies which were majority owned or controlled by Raytheon for technical, managerial and other assistance necessary for them to become strong,

profitable enterprises. In February of 1967, Raytheon and Machlett appointed Mr. Clare to be Chairman of ELSI's Board of Directors with the express instruction to make ELSI viable.

In this capacity Mr. Clare personally participated in numerous meetings with Italian Government officials in an attempt to persuade them to participate in and support ELSI. Mr. Clare was also personally involved in the development of the orderly liquidation plan.

In addition to his extensive management experience, Mr. Clare is an electrical engineer. He has a Masters degree in electrical engineering from the University of Birmingham in the United Kingdom. He has worked for major telecommunications and electronics companies and in the United Kingdom's Ministry of Aviation.

Mr. Clare, would you please describe for the Court your association with ELSI during late 1967 and early 1968.

The PRESIDENT: Before you speak, Mr. Clare, could you please make the solemn declaration.

Mr. CLARE: I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth.

The PRESIDENT: Thank you very much. You may proceed now.

Mr. CLARE: In February 1967 I was appointed by Machlett and Raytheon as Chairman of ELSI. I had with me Scopelliti and Bianchi, who were my Controller and Legal Adviser in Raytheon Europe — they were made Directors of ELSI. We carried out initially a quite exhaustive analysis of ELSI's problems and we produced a Report in May 1967 outlining in great detail the problems and possible solutions to the problems.

These were four major issues: there was the question of finance; there was debt of about 13 billion lire and ELSI was paying nearly 1 billion lire a year to the banks, of which something like a half, I think, was going to the IRI banks. Up to that point, you might say that the only people who made profit out of ELSI were the banks. So ELSI needed further financing.

Then the whole middle management systems and manufacturing systems needed upgrading. We put in about ten experts from Raytheon, who joined me there. They were all American/Italian, who had all been born in Italy. We had a Managing Director who was Co–Managing Director with Profumo, experts in almost every function in the company and two European sales executives, one covering microwave tubes and one covering semi–conductors.

We did upgrade the systems; we got significant improvements in manufacturing efficiency and I will refer to that in a little more detail, line by line, when I am talking about the various lines.

There were, at that time, about 200 people too many. There had been a reduction in sales of the Hawk tubes and one or two other things. If it had been America, we would have gotten rid of 200 people right away. It was impossible to get rid of anybody there. We in fact got rid of two people off the television line; we had a strike for about three weeks on that line. So, effectively, the workforce was static. So we needed new products which were not too highly technical, because there were not many qualified engineers in Sicily, and we outlined in the Report a whole list of new products that were low technology and could have been gotten in very quickly if we could have made the 30 per cent law work, of which I am sure you have already heard, which is that Government agencies are required to buy 30 per cent of what they buy from the *Mezzogiorno*, if it is available to be bought there.

Products were looked at were typically low technology. First of all, cable forms in telephone switching and motor cars: telephone switching is STET, which is again the Government. Alfa Romeo is Government–owned, or was Government–owned until quite recently. In both of these, dozens of wires that have to connect everything to everything, all put together and bound up into a thing you can just put into the telephone switching unit or a car — those are called cable forms. We could have certaintly very rapidly have had 50 girls working on that, but we had no joy from trying to talk to STET and the motor car company about that. We could have wound relays — these are the things that go click, click, click in the old telephone exchanges — that was a very simple thing to do to begin with under specification from STET and then worked up to making all the other bits that go with the relays. With the 30 per cent law operating for the X–ray tubes, we could have at least doubled or trebled the activity in that

area. We would move on from making these bits on telecommunications to sub-assemblies — there were all sorts of sub-assemblies that could have been made under sub-contract from STET. We did, in fact, talk to STET about this but they regarded us with suspicion as potential competitors. They were after all, as was the motor industry, a growth industry. It is still a growth industry, so there was plenty of room for sub-contract work to be given to us without conflicting with their own companies. We made it clear that we did not intend to go into competition with them in telephone switching. We had very little capability of doing that.

Then, on the semiconductor front, we could have sold high-voltage rectifiers to the motor car industry for electronic ignition. In railway systems we could have sold power rectifiers. There are a whole list of things like this, all of which related to Government-owned activities that could have given us sub-contract work and very quickly we could have employed those 200 people. But we had no positive reply from anybody.

We felt we needed a significant Italian partner. I am sure you have already heard that we should have had transport cost help for our television tube business. The cost of buying tubes in Germany and shipping them to Sicily and then shipping them out again for export was extremely high. And there was the 30 per cent law, which we were assured should work, but it did not. So we felt we were sort of babes adrift a bit in the Italian political environment and we needed a significant partner that could help us handle this and also bring in the additional capital that was necessary to make the company look more sensible and not pay a billion lire a year interest.

Ms. CHANDLER: Mr. Clare, with regard to this latter point, what steps did you take to offer the regional and national governments an opportunity to provide ELSI with this assistance or participation that you were seeking?

Mr. CLARE: You have already said that we had a large number of meetings. Over a year we had over 70 meetings with practically the entire Italian establishment. The very first meeting was with Minister Andreotti, who was then Minister for Defence, and meetings with Ministers Colombo for Finance, Rumor who was then head of the Christian Democrat party, a whole heap of Ministers. We met with the management of IRI, with all the banks, the governor of the Bank of Italy. In Sicily we met with On. La Loggia who is the head of ESPI, which is like IRI in Sicily, and a lot of his people. We met with President Carollo and with all the union heads. We met with some of the commercial people such as the head of FIAT. In fact I cannot think of anyone who was anyone at all in the total establishment of political Italy and Sicily that we did not talk to.

It started by everybody being extremely enthusiastic and wanting to help us. There was an entity there which they thought was very valuable. I suppose the only people who, right from the beginning, were very blank-faced about it all was IRI. We never got even one smile from them. But certainly the rest of the government Ministers that we met were very helpful and made statements about the various assistances we should be having — Minister Colombo said we should have the transport cost and it would be arranged; the Minister of Industry said the 30 per cent law should apply and it will be applied. But nothing happened.

Towards the end of that year, in the latter quarter, the whole atmosphere began to change. We made it clear to everybody as we talked to them — we gave everybody our Report, by the way, it was very widely circulated so that IRI and ESPI and every Minister we could think of had it to read — that we were putting in this 4 billion lire, which was a last effort and that we thought it would last maybe a year or fifteen months; that if we could not get things sorted out in that time we would then have to let it go at that. We were not prepared to put in any more money. That was made very clear to everybody. And if in fact we ran out of money and were legally forced to stop, then we would organize an orderly liquidation.

As time progressed people like La Loggia became less and less optimistic and started to talk about it being necessary to have IRI in as a third party and at that point we became more closely connected with the President of Sicily, President Carollo; he was obviously extremely keen to keep the plant going and to develop electronics in Sicily. We had a period when to

begin with he was effectively saying to us: I will see to it all, and it finished up with his saying: we have got to get IRI in. Then one night we met with him and I thought he was saying: « I have done it! » He in fact took us to his home and there were whiskies issued all round and we toasted each other and we thought it had been settled. The next day we found it had not.

So right at the end, which was I think 29 March or around there, the last night when I had been told by my legal man: you have now got to declare redundancy — which we had already done a few days before — and we had to send out notices to all the people. About 9.30 that night I was called over to the Ministry of Industry and the General Manager told me he was sorry that the Minister was not there — although there seemed to be a lot of people on the other end of the telephone — and he really said we cannot afford the political chaos for you to close the plant. We do not want you to close the plant. You will upset the Prime Minister if you do. We said we had waited a year to see what we could do, what deal can we do? The answer was effectively nothing, just do not close the plant. Do not send out those notices. So we sent out the notices and what was very peculiar was that the Italian staff in the office would not touch them. They seemed to be frightened of something and so in fact Scopelliti and Bianchi and I personally inserted about 800 letters into envelopes and stamped them and took them round early in the morning and posted them off. That was that. And then two days afterwards Profumo, who was the Italian Managing Director there, met with Carollo and told him that the Region was going to pay for the people until a new company was formed and that the Prefect would seize the assets and that would be that. So at that point that was it.

Ms. CHANDLER: At that point, what did you decide to do?

Mr. CLARE: You mean after the seizure of the assets or prior to the seizure of the assets?

Ms. CHANDLER: Prior to the seizure of the assets what was your plan for the treatment of ELSI's assets?

Mr. CLARE: Well, prior to that, we had planned an orderly liquidation. We had taken the decision we would not go bankrupt, I had that clearly from Raytheon, and we set about organizing this orderly liquidation. We moved all the books of the company up to Milan so that if we did have problems we could at least control the books and control the debts that we owed and the debts that people owed to us. We had moved quite a lot of inventory up there so that we could sell it from there if we had to. Our plan was to keep about 130 people working in the plant to work off the inventory that existed there and finish manufacturing the products, to keep making product as necessary to keep our customers happy and to sell off, in an orderly fashion, the assets of the company and we organized small task forces to deal with each facet of the problem. We had a task force, which I was going to run, which would be concerned with contacting potential purchasers. We had a task force to deal with the 130 people in the company and another small task force to contact the banks and another task force to contact our suppliers and we had named people for all these task forces. Later on when the plant had been seized, I handed over to Oppenheim, who was another Raytheon Vice-President, and he was going to run these task forces and the activity of the orderly liquidation. I was then moved to look at the other nine or 10 companies in Raytheon Europe, all of whom needed some attention.

Ms. CHANDLER: Mr. Clare, what was the role of Raytheon in this? Would Raytheon have been willing to back this plan in any way?

Mr. CLARE: Well, Raytheon certainly was willing to back it. They had guaranteed to me that they would guarantee the cash flow necessary to make the liquidation work. They were prepared to purchase the receivables at face value to provide money to do this and one of our plans was to pay off all the small creditors first if we were allowed to do so, so that we were left with only all the major banks to deal with as the major creditors. Raytheon provided money and we actually started to pay off the small creditors but then the banks intervened and said that they did not want that to happen as that was showing preference. Any one of those small creditors could have forced the company into bankruptcy. Our idea was, and we thought the banks would agree with us, to get rid of all of those with only the banks left to deal with and

we could have an orderly arrangement and an orderly liquidation and not have one of these small creditors coming along, put us into bankruptcy and put us into a position we did not want.

Ms. CHANDLER: Mr. Clare let us turn, if you would, to the sale of ELSI or its product lines themselves. If you would, please describe for the Court each of ELSI's product lines and the features of each that you personally thought would be particularly attractive to potential purchasers of ELSI?

Mr. CLARE: I think before I address each line individually, it is important to address the general issue of the intangible values of the company that existed at that time. Certainly, one of those very valuable intangible assets was the relationship with Raytheon and it was quite clear that Raytheon had to continue to give technical and patent and know-how support, as it had been doing, to all of the product lines and it was Raytheon's intention that that particular intangible asset would continue. And there were other very valuable intangible assets. We can take some of them: the customer base. It takes years to establish a base of customers. When you start you have to put in a lot of marketing effort and selling effort, which leads your sales, so that you finish up with something like 10 per cent of the sales turnover being used to sell. ELSI built up quite rapidly and in five years it went from very little to 8 billion lire. Now, if you put in, say, a billion lire of selling costs starting from zero (that is a lot of money and you would not have put that in, but that is just an example), at the end of the year you might be selling at half of what you would, ultimately expect for that investment, say, 10 billion lire. Half of that would be five. So you could put in the billion lire to get an average of 2.5 billion lire sales in the first year. Now it is quite easy to plot out, year by year, how much extra sales expenses you are putting in to build up your sales to get to the point where you have 8 billion lire sales. However you do it, you come out with a figure of at least a billion lire for extra sales costs. There are two or three ways you can do these calculations, but a billion lire is the sort of minimum figure one gets to. Then, if you take the technical and know-how support, ELSI was putting in about 8 per cent of its sales into research and development, that is about what we were putting in in ITT. I was once Technical Director of ITT Europe in which we had about 650,000 people working and the average R&D investment was 8 per cent of sales. If one says that there is a five-year product life, after five years' investment at that level, you finish up by saying at that point, I have invested something like 2.5 billion lire in order to be able to make all these products. If one says it only takes you three years to develop a product, rather than five, then you might say all that work, all that technology know-how, is worth 1.5 billion lire, and that again is fairly conservative. On top of that there's the technical know-how that was fed in from Raytheon. And then one can look at the supplier base — we were making sophisticated products that require well quality-controlled input materials and that means establishing a relationship with each supplier, with getting the material from him, checking it quality control wise, keeping in touch with him, having relationships with the suppliers quite regularly, that supplier base is probably worth at least half of the customer base when you are dealing with these highly sophisticated advanced technology products. And there was the labour force that had to be trained. Now in Sicily it took us probably twice as long to train anyone as it would, say, in Milan or in Frankfurt and that amounts to another large amount of money. And then, as well as training people, one has to build up manufacturing know-how on the lines; if you put just trained people on the continuous process line with high technology products, it is not going to work. They have to learn how to work as a team and that manufacturing know-how, which enables you to produce products of high quality and controlled quality, is what we call manufacturing know-how, and that also has a high value.

Within the set-up we also established various support groups. There was a maintenance group, there was a small engineering manufacturing group to make bits and pieces we required, these also had a value. Then the Raytheon connection on its own was certainly extremely valuable. And if you add all these up, when we have done sums, not having just pulled figures out of the air, you easily reach a figure of 4 billion lire plus. And that is real and valid. So that was a supporting situation in considering the situation of each of the product lines.

Now we take the television tube line. We believed that could be sold as an independent business because it was a separate entity. It was a black and white tube line, originally set up

under license from America. I think it was from GE but I can't be certain of that, I can't remember. As we progressed and made bigger tubes the question of implosion, the tube going bang, was more of a worry. We took another license from America for a banding system that made it implosion-proof. When we got there they were making about, of large tubes, 30,000 to 35,000 tubes a month if they were lucky. There was a large amount of scrap, there was a large amount of bad inventory. We cleared out all of the inventory, we instituted a reclaim section so that the tubes that were not good could be reclaimed because the big glass bulb was something like 65 per cent of the cost of the tube and had been imported from Germany at great cost. So we reclaimed the bad ones and that gave us significant improvement in yield. We had already got 20 per cent of the Italian market and we exported to Germany, France and Holland, I think something like 40 per cent of the output was exported. As a result of all the improvements we put onto that line we increased its manufacturing capacity to 50,000 tubes a month and actually, in December of 1967, we manufactured and sold some 50,000 tubes.

That means that if we could have kept going, the sales volume in that line could have gone up from 4–5 billion to over 6 billion per year. Now these transport costs we talk about amounted to something like 6–8 percentage points of margin for that line. Prices were very competitive and we were getting a standard variable margin of about 30 per cent. That additional 6–8 per cent on 6 billion sales would have added in 4–5 hundred million lire of additional profit.

There was the possibility of colour, TV raising its head and we tried to talk with all the people in Italy about what was going to happen. We established the colour laboratory there at a cost of some quarter of a million dollars, so that we could manufacture our own colour tubes. I had been with ITT and I had been looking at the problem of colour television and in my view one had to take a license from RCA and build an RCA colour television tube line with an output of 400,000 tubes a year. We were actually in negotiations with RCA about license possibilities. In fact, I have just checked dates. I thought Italy was late and they did not agree on their colour system until 1975, and I believe that the first colour transmission there was at the end of 1976, so that the black-and-white line had a good 10-year life of potential sales and profit if handled properly.

If we could now turn to the ray tube line. These were made with technical know-how from Machlett which was a Raytheon company. Machlett had ray tube manufacturing plants in America and in Switzerland. In Switzerland it was a company called Comet. The tubes being made in Palermo were modern high technology tubes which at that time had what was called rotating anodes. Where the stream of electrons hit the anode, it rotated round. There was no burnt spot produced and there was no other manufacturer of those ray tubes in Italy and we tried desperately to get more replacement orders from the Italian medical system, but it didn't work; if we could have got the 30 per cent law to apply, we could have doubled and trebled the sale of those tubes, which were high margin products. The standard variable margin was about 70 per cent.

Also in modern telephone switching, at that time, there was being introduced, relays called reed relays which were glass envelopes with little metal contacts inside. This required glass sealing, control of vacuum, clean metals, and all of the technology of the ray line would have been applicable to these reed relays which would have been another new product, but which we had to sell to STET.

Now I am quite certain that if, in the end, we had not sold it to anyone else, Comet, the company in Switzerland, would have taken that line and either left it there as a EEC manufacturing source, while they were in EFTA, or they would have just moved the line. Raytheon would have taken it because it was a very good line.

In the microwave tube line, as you heard from Mr. Adams, we were manufacturing low noise power devices for the Hawk missile system. This was a very special tube, low noise, very few people can make it. There are in fact two of these tubes in the missile system. One of them was smaller, we called it a local oscillator. A few years before, I had been responsible for most of the defence missile systems in the UK. And one or two offensive systems as well. And we were developing systems similar to Hawk, I tried to get one or two English valve companies to manufacture these low-noise, low-power klystrons and it was not possible. In the end we took a license from Raytheon to manufacture these tubes in the UK through the company

Ferranti. And in their contract I put a clause to the effect that if they changed the material of only one washer, the contract was void. And I think that indicates what high technology was involved in manufacturing those tubes. It required very high quality control on the line, it required very high maintenance of the equipment and it involved high technology all the way down the line. And we were making product there which in many cases was tested to be better than the American product. That same line also made power magnetrons, the power sources for big radars. And you have heard, and I'll say a little–more about it in a minute, about the microwave ovens which Raytheon invented. There was a magnetron in the microwave oven; in those days it was worth about 50 dollars, say 30,000 lire. Amana had been acquired by Raytheon and as you know the sales of Amana microwave ovens grew from 20,000 over a few years to half–a–million.

If we had had that product developing in ELSI, the microwave line could have been making those magnetrons. And if we had only made for Europe a tenth of what they made in America, for the magnetrons alone, we would have sales of a billion lire or more per years.

Then the microwave ovens. I am sure Mr. Adams has already told you about these. Raytheon invented it and developed it. It grew from 20,000 per annum to half a million per annum Amana sales in America. There were very few exports to Europe. They could have been manufactured in ELSI in the EEC as a European base. That would have been a very good growth product and the licensing patent arrangements would have obviously been made available by Raytheon.

On the semi–conductor line, when we got there they were manufacturing old–fashioned products. They were making germanium transistors. There were about 120 or 150 people on the line. We stopped manufacturing germanium devices. Raytheon provided us with help from their semi–conductor operation to get rid of the stock of germanium.

We had a company in Zurich called Transistor A.G. that was in silicon rectifiers, and we began to put those two companies together to transfer know–how from Transistor A.G. to ELSI, and we began to manufacture silicon rectifiers and high voltage stacks. These latter are rectifiers stacked up to give high voltage rectification for use in television receivers. We had in mind that we would regard ELSI as the EEC manufacturing source of these products, whereas Transistor A.G. was in EFTA, and we did provide a man who was the European sales co–ordinator for these products in Europe totally.

And, of course, there were the opportunities to develop further higher power silicon rectifiers particularly if we could have made sales to the Italian Railways. If it had not been possible to sell the semiconductor line, having gotten Transistor A.G. and ELSI working so closely, we would have taken that line ourselves. In fact, after the seizure, by arrangement with the liquidator, we purchased some of the equipment from the high voltage stack line and we took the man who was running it and we moved him to Zurich and we ran a line of fifty girls very profitably for many years.

We also had surge arrestors, which were little glass sealed things, which if lightening strikes the telephone lines saves damage hitting the equipment. We sold some of these but not many. But if we could have gotten STET to buy, we could have sold a lot more of them and we could have probably then exported more. So, I think, that is a review of the lines.

Ms. CHANDLER: Mr. Clare how would you have gone about finding purchasers for these product lines and selling them either as a whole or as by product line?

Mr. CLARE: We thought of this in three possible steps. The first thing was to try and sell it as a total entity, the second thing was to try and sell it as two entities because the television tube plant was literally just half of the total plant and quite separate. If that did not work then we would sell them as separate lines.

The obvious purchaser to try again for the whole assembly was IRI and it would have been possible for them to have taken it, for them, very cheaply. I mean if they had taken it then certainly the Sicilian organizations, the Region itself and ESPI and IRFIS would have all chipped in and they would have had six billion, seven billion, lire without any trouble. A large part of the bank debt were IRI banks so, they could have kept the debt with their banks. They could have paid book value and would only have had to put in quite a small amount of new

capital. They were in a very strong position to be able to make certain that the transport costs subsidies would operate and that the 30 per cent law would operate. And, even today, I find it incredible that that was not done instead of what happened. Although there was much talk about the need to preserve the plant and preserve the jobs of the people, IRI was hell bent on closing it and making it bankrupt and destroying a lot of what was there.

It would have probably been difficult to find anyone else other than IRI who would have bought the thing totally but if we split it into two, there would have been a number of potential purchasers. As soon as we announced our voluntary liquidation, we began to get some enquiries immediately from all over the place. We had enquiries from Japan for the semi-conductor line, and enquiries from America; we had enquiries from Greece for the television line.

We would have approached, and we planned to approach, our major competitors. We also planned to approach our major distributors. Sometime later on I actually sold off, not in Italy, two companies that were in trouble to major distributors of ours who were using products of those companies. And if it came to selling the individual lines, then, if we could not sell the X-ray line and the semi-conductor line, Raytheon would certainly have taken these.

And as far as the microwave tube line is concerned, that would not have been a question of selling, that would have been a question of holding an auction and taking the highest bidder with the maximum goodwill. We had this high technology there which existed nowhere else in Europe, except where we licenced it in the United Kingdom. And there, I am sure, we would have got a goodwill figure over and above book value. Now, we had all those plans set up, as I indicated earlier, to start this voluntary liquidation, but we had the assets seized and when the assets are seized, there is nothing to sell. So, at that point, it stopped.

Ms. CHANDLER: Mr. President, our examination of Mr. Clare is nearly complete. However, I do note the lateness of the hour, would you like us to continue?

The PRESIDENT: Please finish now.

Ms. CHANDLER: Thank you. Mr. Clare, in your assessment, would the sale of ELSI's assets have generated sufficient revenue to pay off ELSI's creditors?

Mr. CLARE: Yes, I have no doubt about it. Earlier in the year we had cleaned up the receivables, we had also cleaned up the inventory. In fact, in 1966 and 1967, for a combination of cleaning up the inventory and writing off bad debts, we wrote off two billion lire. So on the balance sheet we were looking at, the values that were there, were after having written off two billion lire, in fact a little more than two billion lire, in the prior two years.

We felt very strongly, and with conviction, that the receivables and the inventory were very good. In fact, Raytheon had guaranteed the cash flow necessary for the voluntary liquidation and they were prepared to purchase the receivables at face value. This left us with the fixed assets that we had to sell. We have been through all the lines and their characteristics and, certainly, coupling this with the intangibles which I talked about, I am sure we would have had no difficulty in obtaining book value.

Ms. CHANDLER: Mr. Clare, what is the book value of the company, that is the value you expected to actually receive upon the sale of ELSI's assets. How does this compare to the quick sale valuation that was prepared at the time of the orderly liquidation?

Mr. CLARE: As managers, we had responsibilities obviously to get as much money as possible, and so we were aiming for book value. But in talking to Raytheon and arranging for whatever money had to be provided we had to take a very conservative view of what we thought we could do at the bottom end of the scale. And this quick-sale book value was that figure. It also related to what we worked out as the sort of figure that we thought we could offer the major creditors. We desperately wanted them to agree that we could pay off all the small creditors so that we had no possibility of any one of those raising the issue of bankruptcy. And in talking something like 50 cents on the dollar, the big banks are big boys. They know that if they do a deal with a voluntary liquidation they get something; if they go into bankruptcy, they are likely to get a lot less. In fact, I believe, they finished up with less than 1 cent on the dollar.

But I also felt very strongly that Raytheon would support and guarantee the 50 per cent payment to the banks. So this was our approach. We could talk 50 per cent, we could get a guarantee from Raytheon to pay off all the small creditors and we set ourselves a target which we felt was not easy, but not difficult, to meet. We would have tried all the time to have gotten book value and whatever we got above, the quick-sale value, then all the creditors would have shared in it pro rata, that is, all the creditors who had not been paid off.

Ms. CHANDLER: At this point the requisition of ELSI's assets intervened and you were not able to proceed with your planned orderly liquidation. What effect did the requisition have on the value and status of ELSI's assets at that time?

Mr. CLARE: Well, there is a bit of simple logic there. If you are trying to sell something and someone takes it away from you, you've got nothing left to sell. That means there was no money to go into the orderly liquidation, no sales proceeds, and it was necessary to have continual access to those assets in order to preserve the value of the intangibles. We were keeping 130 people in the plant. Take for instance the customer base. If we had done it in an orderly way, we would go to the customers, we would keep them supplied to some extent, at the same time the competitors would go to the customers and we would have to lower our prices to maintain sales contact, but we would do that. But when we lose control of those assets, then the competitors are there with the customers and we are out — nothing we can do about it. If you take the question of manufacturing efficiency and quality and the training of the people — they disappear. Its costs a fortune to train them, and they probably would get jobs digging ditches. We had a very careful and methodical maintenance schedule for the equipment because it was very necessary to do that, we had continuous processes. In the continuous process if you stop it, it takes quite a long time to start it again. If you stop it and let it sit for three months, it is like leaving a house empty for three months, when you go back the gutter has fallen off, the toilet does not work and some bricks have fallen down — that happens on a line like that.

So that the result of the seizure of the assets and the stopping of their use very rapidly reduced their valuation. It reduced the intangibles because you lose your customer base very quickly, you lose your supplier base not as quickly, but in a pretty short time, the trained people disappear, the manufacturing efficiency disappears and the quality of the machinery, the maintenance of the machinery disintegrates very rapidly. So the effect of seizing it was that the value obviously deteriorates very rapidly.

Ms. CHANDLER: Mr. President, this concludes our examination of Mr. Clare. He is now available for cross-examination or for questions from the Court.

The PRESIDENT: Thank you very much. Do the Italian delegation want to cross examine now, Professor Ferrari Bravo?

Professor FERRARI BRAVO: Your Honour, if it is possible, immediately after the coffee break.

The PRESIDENT: We are going to have a break, and then we shall have the cross-examination of Mr. Clare.

But, before leaving, I would like to put a question myself. How much do you estimate what you call the quick-sale book value of ELSI?

Mr. CLARE: I think we have the figure of 10.8 million.

The PRESIDENT: How much?

Mr. CLARE: 10.8 billion.

The PRESIDENT: I mean lire. And in dollars, how much is it?

Mr. CLARE: I don't do it exactly, I divide approximately by 600 to get a figure, but I mean that was not the exact figure at that time. So divide by about 600. Do you want me to do that?

The PRESIDENT: No, I can divide also!

Thank you very much, we shall continue in 15 minutes.

The Court adjourned from 11.45 *a.m. to* 11.59 *a.m.*

The PRESIDENT: Please sit down. I call on Mr. Ferrari Bravo, who is going to cross-examine the witness on behalf of the Italian Delegation.

Mr. FERRARI BRAVO: Mr. President, I would like that, as in the case of the previous witness, the cross-examination of Mr. Clare be conducted by Mr. Highet.

The PRESIDENT: Would you please call Mr. Clare to come in.

Mr. HIGHET: Thank you, Mr. President. Mr. Clare, I am going to try to keep my questions as crisp and to the point as possible, and of course I know you are seeking to assist the Court and counsel and I would prefer it if you would also make your answers as crisp as possible.

I am referring to the Clare Report, your 1967 report, and you remember that in that, amongst many other things, there were at least three elements that you then specified as being necessary to make a success out of ELSI or an ELSI-like creature. One was an additional capital investment, presumably from the Italian State, of 6 billion lire. The second was new product lines, which you have explained this morning, and the third was financial help, including Mezzogiorno benefits, transportation subsidies and the like.

My question is: wouldn't any purchaser of ELSI, in whole or in part, have had equally difficult problems confronting it or them?

Mr. CLARE: We were hoping that the purchaser would be Italian, to begin with. An Italian purchaser would certainly know a lot more as to how to handle the Italian environment than we knew. If I can go back, I said we had hoped to sell it totally and we would try IRI again, etc. If there was someone who was not Italian we would make it clear to them that these problems existed and they would be forewarned and be in a very strong position to negotiate much more strongly than we did. I have actually, in other circumstances, been in a similar situation where I have negotiated changes before I took over whatever it was I was looking at.

Mr. HIGHET: But that would have required in any event a special application, a special kind of ...

Mr. CLARE: I do not know how special it was. There were laws that existed that had not been applied.

Mr. HIGHET: That leads me to my question about the Mezzogiorno benefits. You said they were not being applied. Were you and the senior Raytheon, ELSI/Raytheon Europe, management aware that you had a right, that ELSI had a right, to the benefits of these laws? If so, why didn't you do something about it?

Mr. CLARE: I personally had discussions with Minister Colombo, I personally had discussions with Minister Bo. I personally had discussions with the Minister for the *Mezzogiorno*. All assured me that the laws existed, we should have the benefit of them, and that it would be applied. I do not know what else I could do.

Mr. HIGHET: What did you do? You had Dr. Bisconti as your counsel. What did you or your counsel do when the laws were not applied?

Mr. CLARE: We used our own counsel, Bianchi. He went round various offices in Rome asking questions.

Mr. HIGHET: Was there any form of administrative relief under Italian procedure which you could have sought a remedy? If there was a right, there has to be a remedy to cure the denial of the right. Was this pursued?

Mr. CLARE: Yes. Bianchi went around and came back having talked to all the offices in Rome, and said, « It is my view, and I will give it to you in writing, that as of now you should be able to claim 300 million lire ». And we put on our balance sheet 300 million lire.

Mr. HIGHET: But Mr. Bianchi was not prepared to actually pay the 300 million lire.

Mr. CLARE: Why should he pay it? He worked for me.

Mr. HIGHET: Or undertake the performance of the Mezzogiorno benefit?

Mr. CLARE: There are lots of funny things happening in the *Mezzogiorno*. You can walk around and see a lot of projects that have been started and not finished.

Mr. HIGHET: I am really hearing that you have your counsel walking around and asking why something isn't happening and then saying, well in my opinion it will happen and Minister so–and–so has given us his assurance, and so–and–so and so–and–so. It still does not happen. Why don't you then do something about it?

Mr. CLARE: I do not know what else I could have done, unless I went to the Pope — and I'm not being funny there. The Church are very influential.

Mr. HIGHET: But the Lateran Treaty might have ... However.

Mr. CLARE: Having been to the Ministers, I really thought that was about as far as I personally could go.

Mr. HIGHET: Good. Let me ask you a subsidiary question along this line. What makes you think, or made your think, or might make you think, that the Mezzogiorno benefits were applicable to non finished goods?

Mr. CLARE: I was told so by two Ministers concerned.

Mr. HIGHET: You were told so. Did you check to see whether they were right or wrong?

Mr. CLARE: No. If I ask a Minister something and he tells me something, I do not say I do not believe you.

Mr. HIGHET: You mentioned — and this is a point of information — you mentioned at the end of your testimony taking someone off the line after the famous requisition and the bankruptcy. No?

Mr. CLARE: No.

Mr. HIGHET: Between the requisition and the bankruptcy?

Mr. CLARE: No. When we first went there, I said in the middle of the year, we took two people off the television line when we were trying to improve it.

Mr. HIGHET: But you said you talked to a liquidator about this. I just must have misheard you.

Mr. CLARE: You have certainly misheard me.

Mr. HIGHET: OK, I certainly did. Forgive me. Something I did not mishear was that you did say very clearly, « as soon as we announced our liquidation » you got indications of interest — you mentioned Japan, United States companies. Am I right?

Mr. CLARE: Yes.

Mr. HIGHET: When was this, roughly?

Mr. CLARE: From about the first week in April, roughly.

Mr. HIGHET: So, right around the time of the requisition?

Mr. CLARE: Yes.

Mr. HIGHET: When was the liquidation announced?

Mr. CLARE: The last week in March.

Mr. HIGHET: The last week in March. When was it decided? September 1967?

Mr. CLARE: No. We put in this money. We made clear we were not going to put in any more money. We therefore had to watch very carefully that we stayed legal, as far as the balance sheet was concerned, and I had both Scopelliti and Bianchi watching like hawks, so that as the money was disappearing we were not getting into an illegal position in the Italian situation and, in September 1967, we were certainly a long way from being insolvent. It was

only in 1968 that we had a few unfortunate incidents which made things disappear much more rapidly than might otherwise have happened. In early 1968, Palermo was decimated with an earthquake and we had our girls afterwards sitting there with a string and a little weight working away, and every time the string quivered they went outside. But Palermo was decimated totally.

Mr. HIGHET: It was not an ideal time to announce an orderly liquidation.

Mr. CLARE: It was after that we announced it and we did not pick the time. The disappearance of the funds, and in the situation to which we were, legally required to react, we had to legally either go for orderly liquidation or bankruptcy.

Mr. HIGHET: Could you have made the payroll, the first payroll in April? I do not think you could have. Do you think you could have?

Mr. CLARE: No, I do not think so.

Mr. HIGHET: You had 22 million lire in the kitty, roughly, and the payroll would have been at least 25 million lire for the first week, which is the week before Easter week. So you were essentially, as we say in the United States, belly up, from the point of the requisition.

Mr. CLARE: We were belly up just before the requisition. That is why we went into voluntary liquidation.

Mr. HIGHET: That's right. I am not debating with you as with counsel, but you also pointed out that one of the contingency plans for taking care of the smaller creditors was so that any one smaller creditor could not have done — which had I been such a small creditor and had I not been paid in full, I would have been sorely tempted to do–which is to throw ELSI into bankruptcy so I could at least get a better bite of it and not be swamped by the major creditors. If this was true, was ELSI a going concern?

Mr. CLARE: I do not see the connection.

Mr. HIGHET: Would you say that a going concern, it is not a legal question, it is a practical question. Would you define a company as a going concern capable of an orderly liquidation when at any moment a small creditor could throw it into bankruptcy?

Mr. CLARE: Recognizing that as a problem, Raytheon made cash available and put it in a bank in Milan and I started to pay off the small creditors and I paid off 130–140 small creditors and the bank stopped me doing it.

Mr. HIGHET: That's right. You also said this morning that Raytheon had guaranteed cash to make the payroll for the reduced number of employees for the period of voluntary or orderly liquidation that you contemplated.

Mr. CLARE: I did say something a little more than that.

Mr. HIGHET: Yes, you did say something a bit more than that, but I just want to focus on this cash.

Mr. CLARE: Not on that particular point, I said they guaranteed me the cash necessary to control and execute an orderly liquidation.

Mr. HIGHET: That's right. Then you met, as I recollect, you met, and it's attached to your affidavit, one of those marvelous exhibits and it's one of the meetings, it's the sort of the antipenultimate meeting with Mr. Carollo. I believe it was Friday, 9.30 at night, and there was a lot of back and forth and there had been meetings all that week. It was obviously a very difficult time, it was in Rome, and you were being besieged, essentially: « for goodness sake, wait till Monday, we'll have everybody in on top of this — the highest authorities are very concerned — they whizzed back and forth and then you went back to your hotel sometime after 12.30 a.m. and called Lexington (time difference would have been 6.30 or 6 in the afternoon) and you talked to Mr. Phillips, and he said go ahead and mail them — and that's when none of the girls would touch the letters and you stuffed the envelopes yourself.

Wasn't this trying to tell you something? Didn't you know, and you had been warned, « warned » is a poor word, it had been stated to you in a heated discussion I presume, with a political figure, a man of considerable enthusiasm and also considerable responsibility and prominence in Sicily, who had stated to you, « Look, if you do this it's going to be a requisition ». That had happened and that is in one of the meetings.

What did you think at the time, Mr. Clare? Were you of the opinion that you were assuming a risk? That you were in fact operating in a country which had been subject to earthquakes, where the second biggest employer in the region was being put out of business? There were 800 employees about to be given the pink slips and the girls wouldn't even fill the envelopes themselves? Didn't you think this was a management blunder?

Mr. CLARE: Certainly not. I had spent, goodness knows, how many months being made promise, after promise, after promise.

Mr. HIGHET: Of the same nature of the promises made that were recorded in that last week in March?

Mr. CLARE: If you look back at some other records, there's lots of promises made. ESPI even to be instructed to put in 6 billion lire. Promise, promise, promise. ELSI was to us an entity they could have picked up very simply and run and made it go and applied these laws. And we'd spent a year working with half of it having nothing but promises. My feeling as I walked out of that room was that it was yet another ploy. I felt it was a ploy that would hold us off until they had their elections and then would be back to where we were. I didn't think there was any solidity in the proposal at all.

Mr. HIGHET. Did it occur to you that if Raytheon had indicated that they would have been prepared to guarantee cash for meeting payroll and other limited purposes for the orderly liquidation in the initial period, that, under the circumstances which appear to us and to the Court, only in black and white on paper–these are minutes of meetings that are held 20 years ago–wouldn't you have thought, as a businessman, that it would have been a very prudent risk to take to extend the normal situation for just one more week?

Mr. CLARE: I had spent many months going through all sorts of proposals. They put 70 % we put 30 %, we put 50 %, they put 50 %, we do that, we do the other. If it was going to be something solid on their part, I would have expected some little gesture, some tiny positive gesture that said here's 10 lire towards it, cash.

Mr. HIGHET: And you didn't feel you got this?

Mr. CLARE: I didn't feel I got that.

Mr. HIGHET: Thank you very much Mr. Clare. Mr. President, I have no further questions.

Mr. PRESIDENT: Thank you very much. Do any of the Judges want to put questions to Mr. Clare? Sir Robert Jennings.

Sir Robert JENNINGS: Mr. Clare, I want to ask, I think a quite simple question, about the liquidation. We heard from Mr. Adams this morning that the decision to liquidate had been taken sometime before the decision was announced confidentially and we heard from you that the plans for an orderly liquidation were really quite elaborate, quite, quite elaborate.

Mr. CLARE: Yes.

Sir Robert JENNINGS: You had spent a good deal of time in thinking out the best possible ways of disposing of the assets. You had your teams arranged and so on that you told us about this morning. So there was, so to speak, a programme for an orderly liquidation. Now, what I would like you to tell me is simply this. Was the giving of notices to the workforce immediately the liquidation plan was ratified by the meeting of shareholders, was that giving of notice a part of the original orderly plan of liquidation or was it a later reaction to the failure of negotiations with the Italian authorities.

Mr. CLARE: We had two things happening in parallel. One was that we were watching very carefully what was happening to the money, the cash flow in the company, and I had my lawyer and my controller telling me: watch it, you know, it's approaching the critical point. We could see trends so that unless something happened we could see two months ahead. We had a Board meeting to formally note that we were running out of money and there had to be an orderly liquidation and that we would not go into bankruptcy. When on the famous « last night », when they said « keep going », my advisers were telling me « unless you put money in, you can't legally keep going » and we had run out of money. In parallel with that, we had to think also what would happen when we did run out of money. We decided to go through an orderly liquidation while we were still working away and hoping and praying that President Carollo could bring off a successful arrangement with the central government. We had to set about planning our orderly liquidation so that, come the day the plant shut, we knew what we were going to do. We did one or two other things. Wehn the personal were on strike, we kept management in the plant 24 hours a day so we could call on the *carabinieri* to protect the plant. We had a ring of *carabinieri* around the plant 24 hours a day and for some time I and the other management, had to walk through that ring. It was very unpleasant. We had to plan for the liquidation in advance and in parallel with all the other activity.

Sir Robert JENNINGS: Yes, I understand that very well, but I am still unclear when the decision was taken to give notice to the major part of the workforce, was this a late development?

Mr. CLARE: The decision was taken at the Board meeting which said we've got to go into voluntary liquidation and we will have to give notice to the people.

Sir Robert JENNINGS: That was in the first week of March, 7th March was it? It was at the Board meeting where a decision was taken by the management to go into liquidation?

Mr. CLARE: That's right, the 17th of March I believe.

Sir Robert JENNINGS: But were your plans for an orderly liquidation already in place?

Mr. CLARE: They weren't in place. No. We took certain actions I think, and I would have to look back at my notes to confirm these dates, but things like moving the books and the inventory, I think, took place after the Board meeting. I'm not sure of that but it was around that time, and then we were thinking, when we had time to think, about the orderly liquidation and plan for that. We were still putting a lot of effort and energy into trying to avert it by still having meeting after meeting, after meeting with Carollo *et al.*

Sir. Robert JENNINGS: Thank you. If I could ask just one more question to confirm an impression I had from what you were telling us this morning, and you may say that I am wrong, but would I be right in thinking that the viability of ELSI as a company really depended almost entirely on getting Government contracts? Would that be right, or did you hope to be able to compete in other markets? Because you told us this morning a lot about the products that you could make, but the problem seemed to be that nobody was buying them. Were you entirely dependent on the Government giving contracts, or did you think that ELSI was able to compete in the general market?

Mr. CLARE: ELSI did compete for years in the general market, and we did not rely on Government contracts in the history of ELSI up to its closure. And, in fact about two years back, we made break-even having paid 800 million, I think it was — I shall have to check, but it is around that — lire interest.

Now, there was a change in product mix. We lost some demand for the microwave low-noise tube for NATO, but which did built up later, and in America we would have solved the problem by firing 200 people, and stayed commercial, stayed profitable — at least, not in loss. Now it was a question of timing. Because we could not fire those 200 people, an alternative was new product immediately, new product immediately of low technology. About the only place we could get that in quantity to support those extra people was from the Government areas which were covered by, we thought, the 30 per cent law. If we could have fired 200 production people, and restructured the company, we could have put in a lot of these products

ourselves, we could have put in reed relays ourselves. We could have put in microwave ovens; we could have put in the microwave magnetron, but it was a question of timing. And all the time we would be trying to do that, we could be losing money paying 200 mouths that were doing nothing. Not only doing nothing, but doing something negative, because they were around the place being in the way. So, it was a question of timing and, to get those products quickly, it was IRI and its satellites that could have done it; and they could have done that if they had taken the company. Now if we could have — I repeat myself — fired 200 production people, or if need be 250 people, and just had the people we wanted, with a restructured company for the products we had, we could have built it up ourselves.

Sir. Robert JENNINGS: Thank you very much, Mr. Clare.

The PRESIDENT: I have another question. I would like to ask the following: you have just said that you would have had to fire 200 people. I imagine that under Italian law you can fire them by paying compensation. It was not just that you could not fire them?

Mr. CLARE: Well, in Italy, there are laws and there is life, and the practical matter is that effectively you could not fire people no matter what you paid them. We fired two and we had a strike. You had to deal not just with the laws but with what the local unions would say and do. In fact, there is no way you could get rid of 200 people, no matter what the law said.

The PRESIDENT: Thank you. Any other questions? Well, I thank you very much, Mr. Clare, for your assistance to the Court.

Mr. Matheson, I think that you want to take the floor?

Mr. MATHESON: Thank you, Sir. In the remainder of the time we have today we would like to present to the Court the views of two eminent Italian legal experts on the issues of Italian law which are presented by this case.

The first of these two experts is Professor Franco Bonelli, who will address questions of Italian law which have arisen with respect to orderly liquidation and bankruptcy. Professor Bonelli is one of the leading commentators and practitioners in this field of Italian law. He has, since 1976, held the Chair of Commercial Law at the University of Genoa; he is also the author of numerous books and articles in this area and has served on many international and Italian arbitral panels. Therefore I would ask the Court to invite Professor Bonelli to speak.

The PRESIDENT: I invite Professor Bonelli to come to the floor.

Professor BONELLI: Thank you. Mr. President, distinguished Members of the Court. I will address my remarks to several issues of internal Italian law that have been raised by the Respondent in these proceedings. I will demonstrate that ELSI's shareholders had the right under Italian law to liquidate ELSI's assets. I will further demonstrate that at no time prior to the requisition was ELSI obligated to file a petition in bankruptcy. Finally, I will establish that, notwithstanding the Respondent's assertion to the contrary, the Respondent has not documented a single violation of Italian law by ELSI's management or shareholders and, indeed, has never charged them with any such violation.

The first section of my statement is the right to liquidate ELSI's assets. As I stated in my affidavit (Reply, Annex 1, para. 1), Article 2448, N. 5, of the Italian Civil Code confers the right on shareholders of all Italian companies to liquidate the assets of the company upon a resolution of the shareholders. This right is extended to shareholders of all companies even in cases in which the business and/or activities of the company are perfectly sound and profitable. For example, shareholders of a small private company may elect to sell the assets of a company rather than the shares of the company if they feel that the assets would be more readily saleable than the shares. Normally, however, shareholders liquidate a company when the company's business produces losses and the shareholders have decided to stop investing additional capital into the company, in order to curb the losses. This is how Raytheon and Machlett exercised this right with respect to ELSI.

The Respondent in this case and the affidavit submitted by Professor Jaeger (Rejoinder, Annex 32) do not dispute this statement of the law: that is that in Italy shareholders have the

statutory right to liquidate the assets of a company for whatever reasons they see fit — I think this is a true statement in all countries, not only in Italy.

Instead the Respondent argues (Rejoinder, p. 197) that because of ELSI's financial situation, Raytheon and Machlett were not entitled to engage in an orderly liquidation. The Respondent identifies various laws which should have prevented the orderly liquidation of ELSI. The Respondent asserts (Rejoinder, p. 197) that ELSI should have engaged in a compulsory liquidation under Article 2447 of the Italian Civil Code; that ELSI should have been declared bankrupt under Article 217 of Italian Bankruptcy Law and that ELSI's management engaged in criminal conduct under various provisions of Italian law.

I will discuss each of these in turn. But first, let me give you an overview of the alternative available to shareholders seeking to liquidate the assets of a company under Italian law.

With regard to a company being liquidated, it can appear at the outset, or at any point in the liquidation, that from a reasonable perspective, the total amount of assets is not sufficient to satisfy 100 per cent of the liabilities. At p. 197 of its Rejoinder, the Respondent states that « an orderly liquidation ... requires the 100 per cent satisfaction of creditors » and not the 50 per cent settlement envisaged by Raytheon and Machlett.

The Respondent's statement as it relates to Italian law is incomplete and as such is wrong. Apparent inability to pay all creditors at 100 per cent is not fatal to a voluntary and orderly liquidation. Several alternatives are available to the shareholders.

First, a liquidator may settle some major unsecured debts, especially with large creditor banks, or others, at a reasonable percentage. These settlements are both legal and practicable. Large creditor banks in Italy have every incentive to settle these debts. Any rational creditor would prefer to obtain a reasonable percentage of its credits promptly in a liquidation, rather than taking the risk of receiving little or nothing after a long delay in bankruptcy. Of course, if the settlement is guaranteed by a parent company, the incentive to settle is even stronger. Professor Jaeger in his opinion agrees that settlement is common practice.

Professor Jaeger also correctly notes a second incentive that large creditors have to settle their credits (Rejoinder, Annex 32, para. 3). According to Italian bankruptcy law, as Professor Jaeger underlines and is correct, the trustee in bankruptcy is obligated to file suit to recover all payments made to creditors in the year preceding the declaration of bankruptcy. Therefore, banks and other large creditors in Italy have a considerable interest in settling at reasonable percentages (like 40 or 50 per cent) to maximize the recovery on their credits and to avoid having payments they obtained in the year preceding the bankruptcy taken away by a trustee in bankruptcy. This is the first alternative: settlement with large unsecured creditors.

Second, if the settlements obtained are either not sufficient or if settlements are not obtained for any reason, the shareholders have other alternatives. They can advance funds to the company in the form of a capital contribution or they can reduce or waive their own credits towards the company, and/or they can postpone such credits until after all other creditors have been paid. In Italy, shareholders frequently do one or any combination of these alternatives, and also they intervene with temporary loans to the company in order to facilitate its orderly liquidation.

What if all these efforts fail? There is still an alternative. If, notwithstanding the settlements with creditors and intervention by shareholders, the liabilities of the company still exceed its assets, the liquidator can propose to all creditors to proceed with their orderly liquidation by obtaining their consent to be paid only a reasonable percentage of their credits. This special procedure is called « private settlement » (in Italian we say *concordato stragiudiziale*) — out of the court, it means. It is very similar to straight creditor settlement. The principal difference is that a « private settlement » (*concordato stragiudiziale*) involves settlement with all creditors, while a straight creditor settlement involves settlement with a limited number of creditors, usually the large creditors. The « private settlement » approach has been widely studied and approved by Italian commentators. I refer the Court to Frascaroli Santi, *Il concordato stragiudiziale*, Padova, 1984; F. Ziccardi, « *Concordato stragiudiziale* », in *Dizionario del diritto privato*, Milano, 1981, p. 345. I do not mix citations here but it is a undisputed point.

Why would creditors agree to a private settlement? Again, the incentives are the same. The result of an orderly liquidation with settlement of creditors is better than a liquidation

through a trustee appointed by the court. Also, creditors avoid the risk that a trustee in bankruptcy would try to recoup any payments to creditors made within a year preceding the bankruptcy as mentioned above.

If these alternatives fail, or if a company elects not to attempt a liquidation, the company may resort to the courts. A company may either make a petition to the court for a judiciary settlement or file a petition for declaration of bankruptcy. In a judicial settlement (in Italian *concordato giudiziale*) the court must assure itself that the company meets certain requirements for the procedure and issues a judgment to this effect. At the same time the court appoints a trustee, who ultimately is responsible for the sale of the company's assets. The time period between the petition to the court and the judgment is rather long: anywhere from 3–4 months up to 2–3 years. It is a long period of time. During this time period, all sales which are made are performed by a liquidator appointed by shareholders and with the support of the shareholders.

In conclusion, in the present case it appears that the sale of ELSI's assets would have been sufficient to pay all creditors in full, including the debts towards the shareholders (on this point I refer to the statement of Coopers & Lybrand) I did not see the accountings, this is only what I read. However, this does not matter. Even if it appeared that the sale of ELSI's assets would have been insufficient to pay all liabilities, ELSI could have taken any other alternatives available to it under Italian law: first, settlements with large unsecured creditors; second, if such settlements should have proved insufficient, shareholders could have made a capital contribution, and/or they could have reduced or waived their own credits towards ELSI; third, ELSI could have proposed to all creditors a private settlement. This is a general overview of what Italian law provides for in these cases.

All these alternatives were both for creditors and for shareholders a better course of action than a bankruptcy proceeding. The sale of assets in bankruptcy occurs over a lengthy period of time. The trustee in bankruptcy is generally not expert in the business or commerce of the company, does not have the support of the shareholders (who can guarantee the buyers, technology and know–how), and the trustee does not have the same monetary incentive to maximize the sale price as would the shareholders in an orderly liquidation. The trustee in bankruptcy in Italy is appointed by the court and normally is not a manager; he is either a lawyer or an accountant.

A confirmation of what I have said comes from the undisputed facts of this case: ELSI's management and shareholders resolved to put ELSI in voluntary liquidation, and they began negotiatons with the large bank creditors with a view to settling their credits at 40–50 per cent. There is every reason to believe that these negotiations would have been successful. But even if they had not, Raytheon and Machlett could have explored any of the other alternatives I have described. This reasonable course of action, which as a matter of fact was chosen by ELSI, was frustrated because the Respondent's unlawful requisition intervened. The second section of my statement is:

No obligation to file petition in Bankruptcy.

The Respondent argues that other provisions of Italian law would have prevented the orderly liquidation and would have obligated the filing of a petition in bankruptcy. I disagree.

First, I will address the Respondent's argument (Counter–Memorial, p. 77) that ELSI violated Article 2447 of the Italian Civil Code. Articles 2447 and 2448, N. 4, of the Italian Civil Code obligate a liquidation whenever a company's capital is depleted below a statutory minimum — a case of compulsory liquidation. During the relevant time–period, this statutory minimum was 1 million lire, a very small amount. If the shareholders do not restore this minimum amount of capital, the shareholders must put the company into liquidation. To determine whether a company must be placed in compulsory liquidation, one compares the company's capital to the minimum amount established by statute. In ELSI's case, Attachment B1 to Annex 13 of the United States Memorial demonstrates that ELSI's capital, even after taking into account losses, was always well above the statutory minimum.

However, if for the sake of argument we were to accept the Respondent's argument that ELSI should have engaged in a compulsory liquidation, the result would have been exactly the same as if ELSI had proceeded with the voluntary liquididation. The critical distinction between a sale of assets under a voluntary or compulsory liquidation, as opposed to a sale in bankruptcy is, who is in charge of the sale of assets? In either a voluntary or compulsory liquidation the liquidator of assets is appointed by the shareholders, and he acts and sells with the support of the shareholders. The liquidator of assets in bankruptcy is a court-appointed trustee. The trustee does not necessarily have any commercial or business expertise in the company in bankruptcy. The trustee must act following bureaucratic and lengthy procedures and is not motivated to sell at the greatest return to the shareholders. Both in voluntary and in compulsory liquidation the liquidator acts with the same trend, with the same attitude.

Second, the Respondent argues that ELSI's management and shareholders should have put ELSI into bankruptcy at some unspecified point prior to the requisition. The Respondent's argument seems to be premised on the proposition that ELSI's assets were insufficient to pay all of its liabilities in full.

The Respondent and Professor Jaeger maintain that it was compulsory for the Board of Directors of a company to file a petition in bankruptcy when the non-request of the bankruptcy « has caused his insolvency to be ' more relevant ' » and the crisis of the company « is so heavy that it is impossible to reasonably foresee any recovery» (Rejoinder, Annex 32, pp. 5-6). Professor Jaeger makes reference in his opinion to Article 217, N. 4, of the Italian bankruptcy law which makes criminal any case where the debtor company « has made worse his insolvency by refraining from making a petition in bankruptcy ».

As a matter of interpretation, I do not think that Article 217 obligates a Board of Directors to file a petition in bankruptcy. There is no ruling or judgment of Italian courts of which I am aware that would support such an obligation. Moreover, some Italian commentators have excluded the existence of an obligation even in the cases considered by Professor Jaeger (Antonini, *La bancarotta semplice*, Milano, 1962, pp. 170 et seq.). However, this question is largely academic as applied to ELSI.

Let us assume for a moment that Article 217 does create an obligation to file a petition in bankruptcy. In this case, ELSI was simply not in the situation contemplated by Article 217 and therefore was under no obligation to file a petition in bankruptcy, no matter how the article is interpreted. Article 217, N. 4, refers to the case in which a company, being insolvent, keeps running new business, and by so doing makes worse his insolvency. This is the fact which is contemplated by Article 217, N. 4. In our case, on the contrary, ELSI was put into voluntary liquidation, which reflects a decision by the Board of Directors and shareholders to stop running the business of the company. In fact, after the decision to liquidate, ELSI's management would have been prevented by Italian law from soliciting new business for ELSI. Article 2449 of the Italian Civil Code provides that:

> « The Directors cannot undertake new business after the occurrence of an event that determines the liquidation of the company. If they violate this prohibition, they assume unlimited personal and joint liability for the new business so undertaken ».

Moreover Article 217, N. 4, refers to an insolvent company, that is one without any possibility of being liquidated through an orderly liquidation. ELSI, by contrast, was capable of being liquidated through an orderly liquidation by any one of the alternatives I mentioned earlier. Thus, Article 217, no matter how interpreted, does not apply to ELSI at all.

I would like to make one final comment with respect to Article 217. If Article 217, N. 4, had been applicable to ELSI (of which I am of the firm belief that it did not) the Public Prosecutor should have begun criminal proceedings against the Board of Directors. The Respondent had sufficient information to make such a determination at the time, if it had been so inclined. Officials of Raytheon, Machlett and ELSI had told the Respondent repeatedly that if they could not make ELSI financially self-sufficient they would liquidate the company. The Respondent had the authority to bring criminal charges. But, not only did the Respondent not criminally

prosecute the Board of Directors, on the contrary, it urged ELSI to remain in operation. I suggest that the Respondent itself did not and does not seriously believe that operation and/or liquidation of the company was a criminal act under Italian law.

The third section of my statement is:

Respondent has demonstrated no violations of Italian law.

The Respondent also asserts that ELSI management was criminally liable under Article 217, N. 3 (I was speaking before on Article 217, N. 4), which prevents the Board of Directors from running an « insolvent » company with « reckless business in order to delay the bankruptcy ». The same reasoning applies. First, ELSI was not an insolvent company and therefore was not subject to Article 217, N. 3. Moreover, ELSI's management and shareholders did not continue to run the business, since they voted to liquidate the company's assets and thus refrained from executing new business. It is the same article I read a few moments ago. Again, it is relevant to note that at no time did the Public Prosecutor initiate proceedings or even an investigation into ELSI; indeed the Respondent continued to encourage ELSI's management and shareholders to keep ELSI in operation. ELSI's management did not violate Article 217, N. 3.

The Respondent seems to suggest that ELSI's management violated Article 218 of the Italian bankruptcy law. This Article makes it a crime for the Board of Directors of an insolvent company to borrow money from a third party in concealment of the insolvency. Again, the Respondent's reasoning is misplaced. First, ELSI was not insolvent. Even if it was, however, the Directors did not conceal any aspect of ELSI's financial condition on its balance sheets. Again, it is noteworthy that the Public Prosecutor never initiated criminal proceedings against the Board of Directors, even though the Respondent was apprised in detail of ELSI's financial condition in 1967 and 1968.

For the first time in its Rejoinder, the Respondent accuses ELSI's management of having violated an additional article of the law, Article 2621 of the Italian Civil Code. In my view Article 2621 is simply irrelevant to the case at hand. Article 2621 makes it a criminal offense for promotors, founders, managers and directors, general managers, auditors and liquidators who, in reports, balance sheets or other information concerning the affairs of a company, fraudulently represent facts which do not correspond to the truth about the formation of the financial condition of the company or who conceal, wholly or in part, facts concerning such condition. The same article also punishes managers and directors and general managers who, in the absence of or contrary to an approved balance sheet, or on the basis of a false balance sheet, in any way collect or pay profits which are fictitious or which cannot be distributed. Having levied this allegation, the Respondent has brought not a single piece of evidence that suggests that anyone associated with ELSI presented false information concerning its financial condition or in any way collected or paid fictitious profits. On the contrary, I would suggest that Raytheon, Machlett and ELSI management were particularly candid concerning ELSI's financial position and the steps necessary to liquidate the company.

There are two short final points I shall mention briefly. In its Counter-Memorial the Respondent alleged that the delays in ELSI's bookkeeping violated Articles 216 and 217 of the Italian Bankruptcy Law (Counter-Memorial, p. 81) and that ELSI's management violated Article 2446 of the Italian Civil Code by failing to take appropriate action with regard to ELSI's share capital (Counter-Memorial, p. 80). The Respondent has not pursued these arguments in its Rejoinder and for a good reason. As I stated in my affidavit (para. 7), any delays in ELSI's bookkeeping in early 1968 that were due to earthquakes in Sicily or strikes at the plant were merely brief and unavoidable interruptions in ELSI's recordkeeping and do not violate Italian law. It was a *force majeure* — earthquakes and strikes at the plant. I further affirm my statement (para. 6) that ELSI's management took all appropriate steps to maintain the appropriate ratio between capital and losses within the time period established by Italian law.

A final remark. Suppose that ELSI management had violated one of the many articles I read, there are five or six articles, of the Italian Civil Code and the Italian Bankruptcy Law,

what should have been the consequences? These violations, or some of them, should have exposed the members of the Board of ELSI to be criminally prosecuted (which did not occur, and this is a confirmation that no violations were made), but none of these violations should have prevented ELSI from making or continuing the orderly liquidation of the company. It was a crime but not an impediment to the orderly liquidation.

The requisition caused the Bankruptcy.

The requisition made the orderly liquidation of ELSI's assets impossible. ELSI's shareholders were deprived of the ability to sell ELSI's assets. Moreover, they were prevented from operating the plant to finish works in process. Thus, ELSI could neither proceed with the orderly liquidation nor generate funds with which to meet future payments.

In sum, I have demonstrated that Raytheon and Machlett were entitled under Italian law to liquidate ELSI's assets and that orderly liquidation could occur under several alternative plans, legal possibilities, even if ELSI's liabilities appeared to exceed its assets (a point I do not concede). It was only by reason of the Respondent's intervention with the requisition order that ELSI's shareholders were deprived of an opportunity to complete any one of these alternative plans. I have also established that the Respondent has not documented a single violation of Italian law by either Raytheon, Machlett or ELSI, or their officials and have refuted the Respondent's contention that ELSI should have filed a petition in bankruptcy prior to the requisition. The inevitable conclusion, therefore, is that the unlawful requisition of ELSI's assets by the Respondent prevented ELSI from continuing the orderly liquidation and caused the damages that are now claimed before this Court.

The PRESIDENT: Thank you Professor Bonelli. I think its near 1 o'clock, Mr. Matheson.

Mr. MATHESON: Mr. President, I need to beg the Court's indulgence at this point. The next individual we had contemplated asking to address you, Professor Fazzalari, evidently has a requirement to be in Rome tomorrow. Would it be possible for him to present his statement at this time?

Mr. PRESIDENT: Yes. In this condition, of course yes.

Mr. MATHESON: I thank you very much. Professor Elio Fazzalari will address the question of whether other remedies were in fact available under Italian law to Raytheon, which is something the Respondent has asserted in its pleadings. Professor Fazzalari is professor of Civil Procedure at the University of Rome. He has chaired a number of international arbitrations. He is the author of a number of publications with respect to Italian civil procedure. I ask the Court to call upon Professor Fazzalari.

Professor FAZZALARI: Mr. President and Members of the Court. I am here today to describe to the Court why Raytheon and Machlett, the shareholders of ELSI, could not bring successful suit against the Government of Italy in Italian courts for the injury at issue in this case.

I wish to make three points but I must apologize in advance for my English. I will speak as clearly as possible.

First, the Respondent in this case has previously argued that a United States national cannot successfully sue in Italian courts against the Government of Italy on the basis of the 1948 Treaty of Friendship, Commerce and Navigation. The reasoning of the Respondent in that case requires a true explanation of certain principles of Italian law.

Second, Raytheon and Machlett could not have successfully sued in Italian courts against the Government of Italy based on the other remedies stated by the Respondent in its pleadings because under Italian law shareholders do not have the legal authority to sue for actions taken against the company in which they have an interest.

Third, even if Raytheon and Machlett could have successfully sued as shareholders in Italian courts against the Government of Italy, ELSI's successful suit based on the specific remedy of an appeal to the Prefect eliminates any other remedies.

I will address each of these points separately.

I. – The treaty is not a basis for suit in Italian courts.

First, the treaty is not a basis for suit in Italian courts. In both the Counter–Memorial (p. 99) not and the Rejoinder (p. 215), the Respondent states that Raytheon and Machlett could have sued in Italian courts under Article 2043 of the Italian Civil Code based on the 1948 Treaty of Friendship, Commerce and Navigation between the United States and Italy. This is incorrect.

When a treaty is signed by the Government of Italy, it must then be ratified by the Italian Parliament through a simple order before it can enter into force. The fact that a simple ratifying order or, as it is sometimes called, a simple « implementing » order, is passed by the Italian legislature is not sufficient by itself to allow suit in Italian courts based on the treaty provisions. To allow suit against the Government of Italy for compensation, the treaty provisions must either contain specific language allowing such suit or there must be additional Italian legislation incorporating the treaty into Italian law with greater specificity.

Both Parties agree that there is no additional Italian legislation other than the ratifying or implementing order. Although the United States pointed out in the Reply that Italian practice has not found provisions such as that of the FCN Treaty enforceable in Italian courts, the Respondent simply cites four cases in the Rejoinder which support this point. Two of these cases involve the United States–Italian FCN Treaty and two involve other treaties. I will discuss each of these decisions in turn.

Decision N. 1455 of 21 May 1973.

On p. 217 of its Rejoinder the Respondent cites *Ministero delle Finanze* v. *S.p.A. Manifattura Lane Marzotto*, Decision N. 1455 of 21 May 1973 (Rejoinder, Annex 5). In this case an Italian company sued the Government of Italy for imposing customs duties on goods higher than permitted by the Schedule relevant to Article 2 (*b*) of the General Agreement on Trade and Tariffs (GATT). The Supreme Corte di Cassazione, that is, the Italian Supreme Court, therefore had to determine whether Article 2 (*b*) was a part of Italian law.

In the Respondent's pleadings, the Italian Ministry of Finance argued that the articles of the GATT at issue in the case did not contain standards that were immediately enforceable by the citizens of the various States that had acceded to the GATT. Instead, the Respondent itself argued that the GATT articles were limited to assigning to national legislators the task of adjusting their own legal systems, by means of appropriate domestic standards, to the principles established in the Treaty. The Respondent stated that the generic character of the clauses and the complexity of their application in Italy meant that a simple implementing order was insufficient. Rather, the Respondent argued that the legislator would have to issue a specific standard or no subjective rights would come into being for private individuals under the GATT provisions.

The Supreme Court of Italy agreed that the existence of a legislative order ratifying the GATT did not automatically make the GATT a part of Italian law which could be relied on by an individual. Rather the Court said:

> « It is quite true that the implementing order, though necessary, it not always a sufficient means for the reception of international treaty provisions in their form and substance into the internal system without any further specific legislation. For this purpose, it is necessary that the same agreement contain specific elements from which complete rules may be elicited. It is not conceivable that provisions, the precise content of which is no determined, be inserted into the legal system. It is equally clear that when it is not possible to determine that content solely through the interpretative instruments, without legislation, such determination cannot be left to the interpreter. In such cases, the international undertaking to comply, which is implicitly inherent in those provisions, cannot be put into effect except through the ordinary procedure (that is, the State, which has an international obligation to govern certain situations in a given way makes specific provision for this purpose which are the only legal source in the matter under consideration » (Rejoinder, Annex V, pp. 9–10).

The Court went on to ask whether the treaty provision, though formally integrated into the internal system, is simply a declaration of principle. If so, it only binds the two governments to harmonize their laws, without any immediate relevance to individuals, meaning that individuals could not claim rights based on the treaty actionable in courts.

The Court found Article II (*b*) to contain sufficient specificity. This is not surprising since Article II (*b*) incorporates a specific schedule of products setting forth specific limits on the customs duties or charges that may be imposed on those products. The Court found that since the content of the provision was defined, it was therefore immediately applicable.

In our case, however, the FCN Treaty provisions do not have comparable specificity. Rather, they state general principles which may be enforceable immediately as a matter of international law — that is, they are binding on the two States — but which are not capable of enforcement in Italian courts without additional legislation.

Case N. 107 of 14 January 1976.

The other case is Case N. 107 of 14 January 1976. On p. 217 of the Rejoinder, the Respondent cites *Ministero del Tesoro* v. *Mander Brothers Ltd.*, Decision N. 107 of 14 January 1976 (Rejoinder, Annex 4). In that case a citizen of the United Nations sued the Government of Italy for losses incurred in Italy as a result of the Second World War.

The Supreme Court of Italy found that Article 78, paragraph 4, of the 1947 Peace Treaty between Italy and the allies (49 *UNTS* 126) provided that the Government of Italy was obliged to indemnify « United Nations nationals » for losses undergone as a result of wartime events in Italy. This specific obligation was found to be immediately operative in Italian domestic law without the need for a further standard-setting act of integration or adaptation.

The Court's decision is quite understandable. Under Article 78, paragraph 9, « United Nations nationals » are defined as nationals of any of the United Nations or individuals which were treated as the enemy under the laws in force in Italy during the war. Thus the Treaty was clearly meant to have internal effect since some Italian nationals qualified as United Nations nationals. Further Article 78, paragraph 4, expresses a specific obligation of Italy to restore all the legal rights and interests in Italy as of 10 June 1940 of these United Nations nationals, with other specific provisions regarding compensation in lire for lost property at two-thirds its value. Obviously none of the United States-Italy FCN provisions at issue in this case contain similar specificity.

Decision N. 2228 of 30 July 1960.

Now I come to the two cases involving the US-Italy FCN Treaty. The enforcement of the FCN Treaty in these cases was limited to provisions containing a « most-favoured-nation » clause. The US citizen drew special protection not from the FCN Treaty itself, but from some parts of it in conjunction with other treaties entered into by Italy with third countries.

On p. 100 of the Counter-Memorial and p. 216 of the Rejoinder, the Respondent cites *The Durst Manufacturing Co.* v. *Banca Commerciale Italiana*, Decision N. 2228 of 30 July 1960 (Rejoinder, Annex 11). In this case, the US-Italy FCN Treaty was used in conjunction with Article 23 of the Italian-French Convention of 12 January 1955. Article 23 specifically provided for an exemption from authentication for the notarial instruments executed in the territories of the two States. This provision was then held applicable to a US national through application of the most-favoured nation clause of Article V, paragraph 4, of the FCN Treaty.

The first important point about this case is that Article V, paragraph 4, of the FCN Treaty was not itself specific enough to provide a standard of enforcement. The court noted in its opinion that no specific waiver or exemption existed in the FCN Treaty itself, and that « to render operative the most-favoured-nation clause » reference must be made to the other treaty. The second important point is that with the exception of Article V, paragraph 3, none of the US-Italy FCN provisions argued in this case call for a « most-favoured-nation » standard or treatment. There is nowhere else to look to find the specificity necessary for these provisions

to be enforceable in Italian courts. The third important point is that the *Durst case* did not involve a suit against the Government of Italy or a suit involving the payment of compensation, and therefore cannot be considered as a precedent that such suits are possible under the Treaty in Italian law. And the last decision is:

Decision N. 2579 of 6 December 1983/17 February 1984.

On p. 216 of the Rejoinder the Respondent cites *In re Walsh*, Decision N. 2579 of 6 December 1983/17 February 1984 (Rejoinder, Annex 12). That case involved the application of Italian customs and tax laws to a sporting vessel brought into Italian waters. The Supreme Court of Italy did not rely on Article 14 of the FCN Treaty alone for enforcement. Rather the detailed body of regulations derived from the Geneva Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats of 18 May 1956 (319 *UNTS* 21) was used to provide a specific standard for the Italian court to follow. Aside from the fact that almost all the provisions at issue in this case do not contain a most-favoured-nation clause, the Respondent has not pointed to any other treaties or conventions that could have been used in conjunction with the FCN Treaty to obtain compensation in Italian courts against the Respondent.

In neither of the two cases cited by the Respondent concerning the FCN case was there an action against the Government of Italy or even an action seeking compensation. The Respondent claims this is not significant (Rejoinder, p. 216) but these are essential elements that an Italian court would find significant in deciding whether the Treaty provisions alone create subjective rights for individuals.

These cases are less significant, however, than a case still before the Italian courts where the Respondent itself in effect has argued that the FCN Treaty provisions cannot be an independent basis for suit under Article 2043 of the Italian Civil Code. In opposing an attempt by a United States citizen before the Court of Rome to recover compensation for an expropriation of property in violation of Article V of the FCN Treaty, the Attorney General of Rome expressly stated in the Government's final brief that the Treaty's provisions « are at best an indirect and additional guarantee of international relationships between nations », which « cannot be used to confer the quality of personal rights on situations that are not such » in the Italian legal system. I refer to the case of *Talenti* v. *Presidenza del Consiglio dei Ministri*, N. 32266/83, brief filed 30 October 1987, page 18 (if for the Court's convenience it wishes to have a copy of this brief in Italian and with a certified translation into English of the relevent paragraphs, we will provide it to the Court and to the Respondent).

To understand why the Respondent argued in the *Talenti case* that the language of this Treaty provision is not sufficiently specific to permit suit by an individual, it is necessary to analyze certain principles of the Italian legal system. I begin with Article 2043 of the Italian Civil Code, which the Respondent states can be used to bring suit based on the Treaty.

Article 2043 is attached to the Rejoinder at Annex 16. That Article states:

> « *Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno* ».

Translated into English, Article 2043 reads:

> « Any act committed either wilfully or through fault, which causes wrongful damages to another person, implies that the wrongdoer is under an obligation to pay compensation for those damages ».

This article is the basic Italian statutory provision allowing suit for wrongful conduct. The Respondent contends that the Treaty provisions could have provided a basis for determining that the Respondent's conduct was wrongful (Rejoinder, p. 215). An indisputable principle in Italian law — one accepted by all Italian courts and scholars — is that suit based on Article 2043 can only be brought for damage to an individual's « subjective » right, known in

Italian as « *diritto soggettivo* », but not for damage to an individual's « legitimate » interest, known in Italian as « *interesse legittimo* ». Therefore, I will attempt to explain to you the distinction between « *diritto soggettivo* » and « *interesse legittimo* ».

In Italy, the differences between an individual's « subjective rights » and an individual's « legitimate interests » was historically introduced at the end of the last century when the individual was first permitted to challenge certain administrative acts of the public authorities even when these acts did not infringe upon the persisting individual's rights. To avoid exposing the administrative authorities to claims for damages, as well as to avoid subjecting the authorities to the jurisdiction of ordinary courts (which is the case for violations of « subjective rights ») the individual was instead granted a sort of « weaker » right, one based on the individual's interests in the compliance of public authorities with the law. This interest is called an « *interesse legittimo* » or « legitimate interest ».

Today the following important consequence exists in Italian law also for suits against the government: a subjective right is enforceable in the ordinary civil courts, while a legitimate interest is protected by administrative judges. Further compensation is due only for damages resulting from injury to a « subjective right » under Article 2043 of the Italian Civil Code, whereas damages resulting from injury to a legitimate interest are not indemnifiable.

How then, when one wishes to sue the government, does he determine whether something is a subjective right or a legitimate interest? In Italy, a « subjective right » arises when a rule requires a subject to do a certain performance and specifies the subject who is entitled to receive this performance: the latter is qualified as the holder of a « subjective right ». As an example, if the government rents a building for offices, Article 1587, para. 2, of the Italian Civil Code requires that the government, as a lessee, pay rent to the lessor who is, for this purpose, the holder of a « subjective right » to the punctual payment of the rent.

If instead, the law calls upon a subject (usually an organ of the public administration) a duty to do some act, without fixing the addressee of the performance, the obligation is provided for benefit of the whole community. The individual, who receives the benefit of that performance, is the holder of a « legitimate interest » (that the law be respected by the public authorities).

As an example, when the law fixes in detail the rules that must be followed by government authorities in conducting competitive examinations for public employment, these rules are made in the general interest of the public. An examination candidate is interested in the correct administration of the examination by the public authorities and has, therefore, a « legitimate interest » in it. Therefore a candidate may challenge the improper administration of an examination in an administrative proceeding, but cannot bring suit successfully in the ordinary courts. If successful in a proceeding before an administrative judge, the candidate cannot receive compensation for any alleged injury.

The inability to bring suit under Article 2043 based on a legitimate interest has been repeatedly confirmed in innumerable decisions of the Italian Supreme Court. For instance, less than a year ago in Decision N. 2579 of 25 March 1988, the Supreme Court of Italy stated that there is a basis under Article 2043 for a right to damages only when there has been prejudice to subjective rights (*la configurabilità di un diritto al ristoro del danno solo in presenza di una lesione di diritti soggettivi*). The Supreme Court of Italy, in Decision N. 435 of 21 January 1988, found that an ordinary judge did not have jurisdiction to decide a suit seeking compensation under Article 2043 for damage resulting from prejudice to legitimate interests. The same conclusion was reached in other recent decisions of the Supreme Court of Italy, such as Decision N. 436 of 21 January 1988 and Decision N. 1202 of 5 February 1988.

In my opinion, the provisions of the 1948 FCN Treaty between the United States and Italy at issue in this case do not provide for the individual a « subjective right » enforceable in an Italian court. These Treaty provisions state only general standards of protection without indicating that individuals are granted rights to sue the Government of Italy in Italian courts based on violations of the Treaty. Therefore it is impossible for an individual to receive damages from an Italian Court based on the Treaty. Even if the Treaty created a legitimate interest for the individual, there would be no ability to claim damages based on that interest. This is the first point, I shall finish in a few minutes with the second and third points.

II. – As shareholders, Raytheon and Machlett could not have sued under Italian law for actions taken against « ELSI ».

My second point is that as shareholders, Raytheon and Machlett, could not have sued in Italian courts under Italian law for actions taken against ELSI.

As is true of other legal systems, under Italian law a shareholder in a company is not entitled to act in place of the company for protection of the rights and interests of that company. In support of this point, I refer the Court to a treatise edited by Professor Giuseppe Auletta entitled *Diritto Commerciale* (or « Commercial Law »), at pp. 104–105. This treatise explains — as does many others — that the company serves as an independent juridical personality, autonomous and distinct from the shareholders. From this indisputable principle, Professor Auletta — as well as all other scholars — derive several consequences under Italian law. Shareholders cannot individually decide matters concerning the company. Together, in the organ of the company called *Assemblea*, shareholders can undertake inportant decisions regarding the life of the company, but they do not undertake managerial action. Law suits against third parties for acts that harm the company, even though the shareholders' interests are indirectly harmed, cannot under Italian law be undertaken by the shareholders themselves.

The autonomy of the company from its shareholders is even more apparent when the company goes into bankruptcy. At that point, all the rights of the company are transferred to the bankruptcy trustee, who is the public officer designated by the court, with powers even more autonomous than those of the company's organs.

Therefore, in this case, had Raytheon and Machlett tried to sue in Italian courts claiming injury to themselves from the requisition and from other actions taken by the Government of Italy, there is no question that they would have failed. Under Italian law it was solely for ELSI to act against the measures taken by the Italian authorities. When the bankruptcy occurred, the protection of ELSI's rights transferred to the bankruptcy trustee, but not to the shareholders. That is why only ELSI could appeal the Mayor's requisition order.

Both the opinion of Mr. Giuseppe Bisconti and Professor Antonio La Pergola — the former President of the Italian Constitutional Court — are quite accurate on this point. They both find that Raytheon and Machlett as shareholders had no remedies to exhaust in local courts. Further, contrary to the Respondent's statement on p. 216 of the Rejoinder, Professor La Pergola did not discuss only the diplomatic protection of foreign shareholders in Italian corporations. On pages 7 and 12 of the English translation of his Opinion, Professor La Pergola considered the FCN Treaty and determined that it did not permit Raytheon any recourse to domestic remedies.

The Respondent asserts that Raytheon and Machlett should have sued the Mayor of Palermo to obtain a criminal conviction, for abuse of power, and then sued for damages based on the criminal conviction (Rejoinder, p. 214). The incapability of the shareholders to sue under Italian law for acts that directly harm ELSI and indirectly harm the shareholders, explains why this assertion is incorrect. Moreover, I must point out that a criminal action against the Mayor of Palermo is a very serious step. To succeed, ELSI or the bankruptcy Trustee (or the shareholders under the Repondent's theory) would need to prove that the Mayor of Palermo had a specific personal intention to inflict damages on ELSI. In my opinion it would be impossible to do this, since on the evidence of this case an Italian court would find that the Mayor was not acting on his own initiative. I must also point out that an unsuccessful attempt to obtain a criminal conviction would have exposed ELSI managers or the bankruptcy Raytheon and Machlett to imprisonment under Italian law for « *calunnia* » or the wrongful assertion of criminal conduct.

III. – The specific remedy of the appeal to the Prefect precludes other remedies in Italian courts.

I would now like to move on to my third and final point. Even if Raytheon and Machlett could have successfully sued as shareholders in Italian courts against the Government of Italy,

ELSI's successful suit based on the specific remedy of an appeal to the Prefect eliminates any other remedies.

There is a fundamental principle of the Italian legal system known as « *tipicità della tutela giudiziaria* », which translates into English as « typicality of judicial protection ». Under this principle where specific remedies are provided for a particular violation, there is no ability to pursue other more general remedies. For instance, on the subject of emergency protection for individuals, Article 700 of the Italian Code of Civil Procedure provides generic protection in a situation of emergency, but it does not apply if the individual already has recourse to a more specific remedy. I refer the Court to a 1983 Italian book titled *Provvedimenti d'urgenza* (or « Emergency Measures ») by Professor Tommaseo which makes this point on pages 180–181.

In our case, Italian law provided a very specific remedy for the unlawful requisition of ELSI's plant and assets. Under Article 7 of Law 2248 of 20 March 1865 — there are in Italy very old Italian laws — the Prefect has the power of ordering the requisition. In cases of a particular and exceptional emergency, the same power is given to the Mayor. But, under Article 1 of Law 996 of 30 November 1950, only the order from the Prefect is definitive, not the order from the Mayor. Therefore you can appeal the order of the Mayor to the Prefect.

The appeal to the Prefect is the specific and therefore exclusive remedy against the requisition of ELSI. Since this remedy was successfully pursued, there is no possibility for any other remedies by anyone else. Further, a successful appeal to the Prefect can only result in the duty of the requistioning authority to pay the rent for the period of the requisition. This rent could only be paid to ELSI, not to Raytheon and Machlett as shareholders of ELSI.

In conclusion, it is clear that the additional remedies in Italian courts proposed by the Respondent in this case are not in fact possible. Suit could not have been brought on the basis of the Treaty provisions themselves, because those provisions do not provide with sufficient specificity subjective rights to be applied in favour of an individual. Further, the specific remedy of appealing the requisition order to the Prefect precludes other more general remedies for injury caused by the requisition order. Finally the status of shareholders under Italian law is such that the rights and the interests at issue in this case could not serve as the basis of a suit in Italian courts for the acts committed by the Government of Italy.

This concludes my statement on the availability of remedies in Italian courts for Raytheon and Machlett. Thank you for your so kind attention.

The PRESIDENT: Thank you very much, Professor Fazzalari. If the Italian Delegation do not object, I will ask the American Delegation to provide the opinion of the Attorney General of Rome mentioned by Professor Fazzalari. If I understood him correctly, I assume that this is a new document that is not in a publication readily available in the official languages of the Court. Professor Ferrari Bravo.

Professor FERRARI BRAVO: Mr. President, I did not catch exactly the number and object of this decision but it seems to me that the decision itself should be considered as important and its text provided by the American delegation with an appropriate translation. What has been mentioned is an opinion expressed in the course of the pleadings of the case which, in itself, is not authoritative in Italian law, the authority coming from the judgment itself. If the American delegation wants to file the opinion with the Court, it is fine, but as the precedent is given bythe judgment, as such, also the judgment — which is much more important — should also be filed.

The PRESIDENT: I understand your position but the problem is not exactly this, the problem is that the Chamber faces reference to a new document which has not been submitted before. What I understood from Professor Fazzalari, was that the case had not been decided yet. In this particular case the problem is that this is a new document; documents have to be submitted before the oral hearings to the Court and therefore, in the case of a new document, whatever its nature, I need the agreement of both Parties, otherwise we will have to have a special hearing on this new document. Therefore, if the Italian delegation objects to the submission of this opinion of the Attorney General of Rome, we will have to hear both Parties

on this case. So, the problem is not whether what Professor Ferrari Bravo said is final or not, the problem is that we are facing here a new document not having been mentioned to the Court before the hearings. Mr. Matheson.

Mr. MATHESON: Mr. President, we would be happy to accept the proposal of the Respondent. We will provide you with both a copy of the decision and a copy of the brief. Thank you, Sir.

The PRESIDENT: Thank you. There is agreement of all Parties that we will receive this document in one of the official languages of the Court. Thank you very much. We will meet tomorrow at 10 o'clock.

The Court rose at 13.40 *p.m.*

C 3/CR 89/3
Wednesday 15 February 1989, at 10 a. m.

Mr. MATHESON, Mr. MURPHY, Mr. GARDNER.

The PRESIDENT: Please be seated. Mr. Matheson.

Mr. MATHESON: Thank you, Mr. President. It is our proposal to begin this morning's session with a presentation on the question of the admissibility of the United States claim. This will be given by Mr. Sean Murphy, who is an Attorney/Adviser in the Office of International Claims in the State Department. Following that, we would propose to offer a presentation on the question of the violations of the FCN Treaty. This will be given by Professor Richard Gardner, who is Professor of Law and International Organizations at Columbia University, and who was formerly the United States Ambassador to Italy. Finally, if there is time, we would offer a presentation by Mr. Timothy Ramish on the question of the relief requested by the United States. Mr. Ramish, of course, is the Deputy Agent for the United States in this case, and is also the United States Agent to the Iran/United States Claims Tribunal. And so I would request that you ask Mr. Murphy to begin this morning's session.

The PRESIDENT: I call upon Mr. Murphy.

Mr. MURPHY: Mr. President, distinguished Members of the Court. It is with great honour that I appear before this Court on behalf of the United States.

Jurisdiction.

Mr. President, the jurisdiction of this Court is based on Article 36, para. 1, of this Court's Statute, which provides the Court jurisdiction over all matters specially provided for in treaties and conventions in force. Article I of the 1948 FCN Treaty between the United States and Italy states that disputes as to the interpretation or the application of the Treaty which are not satisfactorily adjusted by diplomacy shall be submitted to the Court. Unfortunately, over a period of years our two governments were unable to resolve this dispute through diplomatic means. Therefore, by application of 6 February 1987 the United States submitted this dispute to the Court. In its Counter-Memorial, on p. 98, the Respondent accepted the Court's jurisdiction.

Admissibility.

In the Counter-Memorial p. 99, the Respondent contends that the claim in this case is inadmissible before the Court because local Italian remedies allegedly were not exhausted by Raytheon and Machlett. This objection is entirely unsubstantiated and should be dismissed by the Court. Yesterday Professor Fazzalari indicated why, under Italian law, no further legal remedies exist. Today I will discuss this issue in relation to the interpretation or application of the FCN Treaty and international law generally.

As a matter of background to this issue, I would like to draw attention to the fact that the Respondent's objection was joined to the proceedings on the merits of the Applicant's claim in accordance with Article 79, para. 8, of the Rules of Court. In letters sent to the Court dated 16 November 1987, the Parties agreed that the Respondent's objection — which was raised in the Counter-Memorial — should be heard and determined within the framework of the merits. In its Order of 17 November 1988 the Court noted the Parties' agreement.

Although the United States was able to respond to the objection in its Reply, the Respondent continued in its written comments on the objection — and indeed further developed the objection — in its Rejoinder, thus preventing the Applicant from fully responding to the objection in the written pleadings. Therefore the United States is compelled to address the preliminary

objection at this stage in the proceedings, including the additional contentions advanced by the Respondent in the Rejoinder.

The Respondent states in the Rejoinder that the United States has accepted Italy's position that the local remedies rule applies to a claim made under a treaty (Rejoinder, p. 213). In fact, the United States has not accepted this position. In this case the United States seeks two types of relief: first, a declaration by this Court that the Respondent has violated the Treaty of Friendship, Commerce and Navigation between the United States and Italy and, second, reparation for the damages arising out of those violations.

With respect to the first type of relief there is clearly no requirement in international law that a State must exhaust local remedies before it can seek to vindicate its own rights through declaratory relief. As Professor Meron states in his seminal article:

> « (I)f the diplomatic negotiations between the two States prove unsuccessful, and State B applies to the International Court of Justice complaining of a breach of certain treaty obligations by State A (as shown by its conduct towards the injuried alien) and asking principally for a declaratory judgment based on the interpretation of the treaty, this would appear to be a case of direct injury to which the rule of local remedies would not be applicable » (MERON, « The Incidence of the Rule of the Exhaustion of Local Remedies », 35 *BYIL*, 83, 85 [1959]).

At a minimum, therefore, the United States claim for a declaration by this Court that the Respondent has violated the FCN Treaty should not be dismissed on the basis of the local remedies rule.

With respect to the second type of relief sought by the United States, historically there has been some controversy over whether the local remedies rule applies to a claim for compensation by a State on behalf of a national when the claim is based on a treaty violation. In the case of this particular treaty, there is no reason to believe that the parties intended such a rule to apply. The 1948 Economic Cooperation Treaty between the United States and Italy — which was negotiated at the same time as the FCN Treaty at issue in this case — expressly includes the local remedies rule in Article X (20 *UNTS* 43, 9 Bevans 306, *TIAS* 1789). In the FCN Treaty there is no express inclusion of the local remedies rule. Instead, under Article XXVI of the Treaty, both parties agreed that disputes between the parties as to the interpretation or the application of the treaty not satisfactorily adjusted by diplomacy shall be submitted to the Court.

It is well known that there are some situations where the local remedies rule does not apply. For instance, the Respondent itself argued in the *Phosphates in Morocco case* that the rule does not apply where the Respondent government has committed an illegal act at the beginning of the underlying dispute, or where there is a collaboration of different government branches in perpetration of a wrong, such that the governmental character of the act would lead one to believe that the internal judicial process would not provide the desired redress (*PCIJ*, *Series C*, *N.* 84, pp. 443, 447–48). In this case, the initial requisition of the Respondent was determined by its own courts to be illegal and the subsequent acts of various government entities resulted in the appropriation of ELSI's plant and assets by the Respondent.

In any event, the United States has not argued extensively the theoretical underpinnings of the local remedies rule in this regard, because we believe, whether or not the local remedies rule is applicable in this case, that the rule is clearly and demonstrably satisfied, and there is no need to debate the exact scope of its application.

The Respondent devotes considerable space in its written pleadings to proving the existence of the local remedies rule. The United States, however, has never contested the existence of the rule. Commentators and courts have propounded various procedural and substantive reasons for the local remedies rule. This Court has stated that the rule ensures that a respondent State will have the opportunity to redress the alleged injury within the framework of its legal system. *Interhandel case* (*ICJ Reports* 1959, p. 27). Further, the rule helps to clarify the facts and applicable domestic law prior to the consideration of a claim by an international tribunal. The

rule helps to avoid excessive recourse to international adjudication. The rule helps determine the existence of an internationally wrongful act.

Now there are three reasons why the local remedies rule is satisfied in this case. First, Raytheon and Machlett exhausted all available and known remedies in Italian courts, on the basis of the best legal advice available to Raytheon and Machlett from Italian counsel. Second, the Respondent's failure to indicate to the United States throughout a period of almost 14 years of diplomatic correspondence that the Respondent believed further local remedies existed and should be pursued, estops or precludes the Respondent from raising such an objection at this time. Third, it is the Respondent who must establish that further local remedies exist, but it cannot do so since the further remedies identified by the Respondent are not in fact available to Raytheon and Machlett. I will discuss the first two of these points. Yesterday you heard Professor Fazzalari address the third point in depth and therefore I will only cover it briefly.

Local remedies were exhausted.

All effective local remedies in Italy capable of rectifying the injury caused by the Respondent were pursued and therefore the local remedies rule, if applicable, is satisfied. As I go through the steps that were taken in Italy, I remind the Court — as the Respondent does on p. 99 of its Counter-Memorial — that for purposes of considering this issue the Court should consider as correct the facts as stated by the Applicant.

The requisition of ELSI by the Mayor of Palermo occurred on 1 April 1968. At the direction of Raytheon, ELSI immediately sent cables to the Mayor and other Italian legal authorities seeking a revocation of the order (Memorial, Annex 26, para. 9). No response was received. On 9 April ELSI formally petitioned the Mayor to lift the order, arguing that the requisition was illegal and would only delay the solution of the problem (Memorial, Annex 26, para. 9). Again there was no response. Consequently, on 19 April 1968, ELSI appealed the requisition to the Prefect of Palermo, an official of the Italian Government empowered to hear appeals of decisions by local governmental officials (Memorial, p. 13, and Annex 36).

As we have already indicated, when the Prefect failed to act, there was little choice but to place ELSI in bankruptcy. Raytheon and Machlett then pursued administrative and judicial remedies through their representative on the creditors' committee and through the bankruptcy trustee. Raytheon and Machlett directed their representative on the creditors' committee to appeal decisions of the bankruptcy judge, such as the decisions to lease the plant to ELTEL and to sell the plant, equipment, and supplies to ELTEL (Memorial, p. 16). These appeals were undertaken but were uniformly unsuccessful.

Only after ELTEL completed its acquisition of ELSI's assets did the Prefect of Palermo reach his decision on the appeal of the requisition order (Memorial, p. 21). The decision was rendered 16 months after the appeal was filed and yet 40 days after ELTEL had completed its acquisition of ELSI's assets. The Prefect found that the requisition was illegal, ruling that it could not possibly have achieved its stated purposes. Specifically the Prefect ruled that: « the order is destitute of any juridical cause which may justify it or make it enforceable » (Memorial, Annex 76, p. 11).

The Mayor appealed the Prefect's Order to the Italian Council of State and the President of Italy. His appeal was dismissed on the ground that he lacked standing to appeal a decision of the Prefect, his administrative superior (Memorial, Annexes 77 and 78). The Prefect's ruling therefore stands as the final decision of Italian authorities that the requisition was unlawful.

The Prefect's delay in ruling on ELSI's appeal of the requisition was apparently unprecedented. As was mentioned in our discussion of the facts, in other cases in which the 1865 law had been invoked as a basis for requisition of industrial plants, the Prefect of the relevant jurisdiction quickly quashed the requisitions (Memorial, Annex 26, para. 10).

Based on the Prefect's decision, the trustee brought suit on behalf of ELSI's bankrupt estate on 16 June 1970 in the Court of Palermo against the Minister of the Interior of Italy and the Mayor of Palermo for damages to ELSI resulting from the illegal requisition (Memorial, Annex 78). The Trustee sought damages of 2.395 billion lire plus interest for the decrease in value

of ELSI's plant and electronic equipment during the requisition, and for ELSI's inability to dispose of the plant and equipment during the requisition period (Memorial, Annex 79).

On 2 February 1973, the Court of Palermo ruled that the Trustee was not entitled to compensation for the requisition (Memorial, Annex 80). On appeal, the Court of Appeals of Palermo found on 24 January 1974 that the Trustee was entitled to at least compensation from the Minister of the Interior for loss of use and possession of ELSI's plant and assets during the six-month requisition period. It therefore awarded, in effect, a « rental » payment of some 114 million lire (US$171,000), computed as half the annual rate of five per cent of the total value of the assets (Memorial, Annex 80). This decision was upheld on appeal by the Italian Supreme Court on 26 April 1975 (Memorial, Annex 82). The amount of the judgment was received by the trustee and, less costs and expenses, distributed to ELSI's creditors (Memorial, Annex 26). This decision, by the highest court in Italy, stands as the ultimate Italian judicial determination regarding the compensation due by the Respondent for its acts against ELSI.

When the bankruptcy trustee initially lost his suit in 1969 for compensation on the basis of the unlawful requisition before the Court of Palermo, Raytheon and Machlett considered whether they themselves, as shareholders of ELSI, could successfully sue the Respondent in Italian courts. Consequently, while the trustee was pursuing appeals of the lower court's decision, Raytheon sought the opinion of its Italian counsel, Giuseppe Bisconti, an eminent lawyer experienced in Italian litigation.

Mr. Bisconti's opinion, rendered in a letter dated 6 November 1971, states that the sole remedy under Italian law for appealing the requisition order was an appeal to the Prefect, which could be taken only by ELSI, and once ELSI was bankrupt, by the trustee. The shareholders could not take advantage of this remedy. Further, once the Prefect declared the requisition illegal, only the trustee — not ELSI or its shareholders — was capable of bringing suit against the Respondent for compensation.

Mr. Bisconti specifically considered suit based on Article 2043 of the Italian Civil Code and concluded that since under Italian law the requisition was directed against ELSI and not the shareholders, no remedy existed other than suit by the trustee. Mr. Bisconti concluded that Raytheon and Machlett had exhausted all available local remedies.

Yet Raytheon and Machlett wanted to be absolutely sure that no further remedies were available. Therefore Raytheon also sought the opinion of an esteemed Italian professor of law, Professor Antonio La Pergola, then professor of Law at the University of Bologna and subsequently President of the Italian Constitutional Court. He engaged in an extensive review of both Italian law and international law. In a lengthy written Opinion, Professor La Pergola agreed that the bankruptcy status of ELSI prevented any further actions by either ELSI or the shareholders. He asserted that the actions of the Respondent constituted a violation of the FCN Treaty and that an international claim could be brought without further pursuit of local remedies. The Respondent inaccurately asserts that professor La Pergola's Opinion only discusses the diplomatic protection of foreign shareholders in Italian corporations. In fact, professor La Pergola accepts the admissibility of an international claim after having established and explained that the FCN Treaty did not provide Raytheon recourse to any domestic Italian remedy.

The Respondent itself first entered into evidence the Bisconti and La Pergola opinions without any objection as to their contents. The two opinions appear attached to the Counter-Memorial at page 159 of Volume I of the Unnumbered Documents. They are also Annexes 3 and 4 to the Reply. Only in the Rejoinder does the Respondent object to the conclusions found in these two opinions.

These two opinions persuaded Raytheon and Machlett that their only further recourse was to ask for the assistance of the United States government in an effort to settle this matter. I would like to emphasize that in this case the United States waited a considerable amount of time for internal remedies to be pursued before taking up this claim and making appropriate representations to the Italian Ministry of Foreign Affairs. This is not a case where once the injury occurred the interested government immediately sought a government-to-government solution without any regard to the existence of local remedies.

Through all of these actions, the local remedies rule is satisfied. The Respondent, through resort to its highest courts, was provided the opportunity to redress its unlawful acts within the framework of its own legal system. Rather than provide such redress, the Respondent definitively indicated that it did not intend to provide further compensation to Raytheon and Machlett. Raytheon and Machlett made every reasonable effort to stop or to overturn the actions of the Respondent through the legal mechanisms made available in Italian courts to shareholders. To be sure that further remedies were not available, the opinion of Raytheon's regular Italian counsel and, in addition, the opinion of another Italian legal expert, were obtained. A complete record is now before this Court, since the Italian courts have passed upon the facts underlying this case. The internationally wrongful acts of the Respondent arising from the breach of its international treaty obligations are complete. Therefore the objection should be dismissed.

The Respondent is estopped from making this objection.

The second point on this issue is that the Respondent is estopped or precluded from raising the exhaustion of local remedies at this time. Throughout the diplomatic negotiations about this claim, the Respondent never stated that Raytheon and Machlett, as shareholders of the bankrupt ELSI, should pursue further remedies in Italian courts. Even after the United States had explicitly asserted that all remedies had been exhausted, the Respondent manifested no disagreement.

On 7 February 1974 the United States sent Diplomatic Note N. 51 to the Respondent. This Diplomatic Note appears as the first few pages of Volume 3 of the Counter-Memorial, which is also Volume 1 of the Respondent's Unnumbered Documents. In this Diplomatic Note, the United States advanced a claim which it said was:

> « based upon illegal actions and interferences by Italian authorities contrary to treaty provisions, Italian law, and international law which precluded an orderly liquidation under the laws of Italy of ELSI S.p.A., a wholly-owned Italian subsidiary of Raytheon Company and Machlett Laboratories, located in Palermo, Sicily » (Unnumbered Documents, p. 3).

The seventh paragraph of this Note states that:

> « It is clear from the legal opinions submitted with the claim that the appeal taken to the Prefect of Palermo was the only legal remedy available to Raytheon Company and Machlett Laboratories Incorporated to obtain redress ».

The legal opinions referred to in the Diplomatic Note were the legal opinions of Mr. Giuseppe Bisconti and Mr. Antonio La Pergola, to which I referred earlier. Their opinions were a part of the several volumes of materials sent to the Respondent to support the claim, which the Respondent has introduced as Volumes 3 through 5 of its Counter-Memorial. As you know, both these opinions extensively considered the ability of Raytheon and Machlett to pursue further remedies in Italian courts, and concluded that they had exhausted every remedy that was available to them.

What was the Respondent's reply to this extensively documented claim? For four years — *four* years — the Respondent failed to provide any written response to the claim. The United States made numerous demarches during this period and raised the matter in discussions both at the ambassadorial and staff levels, but the Respondent failed to provide any substantive response. Finally, at a meeting on 13 June 1978 an official of the Italian Ministry of Foreign Affairs orally rejected the United States claim and stated that a written response would be provided. An undated Aide-Mémoire was delivered to the United States Embassy on 3 August 1978, and has since been treated as the Italian Aide-Mémoire of 13 June 1978.

This was the first written communication from the Foreign Ministry to the United States in this case. In it the Respondent rejected the claim by stating that there was no damage to the shareholders. The Respondent, however, never — and I repeat *never* — questioned the United States unequivocal statement that the appeal to the Prefect was the only legal remedy available to Raytheon and Machlett. The Respondent simply stated in paragraph 1 that « The facts may be assumed as they have been expounded by the claimant » and in paragraph 3 that the claim

was groundless because « the records show that the order of seizure, even though unlawful, did not cause damage to the shareholders ». I must stress that absolutely no mention was made by the Respondent that additional local remedies were available to Raytheon and Machlett that they should pursue, despite the United States clear presentation of a claim based on the unavailability of further local remedies.

In none of the further letters and diplomatic notes between the Parties, right up until 1986 when the Parties reached agreement that the United States would institute these proceedings and submit this dispute to the Court, did the Respondent ever state that it believed that Raytheon and Machlett had failed to exhaust local remedies. In reply to the Respondent's Aide-Mémoire, the United States sent another Diplomatic Note, N. 194 of 18 April 1979. In this Note it is obvious that the United States sought to address all of the points made by the Italian Aide-Mémoire, which had restricted itself to the validity of the claim under Italian law.

When no response was received, the United States sent a letter dated 6 December 1979 from our Ambassador to the Respondent's Ministry of Foreign Affairs. At this point efforts were made by the United States to place the dispute before three international experts who would make a recommendation.

The Respondent, by letter of 18 April 1980, rejected this proposal on the basis that payment of compensation to ELSI was not justified under the law. Again, I must stress that the Respondent did not reject this effort at conciliation on the basis that Raytheon and Machlett had failed to exhaust local remedies. Mr. President, the 1978 Italian Aide-Mémoire, the 1979 US Diplomatic Note and letter, and the 1980 Italian letter were all filed with the Court under cover of our letter of 20 January 1989.

Further communications between the two governments related to finding an acceptable dispute settlement mechanism, which was achieved in 1986 when the Parties agreed that the United States should bring this case before the Court. I refer the Court to the statement issued by the United States on 7 October 1985 which reads as follows:

> « The two governments have come to the conclusion that they are unable to resolve the diplomatic claim of the United States on behalf of Raytheon Company and Machlett Laboratories, Inc., through diplomatic negotiation or binding arbitration. Therefore, the United States, in conformity with the US-Italian Treaty of Friendship, Commerce and Navigation of 1948 has determined to approach the International Court of Justice (ICJ) with a view to submitting that dispute to a special chamber as provided by the Court's Statute and Rules of Procedure, subject to mutually satisfactory resolution of implementing arrangements. Italy concurs in the opinion that this is an appropriate course of action » (*Department of State Bulletin*, January 1986, at p. 69).

The Respondent also asks in footnote 5 of p. 213 of the Rejoinder whether a State is under an obligation to recommend legal action against itself. The answer to that question, in the context of the facts of this case, is surely yes. When one government says to another government that local remedies have been exhausted, the second government should state that further local remedies do exist if that is what it really thinks.

The Respondent's failure to indicate to the United States that it believed such local remedies existed, precludes or estops the Respondent from raising such an objection now. Estoppel — a concept which goes by many names — is a general principle of international law often referred to by the maxim *nemo potest contra facta sua venire* (no one can contradict his own acts). Judge Lauterpacht defined estoppel in his treatise on *The Development of International Law by the International Court* (1962), at page 72, « as a general principle of law which, once more, is merely an affirmation of the moral duty to act in good faith ».

The principle of preclusion or estoppel is that a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction to its claims in the litigation. The primary foundation of this principle is the good faith that must prevail in international relations, since inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith, I refer the Court to the case concerning the *Temple of Preah Vihear, ICJ Reports 1962*, pp. 39 and 42, and judge Alfaro's concurring opinion.

I would also bring to the Court's attention the Commentary in the 1966 *International Law Commission Yearbook*, Volume II, page 239 applying this principle to treaty relations.

The Respondent has not demonstrated good faith in its diplomatic negotiations with the United States regarding this claim. When the United States asserted that local remedies had been exhausted, the Respondent simply replied, after a four-year delay, that it considered the claim to be juridically groundless from the internal point of view. When the United States challenged this view, once again the Respondent simply stated that there was no legal basis for paying compensation. Our two governments then spent years discussing the possibility of settling this dispute through the instrumentality of a third party. Finally, once the Parties agreed that the United States should bring this claim to the Court for adjudication, then, and only then, did the Respondent raise in its written pleading the argument that the United States application is inadmissible in that Raytheon and Machlett had not exhausted local remedies. Good faith would seem to require that the Respondent should have objected where, in all likelihood, its silence gave the appearance of consent (MacGibbon, « Estoppel in International Law », 7 *ICLQ*, 468 [1958]).

In a series of cases, this Court has consistently recognized the principle of estoppel or preclusion as a principle which prevents one State from acting inconsistently to the detriment of another. Indeed, in the *Award Made by the King of Spain on 23 December* 1906 case, this Court held that Nicaragua, in part due to its informed and deliberate conduct in relation to the arbitration proceedings, was precluded from contesting the validity of the Award, which was therefore valid and binding upon Nicaragua. The Court stated:

> « In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived » (Case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*, *ICJ Reports 1960*, pp. 192 and 213).

This Court also applied the doctrine in the *Fisheries case* when the United Kingdom objected to Norway's delimitation of its North Sea coastline. The Court first established the existence and elements of the Norwegian delimitation system and found « that this system was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States » (*Fisheries case*, *ICJ Reports 1951*, pp. 116 and 136-137). Further, while Great Britain was cognizant of the system, it made no objections. The Court noted that « in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations » (*ibid.* p. 139). Therefore, the Court stated:

> « The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom » (*Ibid.*).

More recently, in the case concerning the *Temple of Preah Vihear* (*ICJ Reports 1962*, p. 39), this Court found that Thailand's inconsistent actions over a period of fifty years precluded its claim that it had not accepted a map placing the temple in question in Cambodian territory. In his concurring opinion, judge Alfaro described at length the basis for the Court's decision. He wrote:

> « The acts or attitude of a State previous to and in relation with rights in dispute with another State may take the form of an express written agreement, declaration, representation or recognition, or else that of a conduct which implies consent to or agreement with a determined factual or juridical situation.
>
> A State may also be bound by a passive or negative attitude in respect of rights asserted by another State, which the former State, later on, claims to have. Passiveness in front of

given facts is the most general form of acquiescence or tacit consent. Failure of a State to assert its right when that right is openly challenged by another State can only mean abandonment to that right. Silence by a State in the presence of facts contrary or prejudicial to rights later on claimed by it before an international tribunal can only be interpreted as tacit recognition given prior to the litigation. This interpretation obtains especially in the case of a contractual relationship directly and exclusively affecting two States. Failure to protest in circumstances when protest is necessary according to the general practice of States in order to assert, to preserve or to safeguard a right does likewise signify acquiescence or tacit recognition: the State concerned must be held barred from claiming before an international tribunal the rights it failed to assert or to preserve when they were openly challenged by word or deed » (Case concerning the *Temple of Preah Vihear*, *ICJ Reports 1962*, pp. 39–40 [judge Alfaro concurring]).

Judge Alfaro also noted that inconsistency in conduct is especially inadmissible when the dispute arises from bilateral treaty relations (*ibid.* p. 42).

While these cases cover widely differing facts, there are certain common threads running through them. First, the act or conduct giving rise to the preclusion or estoppel can take many forms; it may consist of a representation, a declaration, or even silence. Second, the act must be clear and unambiguous. Third, the act must be voluntary, unconditional and authorized.

Let me now run through these threads as they apply to this case. First, what was the act? In response to the United States presentation of its claim, the Respondent remained silent for four years and then declared that the claim failed essentially because of the shareholder status of Raytheon and Machlett. Even though the United States specifically stated that local remedies were completed, the Respondent made no effort to challenge or to contradict this statement. Indeed, it even accepted it when the Respondent stated that « the facts may be assumed as they have been propounded by the claimant ». When the United States followed this up and pressed its claim further the Respondent again simply denied that there was a legal basis for the claim. Second, this act was clear and unambiguous. The diplomatic record in this case shows exactly what the Respondent said and did not say. Third, the Respondent acted without any external coercion to behave as it did.

There are other grounds on which the Respondent can be held accountable for its conduct, which relate to the principle of good faith in international relations, especially in the interaction and in the performance of treaty obligations. In the *Nuclear Tests cases* the Court found that France's unilateral statements had a binding character and stated that binding unilateral decisions made « the State ... thenceforth legally required to follow a course of conduct consistent with the declaration » (*Nuclear Tests cases* (*Australia v. France*), *ICJ Reports 1974*, pp. 253, 267). The Court also stated « a State may choose to take up a certain position in relation to a particular matter with the intention of being bound — the intention is to be ascertained by interpretation of the act » (*ibid.*). The Respondent's statements and actions over the past 14 years certainly warrant a reasonable interpretation that it intended to be bound by the results of the diplomatic negotiations that brought our governments before this Court.

The Respondent's assertion that the United States claim is juridically groundless may also be construed as an admission that local remedies have been exhausted. Professor Cheng writes:

> « [A]n admission does not peremptorily preclude a party from averring the truth. It has rather the effect of an *argumentum ad hominem*, which is directed at a person's sense of consistency, or what in logic is paradoxically called the ' principle of contradiction' » (CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, pp. 142, 144–149 (1953); see also LAUTERPACHT, *Private Law Sources and Analogies of International Law*, pp. 267–269, 277–279 [1927]).

Additional remedies identified by the Respondent are unavailable.

Having discussed first that local remedies were exhausted and, second, that the Respondent is precluded from asserting otherwise, I now reach my third point: whether further remedies

identified by the Respondent as available in Italian courts to Raytheon and Machlett in fact existed.

It is the Respondent that has asserted procedurally that the claim is not admissible because local remedies were not exhausted. It is for the Respondent therefore to show that additional effective remedies were available to Raytheon and Machlett, especially given the many steps taken by Raytheon and Machlett and the judicial decisions within the Italian legal system (FAWCETT, « *The Exhaustion of Local Remedies: Substance or Procedure?* », 31 *BYIL*, p. 452 (1954). As was stated in the *Ambatielos Arbitration* — a decision which the Respondent has repeatedly cited in its written pleadings —

> « In order to contend successfully that the international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used » (*Ambatielos Arbitration Award*, 12 *RIAA*, p. 119 (Award of 6 March 1956), p. 27.

Although the Respondent attempts to conjure up additional hypothetical remedies, there can be little doubt that such remedies either were not available to Raytheon and Machlett or that they would not have provided the remedies sought in this case. For instance, the remedies identified by the Respondent in footnote 15 of the Rejoinder are not remedies that would vindicate the shareholder rights or interests at issue in this case. As was stressed in the *Finnish Ships Arbitration* (2 *RIAA*, p. 1479 [1934]), the local remedies rule applies only to available effective remedies.

The Respondent's objection as to admissibility is based in part on its position that US nationals can sue in Italian courts based on the provisions of the FCN Treaty. This position is inconsistent with the Respondent's position when US nationals in fact do sue in Italian courts based on the FCN Treaty. Professor Fazzalari discussed how the Respondent argued in the *Talenti case* before the Court of Rome that the Treaty's provisions do not confer rights on US nationals any greater than those already existing under Italian law. Yet before this Court, the Respondent states that such remedies, or such rights, do exist (As requested, Mr. President, copies of the Respondent's final brief in the Court of Rome case, as was the ultimate decision of the court, have now been provided both to the Registry and to the Respondent. We have also provided a certified English translation of the quoted part of the final brief, and provided an English translation of the Court's decision which we will have certified as soon as possible).

The ultimate decision of the Court in the *Talenti case* was that the plaintiff had not specified sufficiently in his pleadings the unlawful acts of the Government of Italy. The important point, however, is that the Respondent took the position before its own local court that the Treaty provides no greater rights or remedies in Italian law than already existed. The United States would like US nationals to be able to sue in Italian courts to vindicate rights under the FCN Treaty, but in this case Raytheon and Machlett reasonably relied on the advice of distinguished Italian counsel, based on the consistent practice of Italian courts, that suits in Italian courts were not possible. This advice is apparently consistent with the Respondent's own pleadings in Italian courts.

Professor Fazzalari also discussed in some detail how Italian courts have treated suits based on treaties in general and on this FCN Treaty. Further Professor Fazzalari showed why other remedies alleged by the Respondent were not available to Raytheon and Machlett. Both the status of Raytheon and Machlett as shareholders and the successful pursuit by the bankruptcy trustee of the specific remedy available for the unlawful requisition precludes any further remedies.

For all these reasons, the United States requests the Court to dismiss the Respondent's objection as to the admissibility of the claim. This concludes my remarks. Thank you very much for your attention.

Mr. PRESIDENT: Thank you Mr. Murphy. I call upon Professor Gardner.

Professor GARDNER: Mr. President, distinguished Members of the Court, my presentation will demonstrate how the Respondent's actions in this case constitute violations of several

provisions of the 1948 Treaty of Friendship, Commerce and Navigation between the United States and Italy (the « Treaty »), and also its Protocol and Supplement. I will begin with a very brief description of the general purpose of the post World War II commercial treaties negotiated by the United States — commonly known as « FCN treaties » — which encourage and protect foreign investment on a mutual basis. I will then turn to a detailed discussion of the specific provisions of the 1948 Treaty, Protocol, and Supplement violated by the Respondent.

Post World War II FCN treaties.

Throughout the history of the United States, commercial treaties have played a significant role in the conduct of our foreign relations. The commercial treaties that characterized the first 100 years of the American Republic dealt primarily with navigation and customs, with the rights of individuals travelling abroad, and with diplomatic and consular relations.

In the period following the Second World War, the United States negotiated FCN treaties with 16 countries, including the Republic of China, Denmark, the Federal Republic of Germany, Iran, Ireland, Japan, the Netherlands, and — of course — Italy. This post-war period was notable as a time for the encouragement and protection of US investment interests abroad. The reason is obvious: the United States emerged after the war as the primary source of investment capital at a time when economic development around the world was badly needed. Conditions over the 40-year period since the end of World War II have changed significantly and the treaties anticipated that change. Accordingly, reciprocal protections were granted for foreign investment in the United States. So when I speak of protection for US nationals and corporations in Italy, by and large, the same protections are granted to Italian nationals and corporations in the United States.

Therefore the primary object of these new FCN treaties was to improve and strengthen the protection of foreign investment. Previous provisions relating to commerce and navigation were retained, but a new emphasis was placed on the establishment and protection of businesses. Since international investment in modern times is predominantly by corporate rather than individual enterprise, the new FCN treaties devised ways of providing adequately for the protection of companies, not only of individuals. In fact, as judge Sofaer mentioned on Monday, for the first time many of these protections were extended not just to the operations of the companies themselves in the foreign country, but also to the operations of their subsidiaries chartered under the laws of the foreign country.

Several new elements in these treaties show that they sought to protect the investment of capital. A provision was developed requiring that expropriations, should they occur, be implemented in a non-discriminatory manner. The usual provisions regarding protection and security of property were given more definite content by amplifying the concept of « just compensation ». To protect against injurious governmental harassment short of expropriation, a general injunction against « unreasonable or discriminatory » impairment of interests was developed. The general protection with respect to engaging in business activities was expanded to cover the right to organize, control, and manage corporations created or acquired. The provisions of these FCNs differ, but they all essentially provide protections for acquiring or establishing business enterprises, for operating those enterprises, and for receiving appropriate compensation when those enterprises are interfered with or taken without due process of law.

These treaties contain other provisions not directly related to investment, but all the provisions in these treaties are concerned with hospitality to and equality for the foreigner under the law. As was stated by Herman Walker Jr., the United States representative [from the Office of the Assistant Secretary of State for Economic Affairs] who negotiated several of those treaties:

> « In a real sense, therefore, the FCN treaty as a whole is an *investment* treaty; not a mosaic which merely contains discrete investment segments. It regards and treats investment as a process inextricably woven into the fabric of human affairs generally; and its premise is that investment is inadequately dealt with unless set in the total ' climate ' in which it is to exist ... ».

Now one significant element of these FCN treaties is the attention given to the standard of treatment foreign nationals and corporations should receive. The standard of treatment is not uniform for the Treaty as a whole. Rather, the standard of treatment varies for each article of the Treaty, and may even vary within the provisions of a particular article.

Many provisions contain a « national treatment » standard which calls for equality of treatment as between the alien and the citizen of the country. The national treatment standard allows an investor to carry on its chosen business under conditions of non–discrimination, and to enjoy the same legal opportunity to succeed and prosper as is allowed investors of the country.

Other provisions establish a « most–favoured–nation » standard of treatment which aims to achieve for the investor equal treatment with aliens of a different nationality. Still other provisions simply express a « non–contingent » standard, or « absolute » rules, which are self–contained standards that do not vary based on the treatment of others. Some make reference to international law as the point of reference. Finally, some provisions provide for reciprocity of treatment; the investor is entitled to the same treatment in the foreign country as that country's nationals receive in the investor's country.

The United States–Italy FCN Treaty generally.

Let me now turn to the background of the particular FCN Treaty at issue in this dispute.

The United States and Italy first entered into a Treaty of Commerce and Navigation in 1871, which was amended in 1913. This Treaty focused primarily on navigation and on the rights of nationals, and was terminated in 1937 pursuant to a protocol of denunciation signed at Rome on 15 December 1936. Commercial relations between Italy and the United States during the war era were governed by an exchange of notes of 16 December 1937. These notes were not renewed after the end of World War II.

Hence, the United States and Italy found themselves in the aftermath of World War II without any agreed instrument generally governing their commercial relations.

This prompted the United States and Italy to set about negotiating a comprehensive legal framework for the development of business and trade relations between the two countries. After several negotiating sessions in 1947, the United States and Italy agreed to the text of a treaty, and then, by the time the treaty was signed, to two protocols. The first protocol modifies certain treaty provisions and the second expands some of the provisions of the treaty with respect to foreign exchange.

The Treaty and Protocols, along with an exchange of notes, were signed by the Parties on 2 February 1948. After ratification by both Parties, the Treaty and Protocols entered into force on 26 July 1949. The Preamble of the Treaty states that the United States and the Italian Republic are « desirous of strengthening the bond of peace and the traditional ties of friendship between the two countries and of promoting closer intercourse between their respective territories... ». To this end, the Treaty contains numerous specific and interrelated provisions for the protection of foreign investors, reflecting a fundamental intention of the parties to provide a framework which would foster a favourable climate for investment.

Although the Treaty already provided extensive protection to foreign investors, the two countries negotiated and then signed, in 1951, a Supplement to the Treaty to give added protection to investors. There was some delay in the ratification of the Supplement by the Respondent, but the Supplement entered into force on 2 March 1961. Both the Protocols and the Supplement constitute integral parts of the Treaty and should be taken into account when interpreting the Treaty itself. For the purposes of this presentation, general references to the Treaty are meant to include its Protocols and Supplement.

The United States–Italy FCN Treaty consists of a preamble and 27 articles. The most important new matter in this Treaty — as I have indicated was true of all the post World War II FCN treaties — is the treatment of companies. Their status and activities are given new protections. Article I of the Treaty states that nationals of either Contracting Party shall be permitted to enter the territory of the other Party, and to exercise certain rights and privileges, such as engaging in commercial activities and owning buildings. Article II then moves beyond

the concept of the individual to that of «corporations» or companies, which then appears throughout the remainder of the Treaty. Paragraph 3 of Article II grants to companies the same rights as are granted to individuals in Article I. Consequently companies of one Party are encouraged to enter into the territories of the other Party for purposes of carrying on their businesses.

Navigation matters in this Treaty appear only toward the end of the Treaty. Diplomatic and consular rights are dropped completely and placed in separate conventions. Instead, the first ten articles are largely concerned with the establishment of nationals, corporations, and associations of each Party in the territory of the other Party, and their protection once they have been established.

Perhaps it was best stated in the Report of the Majority in the Italian Senate of 28 May 1949:

> « The first few articles, which are also the most important, guarantee for citizens of the other party, and for the juridical persons, commercial companies, organizations and associations established by them, the exercise of commercial and non–commercial activities in the broadest sense. Full rights are thus granted to carry on any activity; to acquire, own and manage movable and real property; to organize, direct and control companies; to hold office; to make and receive legacies; to protect patents and trademarks, etc., with complete freedom to take legal action, and to enjoy protection from undue interference, etc. » (Counter–Memorial, Annex 7, p. 7; see also US Memorial, Annex 56, p. 6, for an alternate translation).

This, then, was a primary focus of the US–Italy FCN Treaty, the second of its kind in the post–war era. The Treaty provided broad–based protections for the activities of foreign companies to encourage private investment and development.

The specific violations of the US–Italy FCN Treaty.

I come now to the specific violations of the Treaty by the Respondent. There are four specific acts of the Respondent and its agents and officials, which violated the Respondent's legal obligations under the Treaty, the Protocol, and the Supplement.

First, the Respondent violated its legal obligations when it unlawfully requisitioned the ELSI plant on 1 April 1968 which denied the ELSI stockholders their direct right to liquidate the ELSI assets in an orderly fashion. Second, the Respondent violated its obligations when it allowed ELSI workers to occupy the plant. Third, the Respondent violated its obligations when it unreasonably delayed ruling on the lawfulness of the requisition for 16 months untill immediately after the ELSI plant, equipment and work–in–process had all been acquired by ELTEL. Fourth and finally, the Respondent violated its obligations when it interfered with the ELSI bankruptcy proceedings, which allowed the Respondent to realize its previously expressed intention of acquiring ELSI for a price far less than its fair market value.

I will now explain how those four actions violated four primary obligations which the Respondent undertook in the Treaty, Protocol and Supplement. These obligations are:

(1) the obligation to protect US corporations from interference with management and control of their enterprises in Italy (Arts. III and VII of the Treaty and Art. I of the Supplement are the relevant provisions here);

(2) the obligation to protect US corporations from the impairment of their investment rights and interests (Art. I of the Supplement is the relevant provision here);

(3) the obligation to protect US corporations from the wrongful taking of their property and interests in property (Art. V, para. 2, of the Treaty and para. 1 of the Protocol are the relevant provisions here);

(4) the obligation to provide US corporations with the most constant protection and security for their investments (Art. V, para. 1, of the Treaty is the relevant provision here).

I will discuss the violation of each obligation in turn by reference to the ordinary meaning of the relevant Treaty provisions within the context of the Treaty as a whole, and in light of

its object and purpose. As I have noted, a primary object and purpose of this Treaty is the promotion and protection of foreign investment. Where helpful, I will refer to supplementary means of interpretation — especially the ratification history of this Treaty in both countries — for purposes of confirming the interpretation advanced by the United States. As the Chamber is well aware, this approach conforms to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which in this respect codifies established customary international law.

The Members of the Chamber may wish to refer to the text of the Treaty as I discuss these various provisions. The Treaty is appended as Attachment 1 to the Application to the Court, as Annex 1 to the Memorial, and as Annex 1 to the Counter-Memorial. It is important to note that the Treaty's provisions are interrelated and, in some instances, overlapping. Consequently certain acts of the Respondent violated several provisions of the Treaty simultaneously.

Interference with management and control.

– Let us begin with the first Treaty violation: interference with management and control. I shall be devoting a substantial part of my presentation to this central issue. The Respondent's actions clearly interfered with Raytheon and Machlett's management and control of their wholly-owned subsidiary, ELSI. The specific actions that caused this interference were, first and foremost, the illegal requisition of ELSI on 1 April 1968, followed by the inordinate delay in overturning the requisition in time to prevent ELSI's bankruptcy. These actions violated, singly and collectively, Articles III and VII of the Treaty, and Article I of the Supplement.

As has been established, by early 1968, ELSI's financial condition was such that ELSI's shareholders, Raytheon and Machlett, began seriously considering closing and liquidating ELSI to minimize their losses. Although ELSI had never been a profitable enterprise, it has developed a very good reputation and its assets could be excepted to realize much greater amounts in an orderly liquidation than in a bankruptcy process.

Under Italian law, as you have heard, shareholders are entitled to liquidate a company's assets voluntarily, by their own resolution. Indeed, many shareholders decide to do this — and are allowed to do this — every year in Italy. Under Article 17 of the By-Laws of ELSI, the right « of changing the legal nature of the company, of winding up voluntarily the company » was reserved exclusively to shareholders owning shares having an aggregate value of 90 per cent of the capital of ELSI.

Raytheon and Machlett owned 100 per cent of ELSI. Raytheon and Machlett had the right and the responsibility to exercise one of their most fundamental rights in managing and controlling ELSI — the right to liquidate ELSI. The Respondent, on p. 223 of the Rejoinder, accepts that Raytheon and Machlett had this right. On 28 March 1968, having decided that the orderly liquidation of ELSI's assets was prudent, Raytheon and Machlett decided to exercise this right, and voted in accordance with Italian law to proceed with the plan for an orderly liquidation.

As we have demonstrated, that orderly liquidation never occurred. Instead, the Respondent requisitioned ELSI's plant and equipment to prevent the orderly liquidation. This was not a mere « parenthesis » in the life of ELSI as the Respondent states on p. 114 of the Counter-Memorial.

It was a mortal blow that resulted in ELSI's bankruptcy. It was this illegal interference — and not the subsequent bankruptcy — that prevented Raytheon and Machlett from proceeding with their orderly liquidation of ELSI. By the terms of the requisition order, ELSI's plant could not be sold during the requisition period. None of ELSI's equipment could be sold during the requisition period. In-process inventories could not be converted to finished products. Neither ELSI's goods nor its other assets could be sold. ELSI's relationships with its suppliers and customers were cut off abruptly. The loss of ELSI's markets immediately decreased the ability to sell ELSI's product lines together or separately. ELSI was thus prevented from carrying out a management decision reached by its controlling shareholders to close down an unprofitable plant and to liquidate its assets to satisfy outstanding debts. This requisition, later to be declared unlawful by the Prefect of Palermo and recognized by the Respondent's own courts, was an

outright interference with Raytheon and Machlett management and control of ELSI in violation of the Treaty and its Supplement.

But this interference did not stop with the requisition order itself. The President of the Sicilian Region informed ELSI's Managing Director of a plan by the Respondent to use the requisition, not only to prevent the orderly liquidation, but to give the Respondent's State-owned conglomerate — *Istituto per la Ricostruzione Industriale* (IRI) — the opportunity to acquire ELSI's assets.

Raytheon and Machlett made every possible effort to get the requisition overturned. As was discussed earlier in our presentation, cables were sent to the Mayor and other Italian authorities. There was no response. On 9 April a formal petition was presented to the Mayor. Again there was no response. On 19 April the Mayor's order was appealed to the Prefect of Palermo. The Prefect then failed to issue his decision until 16 months later — *16 months later*— after the damage of the requisition had run its course. This too plainly and obviously was a direct interference with Raytheon and Machlett's right to manage and control ELSI.

Now the Respondent states that the requisition was only « temporary » (Rejoinder, p. 223), as though this makes it any less of an interference with the management and control of ELSI. The fact is that the requisition lasted six full months, a substantial time period when you are in the process of winding down a business. There was every reason to expect that at the end of the six-month period the requisition order would be extended, since on its face it provided for an extension and the Respondent was not doing anything with ELSI to improve the allegedly critical situation in Palermo. When President Carollo of Sicily informed Raytheon orally and in writing that the requisition would be prolonged indefinitely unless Raytheon abandoned its plan to wind up ELSI, it was clear that Raytheon and Machlett had completely lost their ability to manage and control ELSI, leaving them only the option of placing ELSI in bankruptcy.

Deprived of the income which the sale of ELSI's assets would have produced, ELSI was no longer able to meet its financial obligations when they came due. Through the ensuing bankruptcy process the Respondent's plan to take over ELSI through its own State-owned conglomerate was brought to fruition.

This interference with management and control violated Articles III and VII of the Treaty, as well as Article I of the Supplement. I will discuss now how the specific provisions of each of these Articles was violated in turn.

Mr. President, I note that the hour has been reached for the coffee break and perhaps it might be appropriate to take the break now so that we could discuss these three Articles without interruption.

The PRESIDENT: Very well. We are going to take the break now. Thank you very much.

The Court adjourned from 11.30 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. Mr. Gardner you can continue.

Mr. GARDNER: Thank you Mr. President. Before the coffee break I had indicated that I wished to discuss how the actions of the Respondent had violated four primary obligations of the FCN Treaty. The obligation to protect US corporations from interference with management and control is the first point I am discussing and wish to continue that before I go on to the remaining three points which have to do with, second, the obligation to protect US corporations from the impairment of their investment rights and interests, third, the obligation to protect US corporations from the wrongful taking of their property and interest in property, and finally, the obligation to protect US corporations with the most constant protection and security of their investments. And, Mr. President, I was on the point of explaining how the actions of the Respondent violated three specific provisions of the FCN Treaty, Articles III, VII and Article I of the Supplement. Let us begin with Article III of the Treaty if I may invite your attention to that Article.

Article III of the Treaty.

Article III of this Treaty, along with its counterparts in other FCN Treaties, is really the heart of the Treaty. This Article is central to the basic Treaty objective of providing rules of fair and equitable treatment in matters of the establishment of and operation of business enterprises in the territory of the other Party.

Article III, paragraph 1, provides corporations the right, on a most-favoured-nation basis, to organize and participate in corporations in the territory of the other Party through purchase, ownership, and sale of shares. Then the first sentence of Article III, paragraph 2, states:

> « The nationals, corporations and associations of either High Contracting Party *shall be permitted*, in conformity with the applicable laws and regulations within the territories of the other High Contracting Party, *to organize, control and manage corporations* and associations *of such other High Contracting Party for engaging in commercial, manufacturing*, processing, mining, educational, philanthropic, religious and scientific *activities* » (Emphasis added).

Thus this sentence confers upon corporations of both parties the right to organize, control, and manage such corporations in the territory of the other party for engaging in commercial and other activities in conformity with applicable laws and regulations.

The second sentence of paragraph 2 of Article III extends the protections of the first sentence. It provides that those corporations that have been so organized under the laws of the other party are themselves entitled to engage in the activities for which they were created or organized on terms no less favourable than those accorded by that party to corporations controlled by its own nationals.

Now two points are to be noted regarding Article III. First, contrary to assertions repeatedly made by the Respondent about the Treaty, it can be seen in this Article that the Treaty, by its terms, specifically protects the rights of corporations incorporated under the laws of Italy against actions by the Italian Government. The fact that ELSI — a wholly-owned subsidiary of US companies — was incorporated in Italy did not remove it from the protection of this Treaty. The Treaty is crystal clear on this. Where the meaning of a treaty provision is clear, such as here in Article III, there is no basis for postulating an interpretation that flatly contradicts the provision's clear and ordinary meaning.

The second point is that the first sentence of Article III, paragraph 2, expresses a treaty right that is not qualified by a national treatment or most-favoured-nation standard. Where this Treaty provides for most-favoured-nation or national treatment, it says so explicitly. Where, as here, those provisions are not included, nor any other standard such as reciprocity, then the provision is non-contingent — it is absolute.

The clause « in conformity with the applicable laws and regulations » simply requires that organization, management and control of the corporation be conducted in accordance with local regulations. The Respondent apparently would like to read into this sentence a national treatment standard, thereby allowing it to interfere in Raytheon and Machlett's management and control so long as it also interferes in the management and control of its own corporations. But the typical national treatment clause as it appears throughout this treaty is quite different; it uses the wording « upon treatment no less favourable than », as can be seen in the second sentence of Article III, paragraph 2.

Rather than impose a national treatment standard, the « in conformity » clause requires Raytheon and Machlett to comply with local regulations regarding organization, management and control of corporate entities. Therefore, the first sentence of Article III, paragraph 2, provided Raytheon and Machlett the right to control and manage ELSI, so long as ELSI was organized, managed, and controlled in accordance with local regulations. As was noted by Herman Walker — the man who played an important role in negotiating these FCN treaties for the United States — the « in conformity » clause

> « is framed in such a manner as to imply that it does not constitute a reservation detracting from the treaty right; and such phraseology has been omitted from subsequent treaties » (WALKER, 50 *AJIL*, pp. 373, 384, n. 53 [1956]).

At all times Raytheon and Machlett conducted their management and control of ELSI in conformity with Italian law, and therefore Article III provides a guarantee that they « shall be permitted » to organize and control ELSI. At no time prior to or during the issuance of the requisition did the Respondent assert that Raytheon and Machlett's management and control was not in conformity with Italian law. The requisition did not create a new regulation that modified the rights of Raytheon and Machlett to control and manage ELSI, since the requisition was found by the highest courts of the Respondent to be unlawful.

For the phrase « in conformity with applicable laws and regulations », to modify the rights of Raytheon and Machlett to control and manage ELSI, it is not enough for an official of the Respondent to assert that he is acting under imperative measures of Italian law, as the Respondent claims in its Rejoinder, p. 222. Especially where the Respondent's own courts find this is not the case. If mere reference to an Italian law satisfies the obligation of the Respondent under Article III, paragraph 2, well then clearly all acts of the Respondent eviscerating the rights of US corporations to manage and control could be excused in this way, thus rendering meaningless the protection of Article III, paragraph 2. Article III, paragraph 2, should not be so interpreted. Indeed it is manifestly unreasonable to so interpret Article III, paragraph 2, since Italy's highest court stated that the requisition was illegal.

The United States submits that the requisition of ELSI's plant and related assets constituted an interference with Raytheon and Machlett's management and control of ELSI. Since Raytheon and Machlett are incorporated in the United States they are, obviously, United States corporations for purposes of this Treaty. ELSI was an Italian corporation engaged in manufacturing and commerce. Raytheon and Machlett owned ELSI. The Respondent was thus obligated by Article III, paragraph 2, not to interfere with Raytheon and Machlett's management and control of ELSI. Yet that is exactly what the Respondent did. Its requisition was aimed specifically at preventing Raytheon and Machlett from taking steps to liquidate ELSI and minimize the losses.

The Respondent claims that the ability to manage and control ELSI remained because ELSI could appeal the requisition order and could be placed in bankruptcy; this claim is made in the Rejoinder, pp. 222–223, and 224–225. Well, this is a peculiar way of honouring the ability to control and manage a corporation. Having been subjected to an unlawful requisition, Raytheon and Machlett were given the so–called opportunity to challenge the requisition by a process that took 16 months to complete. As bills came due, Raytheon and Machlett were also given the so–called opportunity to place ELSI in bankruptcy. These so–called opportunities are far from providing Raytheon and Machlett with the ability to manage and control ELSI. That is because the Treaty protects the full measure of Raytheon and Machlett's ability to manage and control ELSI, including the ability to dissolve ELSI.

The Respondent's other arguments regarding Article III are also manifestly wrong. There can be no question that the Respondent's acts « affected control by the shareholders » over ELSI. While the requisition was technically directed against ELSI's plant and equipment, it was undertaken precisely to prevent ELSI's shareholders from exercising a fundamental right of management and control. It is pure fiction to state that only ELSI's plant and equipment were affected by the unlawful requisition.

As a final note, the Respondent asserts, on p. 221 of the Rejoinder, that the United States implicitly admits that rights under Article III, paragraph 1, and Article II, paragraph 2, sentence 2, were not violated. By not discussing in detail other provisions of Article III, or any other article, the United States does not admit anything. Raytheon and Machlett were not allowed to enjoy their rights and privileges with respect to their participation in ELSI. Nor was ELSI permitted to exercise the rights and privileges to which it was entitled. The United States, however, focused in its written pleadings on those provisions that most clearly relate to the unlawful actions of the Respondent.

Article I of the Supplement.

I now turn to Article I of the Supplement, and I invite the Court's attention to that provision because Article III of the Treaty is not the only Article providing protection against interference and control. Article I of the Supplement reinforces and supplements this protection.

The Supplement to the Treaty, which appears at Attachment 1 to the Application and as Annex 2 to both the Memorial and the Counter-Memorial, consists of nine articles that clarify or expand various provisions of the main Treaty. As stated in its Preamble, the purpose of the Supplement is to give « added encouragement to investments of one country in useful undertakings in the other country ... by amplification of the principles of equitable treatment » set forth in the Treaty itself. The Report to the President by the Italian Chamber of Deputies of 8 November 1958 leading to ratification of the Supplement states:

> « since ' foreign investment ' today means, above all, investment from the United States, we deemed it advisable to remove any obstacle to the inflow of private American capital by concluding a special agreement with the United States Government ... » (Counter-Memorial, Annex 9, p. 3).

Among the needs of American investors identified by the Chamber of Deputies was, significantly, the need for « protection of the rights of the American companies and individuals *in the companies* in which they invest » (Counter-Memorial, Annex 9, p. 4). The Rapporteur of the Italian Senate on 19 July 1960 also spoke of « improving more and more the system of United States capital in Italy and of Italian capital in the United States » (Memorial, Annex 4, pp. 1-2; Counter-Memorial, Annex 14, p. 1).

The most important Article in the Supplement for this case is obviously Article I, which contains additional protections for corporations. I would emphasize that these are *additional* protections, because this Article is intended to supplement, not replace, investment-oriented provisions in the text of Treaty, which themselves are already framed in very specific terms.

Article I states that corporations of one party « shall not be subjected to arbitrary or discriminatory measures ... (A) preventing their effective control and management of enterprises which they have been permitted to establish or acquire » in the territory of the other party. This provision complements and strengthens the guarantees of non-discriminatory treatment and freedom from interference and control which are contained in Article III of the Treaty. The terms of this provision — « shall not be subjected » — are imperative and unqualified. There is no reference to any national or most-favoured-nation standard of treatment, nor to domestic law.

As we have discussed, Raytheon and Machlett were permitted to acquire ELSI. Raytheon and Machlett then were subjected to measures by the Respondent that resulted in preventing effective control and managment of ELSI. Since these measures were both arbitrary and discriminatory, the Respondents's actions also violated Article I (*a*).

An arbitrary act is one that is characterized by the illegitimate exercise of power or an abuse of discretion. Thus, arbitrary actions include those which are not based on fair and adequate reasons — including sufficient legal justification — but rather arise from the unreasonable or capricious exercise of authority. In the light of the object and purpose of this Treaty, the prohibition on arbitrary measures constitutes a commitment of the respective governments not to injure the investments and related interests of foreign investors by the unreasonable or unfair exercise of government authority, authority exercised with no legitimate basis.

Did the requisition have a legitimate basis ? The Respondent claims that there was a public emergency and that the Mayor had the power to do what he did. Yet Raytheon and Machlett had given the Italian authorities every opportunity to take legitimate steps to prevent ELSI from closing, both by becoming a partner in ELSI and by extending the Mezzogiorno benefits to which ELSI was entitled. The Respondent declined to do so. Instead, the Respondent sought to force Raytheon and Machlett themselves to keep ELSI open by the sheer exercise of power. And when Raytheon and Machlett refused to do so, the Respondent declared a so-called « public emergency » and took over ELSI by sheer power. But after the requisition the Respondent did not keep the plant in operation. The requisition did not keep employees on salary. The requisition did not do anything to alleviate this so-called « emergency ». The Italian courts said it best when they found that the requisition was « destitute of any juridical cause which may justify it or make it enforceable ».

So, the requisition was precisely the sort of arbitrary action which the Supplement prohibits.

Its objects and effect were to prevent Raytheon and Machlett from protecting their investment. The requisition had no sufficient or legitimate basis. It was arbitrary.

Not only were the Respondent's actions arbitrary, they were discriminatory as well. The purpose of the requisition, as seen in the statements of the Respondents's own officials, was to buy time for IRI to take over the plant. This was discrimination in favour of a government-controlled enterprise; the kind of discrimination the Treaty protects against here, in Article I of the Supplement, and elsewhere, such as paragraph 2 of the Protocol.

Now the Respondent denies that discrimination has occurred because there is no evidence that the requisition was directed against Raytheon and Machlett because they were US companies. Yet the meaning of « discrimination » in international law goes much beyond simple discrimination againt aliens. On p. 226 of the Rejoinder the Respondent cites an article that describes how much more expansive the concept of « discrimination » truly is. The article is by McKean, entitled, « The Meaning of Discrimination in International and Municipal Law » (44 *British Year Book of International Law*, 177 [1970]). According to Professor McKean, discrimination includes arbitrary, invidious, unjustified or unfair distinctions. There is ample evidence in the words and deeds of the Respondent's officials that this requisition, right from the start, involved an unfair and unjustified effort to obtain ELSI, not to avert a social crisis but simply for use by IRI. IRI's interests were directly contrary to Raytheon and Machlett's and the Respondent intervened to advance its own commercial interests at the latter's expense. This was an unfair and unjustified way of treating ELSI. This was discriminatory as well as arbitrary. This violated Article I of the Supplement.

The correctness of the United States position is confirmed in the expansive interpretation placed on the Supplement by our governments when ratifying the Supplement. The Report by the Italian Chamber of Deputies to the President of 8 November 1958 stated:

> « The Agreement sets out, first of all, to ban *any* discriminatory measures that either country might adopt against the interests of citizens or legal persons of the other contracting State, *designed to restrain* their management or real control of the companies for which they have obtained the necessary permission for their purchase or establishment ... » (Counter-Memorial, Annex 9, p. 6).

The 1960 Report of the Italian Senate speaks expansively of « measures aimed at impeding management or control » (Counter-Memorial, Annex 13, p. 1). Now to argue, as the Respondent does, that the ability to appeal the requisition and to declare ELSI bankrupt satisfies the expansive protection obviously envisioned under the Supplement is manifestly unreasonable.

Article VII.

The last provision I will mention in regard to the management and control of ELSI is Article VII of the Treaty and I invite the Court's attention to that Article. Paragraph 1 of Article VII confers rights upon a company of either Contracting Party with respect to the acquiring, owning and disposing of immovable property or interests therein within the territory of the other Contracting Party. These rights include of course essential rights in the management and control of a company.

The protection in Article VII, paragraph 1, to acquire, own and dispose of immovable property or interests is governed by a complex standard of treatment, which is fully explained in our written pleadings. Prior to the Treaty there were many legal restrictions in the United States under the laws of the various states regarding the holding by aliens of both real and personal property. Consequently Article VII, paragraph 1, establishes a different standard of treatment for Italian companies operating in the United States than for US companies operating in Italy.

Paragraph 1, subsection (*a*) allows Italian companies to acquire, own and dispose of immovable property or interests in the United States only as permitted by the laws and regulations of the various States. Paragraph 1, subsection (*b*), in contrast, grants to a US company the right to acquire, own and dispose of immovable property or interests in Italy on the same

terms as are accorded Italian companies investing in the US company's State of incorporation. The Italian Republic is not obligated to accord to US companies a standard of treatment higher than the treatment accorded to Italian corporations in the home States of the US companies.

Most of the assets seized by the Mayor of Palermo and subsequently acquired by the Respondent consisted of ELSI's manufacturing plant and other immovable property. The refusal to allow Raytheon and Machlett to liquidate ELSI in April of 1968, along with the extensive delay in overturning the requisition, prevented the disposal of their interests in ELSI's immovable property. The United States Memorial (pp. 37–38) describes how similar treatment simply would not occur in the relevant jurisdictions of the United States without payment of compensation.

Now the Respondent attempts to narrow the scope of Article VII by asserting that it only protects the right to dispose of immovable property and absolute « rights » therein, which is more limited than « interests » therein. The Respondent's interpretation of the Article VII, which is based on the Italian text, simply doesn't make sense in either English or Italian. The Respondent would have us believe that the drafters essentially protected the right to dispose of such property and then protected as well « rights therein ».

But such an interpretation is internally inconsistent. Obviously the second phrase — « or interests therein » — is meant to do something more than the first phrase — « immovable property ». Indeed, the phrases « immovable property or interests therein » and *beni immobili o altri diritti reali* must provide expansive protection, otherwise the clause would simply say « immovable property » or *beni immobili*. It is also relevant that Article VII, paragraph 1 (*b*), was drafted and negotiated in English. The final version of Article VII, paragraph 1 (*b*), was presented to the Respondent in English by the United States during the Eleventh Negotiating Meeting on 17 October 1947. The draft was accepted by the Respondent at the Twelfth Negotiating Meeting on 22 October 1947, and only subsequently translated into Italian.

The Respondent asserts on p. 224 of the Rejoinder that Article VII only protects « absolute rights of a more limited nature ». The Respondent argues that the protection of Article VII should be limited to Raytheon and Machlett's ability to hold shares in ELSI, rather than to Raytheon and Machlett's interests in ELSI's plant and assets. This claim is made in the Rejoinder, p. 224. Yet the requisition obliterated an essential right attached to the shares, the right to decide to liquidate the immovable property of ELSI in such a way as to maximize the payment of ELSI's debts.

Now a major object of this Treaty was to encourage investments, including those through the acquisition of Italian companies. Article VII clearly protects the interests or rights that a shareholder has in the immovable property of the company. A narrow reading of Article VII, as suggested by the Respondent, defeats this important objective.

Members of the Court, that completes my discussion of the first main point about *Interference with Management and Control* and I turn now, with your permission, to the second treaty violation, *Impairment of Investment Rights and Interests.*

The second obligation violated by the Respondent was the obligation to protect Raytheon and Machlett's legally acquired investment rights and interests. By requisitioning ELSI's plant and assets and thereby preventing the orderly liquidation, the Respondent impaired Raytheon and Machlett's investment rights and interests, and therefore violated Article I (*b*) of the Supplement. The subsequent conduct of the Respondent in failing to overturn the requisition, until the Respondent could purchase ELSI at bargain prices, also impaired Raytheon and Machlett's investment rights.

Article I (*b*) of the Supplement provides broad protection against excessive government interference in business activities, or other activities not specifically covered by the Treaty. If I may invite your attention to Article I (*b*) of the Supplement, it states that corporations of one Party:

> « shall not be subjected to arbitrary or discriminatory measures within the territories of the other [Party] ... impairing their other legally acquired rights and interests in such

enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise ».

The language of this provision could not be written more broadly. It encompasses protection of all financial commitments made for the benefit of ELSI, whether in the form of direct capital contributions, loans, loan guarantees, or open accounts. It protects against any retroactive impairment of vested rights so long as the acquisition of such rights was lawful, whether such rights were protected by statute or by Treaty. Article I states a self–contained, absolute rule that incorporates neither a national treatment standard, nor a most–favoured–nation standard.

As I note earlier, in my discussion of the management and control of ELSI, the requisition of ELSI's assets was an arbitrary and discriminatory measure. In addition, the failure of the Prefect to rule for 16 months on the appeal of the Mayor's order was an arbitrary and discriminatory act, for it was well outside the bounds of the typical time it takes to make such a decision. In fact, the Prefect issued his decision 48 days after ELTEL purchased ELSI's assets at bargain prices, well beyond the time when the decision could do any good. In the interim the Respondent made statements during the bankruptcy that discouraged private bidders. The Respondent boycotted some of the bankruptcy auctions, instead working out special arrangements for a piecemeal takeover directly with the bankruptcy authorities.

These acts severely impaired Raytheon and Machlett's legally acquired rights and interests in ELSI by making the closing of ELSI much more costly to Raytheon and Machlett than it would have been had the Respondent not intervened.

First, Raytheon and Machlett lost their entire capital contribution. Second, Raytheon was required to pay some 5.8 billion lire — approximately 9.3 million dollars at that time — to bank creditors of ELSI whose loans to ELSI had been guaranteed by Raytheon. Had Raytheon and Machlett been permitted to proceed to an orderly liquidation, they would have realized sums out of which they could have paid these guaranteed bank creditors. Third, Raytheon recovered nothing on its own unsecured lines of credit to ELSI (known as its « open accounts »), which totalled more than 1.3 billion lire, or about 1.83 million dollars. The liquidation plan would have permitted settlement of ELSI's unguaranteed, unsecured loans for the full amount if full value of the assets had been obtained, but under the bankruptcy unsecured creditors received less than one per cent of the amounts claimed.

Raytheon and Machlett's direct capital contribution to ELSI, Raytheon's guarantees of loans made to ELSI by Italian banks, and Raytheon's open accounts with ELSI, are all investment rights and interests protected by Article I (*b*). Article I (*b*) protects anything provided by a US investor to an Italian corporation in which it invests « whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise ». Both open accounts and guarantee payments are investments within this broad definition. This interpretation is confirmed by the Report of the Italian Chamber of Deputies presented to the President on 8 November 1958. In that report the Supplement is read to ban measures designed to restrain rights or to prejudice the interests of these companies or investments in whatever form they may be made (Counter–Memorial, Annex 9, pp. 5–6).

Wrongful taking of interests in property.

The third obligation violated by the Respondent concerns the wrongful taking of interests in property without compensation. The requisition and the delay in overturning the requisition not only interfered with Raytheon and Machlett's management and control of ELSI, not only impaired Raytheon and Machlett's legally acquired interests in ELSI, but also resulted in what can only be described as the taking of the property. The failure to pay promptly just and effective compensation for this taking is a violation of Article V of the Treaty, and I invite the Court's attention to that Article.

Now Article V as a whole is designed to provide essential guarantees for the security of property interests and investments. Paragraph 2 provides that property of United States corporations within Italy « shall not be taken ... without due process of law and without the prompt

payment of just and effective compensation ». Corporations must be able to withdraw this compensation from the territory of the party without interference and without any transfer or remittance tax. This guarantee is, of course, a vital element in promoting investment since this century has seen an unfortunate number of expropriations with little or no compensation.

The obligation expressed in paragraph 2 is absolute. When read in conjunction with paragraph 1 of the Protocol, it unambiguously protects the investment interests of US shareholders in Italian companies whose property is taken by the Respondent. There is no clause linking the treatment of US shareholders to the treatment by the Respondent of its own nationals or the nationals of third countries.

The concept of a « taking » in international law encompasses, in addition to physical seizure, a wide variety of whole or partial sequestrations and other impairments of interests in or uses of property. Indeed the Respondent itself, on p. 228 of the Rejoinder, admits that a temporary requisition can constitute an indirect taking according to the « vast amount of literature on the subject in English ». The Respondent even cites with approval The Hague Academy lecture of Professor Rosalyn Higgins in which she states that « interference which significantly deprives the owner of the use of his property amounts to a taking of that property » (Rosalyn HIGGINS, « The Taking of Property by the State », *Recueil des Cours of The Hague Academy of International Law* (1982–III), p. 324.

It is extremely significant that paragraph 1 of the Protocol to the Treaty extends Article V, paragraph 2, of the Treaty to « interests held directly or indirectly » by corporations of either High Contracting Party « in property which is taken within the territories of the other High Contracting Party ». So, I invite the Court's particular attention to paragraph 1 of the Protocol. We submit that the purpose of the term « indirectly » is to ensure that the ultimate beneficial owner receives compensation pursuant to Article V, paragraph 2.

Thus Article V and the Protocol protect all rights in property upon which it is possible to place a monetary value, including not only rights of ownership but rights of possession, use and enjoyment. Thus the protection extends to leaseholds, easements, contracts, franchises and other tangible and intangible property rights. That the rights of stockholders are included is confirmed by the discussion before the Foreign Relations Committee of the US Senate of 30 April 1948 (Counter–Memorial, Annex 15, p. 25).

The term « prompt » in Article V does not necessarily mean instantaneous, but the Contracting Party must diligently carry out orderly and non–dilatory procedures to ensure correct compensation as soon as possible. The phrase « just and effective » calls for a rendering of full compensation (Counter–Memorial, Annex 16, p. 8), and its meaning has been built up through judicial decisions, arbitral awards, treaty practice, and the writings of publicists. As will be discussed later with regard to the compensation due from the Respondent, compensation should represent the true and proper worth of the property — generally to place the company in the same financial position as it was before the taking.

In addition, paragraph 3 of Article V provides protection directly to an enterprise located in one Contracting Party in which a corporation of the other Contracting Party has a « substantial interest ». The term « substantial interest » depends in large part upon the circumstances of a given case, but includes at a minimum whole or majority interests. This protection is governed by either a national treatment standard or a most–favoured–nation standard, whichever is more favourable. Again I note that here, contrary to assertions made by the Respondent, is another example of where the Treaty protects the rights of corporations incorporated under the laws of one Party against actions by that same Party.

In this case, Raytheon and Machlett were the ultimate beneficial owners of ELSI, ELSI's plant and ELSI's assets. Together, Raytheon and Machlett owned 100 per cent of ELSI. Beginning with the unlawful requisition, the Respondent embarked on a course of activity that resulted in the acquisition of the bulk of ELSI's assets for far less than market value. The Respondent stripped Raytheon and Machlett of their ability to dispose of ELSI's plant and assets promptly in an orderly fashion, took over the plant, delayed providing a decision on the legality of its actions, forced ELSI to go into bankruptcy since it could not pay its bills, and then obtained ELSI's assets in a piecemeal fashion during the bankruptcy process for far lower than they were worth at the time of seizure by the Respondent. While there are times

when a government must act to respond to a national emergency, the Respondent's own courts acknowledged that the requisition was not directed towards responding to or alleviating any such emergency.

The Respondent characterizes its conduct in this case as an ephemeral exercise of a police power (Rejoinder, pp. 228–229), an ephemeral exercise of a police power rather than the deprivation of fundamental property rights. Nothing could be further from the truth. While the Respondent may not have issued an expropriation decree, the Respondent's acts definitively ended Raytheon and Machlett's ability to use and dispose of assets which they owned through ELSI. This constitutes a taking of property giving rise to the obligation to provide compensation. The Respondent cites to an article on expropriation issues before the Iran/US Claims Tribunal (Rejoinder, p. 228, n. 43), but it ignores the salient conclusion of that same article, which reads:

> « Several things have been clearly established by the Tribunal. First, the developing nation's argument that there may be no duty to provide compensation was clearly rejected in these cases. When a taking has occurred, compensation will be required. The cases also fail to lend any credence to the argument that compensation should not be required because of American economic or political imperialism. The cases also establish that a taking can occur without a physical confiscation of a foreign investment. For the most part the economic impact on the investor will be the main consideration. A taking will be found when an investor is deprived of fundamental rights of ownership or his property has become useless » (SWANSON, « Iran–US Claims Tribunal: A Policy Analysis of the Expropriation Cases », 18 *Case Western Reserve, Journal of International Law*, pp. 307, 359–360 [1986]).

Now in the *ITT* v. *Islamic Republic of Iran case* cited by the Respondent, which is an award–on–agreed terms, Judge Aldrich in his concurring opinion stated that such fundamental rights included the right of a parent corporation to participate in the management of its 100 per cent–owned subsidiary, as well as the right to receive information on the financial affairs of that subsidiary (*ITT* v. *Iran*, Award N. 47–156–2 of 26 May 1983, at pp. 4–8, 2 *Iran/US Claims Tribunal* 348). Similar fundamental rights are at issue in this case.

Full compensation ordinarily entails payment of the fair market value of the property taken, measured at the time of the taking (Counter–Memorial, Annex 16, pp. 11–12) excluding any diminution in value caused by the government action against it, or the perceived risk thereof. The goal is to redress all of the injuries resulting from the taking. The Respondent did pay fair market value at the time of the taking of the property here.

ELSI, as of 1 April 1968, remained an ongoing enterprise. In addition to tangible assets as you have heard, it had significant intangible assets which placed the fair market value of the company appreciably above that of the physical assets standing alone. These intangible assets included established customer and supplier relations, developed and fully functioning methods and processes, access to all necessary patents, licenses, technical assistance, and other technology, an established name and reputation for quality products, and a continued relationship with Raytheon.

As will be discussed later regarding the compensation due by the Respondent, given the circumstances of ELSI, ELSI had a fair market value, as of 30 March 1968, of 17.05 billion lire. The Trustee in bankruptcy ultimately received, however, only slightly more than 6.3 billion lire for ELSI's assets. There can be no doubt that Raytheon and Machlett were denied payment of fair market value for the property that was effectively taken on 1 April 1968.

The Respondent argues that because the requisition on its face was for six months, it could not constitute a taking of property under Article V, paragraph 2, of the Treaty. But as I noted earlier the requisition order on its face contemplated extension beyond a six month period and President Carollo had stated that it would continue indefinitely to prevent orderly liquidation. Further, the Respondent's argument is based on a definition of a taking which is far narrower than is accepted in international law. Interference with property to such an extent that the property rights are rendered useless, that constitutes a taking.

The Respondent also attempts to complicate the very clear and ordinary meaning of Article V and the Protocol by finding what it perceives to be differences between the English and Italian texts. The Respondent asserts that the use of « *beni espropriati* » and « *esproprio dei beni* » in the Italian language version of Article V is narrower in meaning than a « *taking* » in property. Further the Respondent asserts that the use of « *diritti* » in the Italian language of the Protocol is narrower in meaning than « *interests* » as stated in the English version. After expressing concern that the Chamber might subordinate the Italian text to the English text, the Respondent then proceeds to try to subordinate its view of the English text to the Italian text.

But in fact, the Respondent sees differences in meanings where there are none. Certainly the Respondent did not view Article V or the Protocol as providing a narrow protection at the time the Treaty was ratified. The Report of the majority in the Italian Chamber of Deputies of 17 December 1948 states:

> « the *principle of expropriation* with guaranteed payment of ' fair compensation ' normally embodied in Treaties of establishment (cf. for example the Italo-Soviet Treaty of Trade and Navigation of 4 February 1924, Art. 6) has been *developed* to a considerable extent in the new Italy-United States Treaty » (Counter-Memorial, Annex 4, p. 12).

And the discussion before the Foreign Relations Committee of the US Senate of 30 April 1948 clearly shows that the passage of Article V was meant to protect broadly foreign private investment

> « in the face of the very obvious trend in many parts of the world toward nationalization of industry, extension of public control over certain industries and the participation of the State in industrial enterprises ... » (Counter-Memorial, Annex 15, p. 25).

The Respondent's effort to restrict the meaning of Article V simply does not comport with these statements. Indeed, the concern expressed by the minority in the Italian Senate, sent to the President on 28 May 1949 was in fact that Article V, paragraph 2, not only provides protection in accordance with the general principles of international law but might even provide greater protection (Counter-Memorial, Annex 7, p. 19).

But even if Article V is read as meaning that property « shall not be expropriated » (the Italian version) rather than that property « shall not be taken » (the English version) the result is the same. Both versions encompass the kind of interference with property which rendered Raytheon and Machlett's interests useless. Again, the fact that the requisition was for an extendable six-month period does not make this any less of an expropriation of interests in property, given the fact that the requisition drove ELSI into bankruptcy.

Likewise, even if the Protocol reads that Article V is extended to « rights held directly or indirectly » rather than « interests held directly or indirectly », the result again is the same. Both phrases were deigned to protect the investment of US corporations in Italy (and, of course, Italian corporations in the United States) through locally incorporated subsidiaries, that is, even if the investment was in an Italian (or US) corporation.

Now at this point, with your permission, I think I should say a few words about the *Barcelona Traction case* (case concerning the *Barcelona Traction, Light and Power Company, Limited, Judgment, Second Phase, ICJ Reports 1970*). I do this because Italy invokes the *Barcelona Traction case* in an attempt to show that international law does not protect the interests of shareholders in their corporations. Such a reading of *Barcelona Traction* is simply inappropriate for three reasons.

First, and foremost, the *Barcelona Traction case* was decided on the basis of customary rules of law, it did not involve the interpretation of a treaty between the parties. The court in Barcelona noted that the case would have been decided differently had the breach of a treaty provision been involved. It declared in paragraph 86 of its Judgment that:

> « the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty ... ».

Now the case before you is that very situation in which « the acts complained of involved the breach of an international obligation arising out of a treaty » where the Court in Barcelona declared that a different conclusion would be required.

Second, the *Barcelona Traction case* concerned what the Court called in paragraph 31 a « triangular relationship » where there was one State whose responsibility for the wrongful taking of property was being invoked (Spain) and two States (Belgium and Canada) which were potentially in a position to assert a right of diplomatic protection arising out of that taking. The question at issue there was the allocation of the right of diplomatic protection between those two potential claimant States. The Court held that in this « triangular » situation, as it put it, it was the State in which the injured corporation was incorporated (Canada) that had the *jus standi* to bring the claim, not the State of the shareholder's nationality (Belgium). The Court noted, however, that the situation would be entirely different in a bilateral situation where there was only one potential claimant State and one State whose responsibility was being invoked, which is the situation we have in the case before you today. As the Court said in *Barcelona Traction* in paragraph 92:

> « It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be », the Court continued, « it is certainly not applicable to the present case, since Spain is not the national State of *Barcelona Traction* » (*ICJ Reports 1970*, para. 32).

But in our case today, we have exactly that bilateral rather than « triangular » situation which the passage I have just cited envisaged: the State whose responsibility is being invoked, Italy, is the State of the company, ELSI, and the United States, the State of the shareholders, is the only State in a position to assert the claim on their behalf.

Now the third point about *Barcelona Traction* is this: even under its reasoning, it is clear that customary international law provides a remedy for foreign shareholders who are deprived of their direct rights. In paragraphs 46 and 47 of its Judgment, the Court declared that:

> « an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected ».

But then it adds significantly:

> « The situation is different if the act complained of is aimed at the direct rights of the shareholder as such ... Whenever one of his direct rights is infringed, the shareholder has an independent right of action » (*ICJ Reports 1970*, paras. 46–47).

Our case, as we have demonstrated, is that very situation where the direction rights of the shareholder have been infringed. Because of the sequestration by the Italian authorities the ELSI shareholders were deprived of their direct rights to manage and control ELSI and liquidate it in an orderly fashion. The other rights of Raytheon and Machlett we are dealing with today — the right not to have their investment rights and interests impaired, the right not to have their interests in property taken without just and effective compensation, and the right, which I will discuss in a moment, to have the security of their interests in property protected — those were also the direct rights of the ELSI shareholders.

The Treaty before us specifically provides protections for US nationals or companies in their ownership, management and control of Italian corporations as well as their investment rights and interests.

On its Rejoinder (pp. 227 and 230), the Respondent tries to plead its own internal laws to show that this is not an expropriation. Well clearly, the Respondent's internal laws cannot excuse violation of the opinion; it ignores the majority opinion which found that the US Government was responsible for all the damages that resulted from its intervention.

In this case, the Respondent chose to intervene in ELSI's fate; by failing to operate the plant, by failing to allow ELSI to meet its financial obligations, it forced ELSI into bankruptcy. The Respondent in this case — like the United States in the *Peewee Coal case* — should be held liable for *all* the losses that its actions caused.

Another case cited by the Respondent is *Youngston Sheet & Tube Co.* v. *Sawyer* (343 US 580 [1952]). Now the Respondent is correct that the United States Government seized most of the steel mills in the United States in 1952 purportedly to avert a nation-wide strike (Rejoinder p. 229). But what the Respondent does not point out is that the Supreme Court declared that the President's seizure of the mills was unlawful under both the United States Constitution and US statutory laws, and affirmed an injunction preventing the seizure from continuing. The mere assertion by the President of the United States that the seizure was necessary to avert a national emergency was found by the Supreme Court to be totally insufficient to sustain his action when that action had no legal basis.

In the present case, the Respondent's acts were not an ephemeral interference with property. This was not a valid exercise of a police power. The exercise of this power was found to be unlawful by the Respondent's own courts. No, this was an outright taking amounting to a wholesale expropriation of interests in property. Due process was not provided to Raytheon and Machlett. Just compensation was not provided to Raytheon and Machlett and the failure to do so constitutes a violation of Article V of the Treaty, as extended by paragraph 1 of the Protocol.

Mr. President, I have another ten minutes to my conclusion, would you permit me to finish it?

The PRESIDENT: Please go ahead.

Mr. GARDNER:

– *Failure to provide protection and security.*

I turn, finally, to the fourth Treaty violation, and that is the failure to provide protection and security to property. The final obligation violated by the Respondent — which should be evident from much of what I have already discussed — was the Respondent's obligation to provide constant protection and security for Raytheon and Machlett's property under Article V of the Treaty. This violation occurred when the Respondent allowed individuals to occupy ELSI's plant.

I invite the Court to look at Article V, paragraph 1, of the Treaty. That provides that United States corporations shall receive in Italy « the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law ». Article V, paragraph 3, provides that United States corporations shall receive in Italy no less protection and security than that accorded to Italian corporations and other foreign corporations.

Once the requisition occurred, the Respondent had an obligation to protect ELSI from its deleterious effects. The Respondent failed to do this in two ways: first, by failing to provide an adequate method of overturning the requisition, and second, by failing to prevent trespass on to ELSI's property.

The delay in ruling on the challenge to the requisition order until after ELSI's plant, equipment, and work-in-process had been acquired by ELTEL was a denial of the level of procedural justice accorded by international law. As was discussed in our presentation of the facts, normally the legality of the requisition would have been reviewed by the Prefect within a few days after the date the ruling was sought, which in the case of ELSI was on 19 April 1968. Indeed, a delay of 16 months was absolutely unprecedented in Italy (Memorial, Annex 26, para. 10). Had there been a speedy decision by the Prefect, the bankruptcy of ELSI declared on 7 May could have been avoided. Since the voluntary petition in bankruptcy was filed on 26 April 1968, had the requisition been rescinded within a few days, or even a couple of weeks, the bankruptcy could have been avoided entirely.

Now, the occupation of the plant, which resulted in its deterioriation and impeded the Trustee's efforts to dispose of it, occurred with the tacit approval of Government authorities. It discouraged potential buyers from inspecting ELSI's plant and assets, and generally chilled the process of selling ELSI for its full value. Therefore this action also constitued a denial of « constant protection and security », thereby violating Article V, paragraphs 1 and 3, of the Treaty regardless of whether physical damage actually occurred from the occupation.

I would like to conclude my remarks with one final point. The Respondent has from the outset of this dispute taken the position that because ELSI was incorporated in Italy, the actions taken by the Respondent that harmed ELSI are not covered by this Treaty. The Respondent states on p. 220 of its Rejoinder:

> « In view of its nationality, therefore, ELSI was not eligible for protection under the 1948 Treaty and 1951 Supplementary Agreement between Italy and the United States with reference to its activities in Italy and the events concerning it which occurred in Italy ».

The Respondent also, in both the Counter-Memorial (p. 106) and the Rejoinder (p. 220), cites *Sumitomo Shoji America, Inc.* v. *Avagliano* (457 US 176 [1982]), and the United States Government brief in that case for the proposition that FCN treaties do not protect companies incorporated in the host State.

With all due respect, this statement is completely inaccurate. As I have noted in citing various provisions of the Treaty, notably Article III, paragraph 2, second sentence, ELSI, as an enterprise acquired by United States corporations and in which they had a substantial interest, was itself protected by the Treaty. This was recognized in many of the legislative reports and debates concerning this Treaty. For instance, the Rapporteur in the Italian Chamber of Deputies, during the debate of 15 December 1959, urged passage of the Supplement to help protect United States investment, in its several forms, one of which is « setting up an industrial plant in Italy under the direct control of the American parent companies » (Counter-Memorial, Annex 11, p. 24). In a letter sent by the United States Secretary of Commerce to the Senate Foreign Relations Committee in May 1952, the Secretary stated:

> « As you may know, the Department of Commerce has recently been giving special attention to the problems of facilitating mutually profitable private United States investments in foreign countries. The conditions under which foreign enterprises may be established and operated in the various countries, the obligations which they must assume, and the rights of which they can feel assured, are outstanding among these problems. It is therefore particularly gratifying that the modernized commercial treaties contain explicit provisions on these questions. In our opinion, they go far toward creating — so far as governmental agreements can — that much desired favourable climate necessary to attract American capital and technology » (Counter-Memorial, Annex 16, p. 41).

Now, a word about this *Sumitomo case*. It is important that we be clear about it. It dealt with a particular article of the United States/Japan FCN Treaty — Article VIII, paragraph 1, which by its terms granted a right to foreign parent companies, not locally incorporated subsidiaries, to employ personnel of their choice. The United States Supreme Court held that Sumitomo America, that is, the locally incorporated subsidiary, could not invoke this provision to avoid compliance with the non-discrimination requirements of United States civil rights legislation. This decision was grounded on the fact that Article VIII, paragraph 1, of the United States/Japan FCN Treaty did not contain a particular protection for subsidiaries incorporated in the host State, just as its counterpart contained in Article I, paragraph 2 (*c*), of the United States/Italy FCN Treaty and Article II of the Supplement do not contain such protections either. But the absence of protection for a locally incorporated subsidiary in Article VII, paragraph 1, of the United States/Japan FCN Treaty does not say anything about the existence of such protections in other Articles of the United States/Japan Treaty, and certainly says nothing

about Articles of the United States/Italy FCN Treaty where such protections are explicitly provided.

But even if ELSI is not protected by the Treaty, we are not dealing here with a matter « internal » to Italy. The Treaty protects Raytheon and Machlett's rights and interests in ELSI, direct and indirect, that were infringed by the actions taken against ELSI. The Respondent would like to view this case through the prism of just Italian law, or through the prism of just customary international law — its repeated references to the *Barcelona Traction case* show this. But, distinguished Members of the Court, what we have in this case is a Treaty; a Treaty which by its terms gives greater protection to rights and interests of foreign investors than is accorded by Italian law or customary international law. And it is by the standard laid out in the Treaty, and only by that standard, that Italy's responsibility must be judged.

In conclusion, it is clear that the argument of the Respondent comes down to a « no–win » situation for foreign investors. According to the Respondent, the rights and interests of foreign investors in locally incorporated subsidiaries are not protected with respect to actions against those subsidiaries by the host government. And likewise, according to the Respondent, the rights and interests of the locally incorporated subsidiaries themselves are not protected. Well this is absurd. By this logic, whenever foreign investment is conducted through a locally incorporated subsidiary — which was the characteristic form of investment at the time this Treaty was concluded and of course remains so today — the foreign investor has virtually no protection under the Treaty. That interpretation is contrary to the ordinary meaning of the provisions of the Treaty. That interpretation is contrary to the object and purpose of the Treaty. That interpretation is unsupported in the legislative history of the ratification of the Treaty. That interpretation is unreasonable and must be rejected. Foreign investment in locally incorporated subsidiaries was protected in 1948 and it is protected today.

Mr. President, distinguished Members of the Court, in the two generations since the Second World War, the world community has benefited from enormous transnational flows of investment capital, technology, and management skills. These flows have been facilitated in part, in considerable part, by a network of international agreements of which the Treaty before you today is but one example. If the narrow interpretations asserted by the Respondent were to be accepted by this Court, the value of this network of treaties would be emasculated and the security of international investments, so important to the welfare of nations, would be gravely undermined. This is not just a matter of interest to the United States, for today, as judge Sofaer pointed out in his opening statement, many other countries have an interest in the protection of their investments abroad and many other countries have undertaken bilateral agreements similar to the Treaty we are construing today.

Mr. President, that completes my statement. I thank you for your attention.

Mr PRESIDENT: I thank you Professor Gardner. We will continue tomorrow at 10 o'clock to hear Mr. Ramish.

The Court rose at 13.10 p.m.

C 3/CR 89/4
Thursday 16 February 1989, at 10 a. m.

Mr. RAMISH, Mr. LAWRENCE, Mr. MATHESON.

The PRESIDENT: Please be seated. I understand that Mr. Ramish is going to take the floor. Mr. Ramish.

Mr. RAMISH: Mr. President, distinguished Members of the Court, it is with great honour that I appear before the Court on behalf of the United States. I will address the relief reques ted by the United States. First, I will deal with our request for a declaration by the Court that the Respondent, through its acts and omissions, violated the 1948 Treaty of Friendship, Commerce and Navigation, and the Supplement thereto. Then I will turn to the entitlement of the United States to reparation for those violations. I will explain the method we have proposed for calculating the appropriate level of reparation and, in that connection, will call upon Mr. Timothy Lawrence to provide expert testimony. And finally, I will address the issue of interest.

I. *Declaration by the court that the treaty was violated*

The United States respectfully requests that the Court adjudge and declare that the Respondent, through the acts and omissions presented to the Court, violated the various provisions of the 1948 FCN Treaty and Supplement that we have invoked in our Application and pleadings.

In the case concerning *United States Diplomatic and Consular Staff in Tehran*, this Court declared that Iran had violated its international obligations under certain treaties, which included the 1955 Treaty of Amity, Economic Relations and Consular Rights (*ICJ Reports 1980*, p. 44). That Treaty is similar to the Treaty before the Court in this case. As was stated in the *Factory at Chorzow case*, the purpose of such a declaration is to:

> « ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned » (*Interpretation of Judgments N. 7 and 8* (*Factory at Chorzow, 1927, PCIJ, Series A. N. 13*, p. 20).

II. *Entitlement of the United States to reparation*

In addition to a declaration by the Court, the United States is entitled to reparation for the violations of the 1948 FCN Treaty and Supplement committed by the Respondent. The priciple is firmly established in international law that a State that breaches its international obligations, whether treaty or otherwise, must make reparation to the State injured by its breach. The Respondent does not dispute this principle — at least tacitly, it acknowledges that if the Court finds that it breached the Treaty, it must make full reparation.

In this case, the reparation is to be measured by the injury suffered by Raytheon and Machlett. The Respondent does not seriously dispute this either; it merely observes that the injury to a State's nationals is not strictly identical with the injury to the State itself — a proposition no one contests. International arbitrators and commentators concur that, for convenience and equity, the damages to an injured national may be used as a guide in measuring reparation to an injured State (see US Memorial pp. 57–58). The financial losses to Raytheon and Machlett constitute the very kind of injury the Treaty was designed to protect against and are therefore an appropriate and equitable measure of reparation. The financial losses to Raytheon and Machlett are also the only convenient measure of reparation. And, indeed, the Respondent itself has not identified any other measure.

Compensation for All Injuries Flowing from the Respondent's Treaty Violations.

If, as the Parties agree, the Respondent must pay compensation for any treaty violation that occurred, of what must that compensation consist? The *Factory at Chorzow case* provides the classic answer, which has been reaffirmed consistently by international tribunals and commentators:

> « reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law » (*Factory at Chorzow, Merits, 1928, PCIJ, Series A, N. 17*, p. 47).

Once again, the Parties appear to be in agreement on the basic principle, if not on its application.

One must ask, therefore: what losses did Raytheon and Machlett suffer at the hands of the requisition and in the bankruptcy process? Their losses can be quantified as the overall difference between their position as it should have been absent the Respondent's wrongful intervention, and their actual position as a result of that intervention. Those losses may be said to fall into two basic categories.

First, there are general financial losses associated with the loss of a small anticipated return of investment in ELSI, the loss of open accounts, and the payment of loan guarantees. These losses reflect the difference between the financial position Raytheon and Machlett would have been in had they been permitted to proceed with the orderly liquidation and the position in which they actually found themselves following the sale of ELSI's assets by the trustee in bankruptcy. Second, there are legal and related expenses. These include the legal expenses forced on Raytheon by the bankruptcy and by the unfounded lawsuits of banks controlled by the Respondent, as well as the costs incurred by Raytheon in pursuing its claim against the Respondent.

I will deal with each of these items of loss separately, along with the Respondent's objections to them. I turn first to the general financial losses that flowed from the requisition and bankruptcy.

General Financial Losses from ELSI's Requisition and Forced Bankruptcy.

When a State deprives a foreign national of property or property rights in a business enterprise, compensation should be based on the full value of the business. This includes not only the value of tangible assets, but also the intangible values bound up with those assets — for example, goodwill, know-how and access to patents and technology. Typically, the value of the business takes into account the company's future earnings potential. However, as judge Sofaer stated at the outset of the proceedings, althought ELSI was to be sold as a live business, ELSI was not generating profits at the time of the requisition. Threfore, the United States is making no claim to future profits.

The starting point for the computation of damages to Raytheon and Machlett is to determine what amount ELSI, or its product lines if sold separately, would have brought if sold on the open market in the course of the orderly liquidation that was planned. The value of a business is market-based — it is sometimes referred to as the enterprises' « fair market value ». It represents the bargain a willing seller and a willing buyer would strike, absent Government coercion or the threat of adverse and illegal Government actions. As we have indicated, the orderly liquidation team had a comprehensive plan to sell ELSI or its product lines as business units. Thus, the orderly liquidation would have realized the market value of ELSI's physical assets as well as the substantial value of ELSI's intangible assets. The plan was to include, in the sales package, ELSI's customer and supplier contacts, technical assistance, patents, trademarks,

know-how, all backed by Raytheon's and Machlett's reputations as leaders in technology in the world's electronics industry.

Because the Respondent prevented the orderly liquidation, we cannot know precisely what this amount would have been. Therefore, we have to arrive at this value based on the best information available. This is justified as a matter of law, so long as the value is reasonable and based on evidence and not mere speculation. In this case, we propose to measure the value of ELSI by its book value.

The United States does not in general view book value as a fair measure of the value of an ongoing enterprise; the market value of the physical and intangible assets of a going electronics company may be many times the book value of the company. Book value is in fact widely rejected as a sufficient measure of the value of a business enterprise. International tribunals have refused to employ book value, because it fails to take adequate account of the elements of the business to be valued (see *The Government of the State of Kuwait and the American Independent Oil Company* (*AMINOIL*), XXI ILM pp. 976, 1038-1039 at para. 165 [1982]).

Commentators condemn book value for the same reason (see Clagett, « Just Compensation in International Law: The Issues before the Iran-US Claims Tribunal », in IV *The Valuation of Nationalized Property in International Law*, pp. 31, 49 (1987); McCosker, « Book Values in Nationalization Settlements », in II *The Valuation of Nationalized Property in International Law*, pp. 36, 51 (1973); Weigel & Weston, « Valuation upon the Deprivation of Foreign Enterprise: A Policy-Oriented Approach to the Problem of Compensation Under International Law », in I *The Valuation of Nationalized Property in International Law*, pp. 3, 16-17 [1972]).

We have decided to rely upon book value in this case, however, because reliance on market value as such is impracticable. International tribunals, while disfavouring book value, have relied upon it or upon similar proxies in some limited circumstances.

This has occurred, for exemple, in cases in which a claimant has proposed book value. In the *Sedco case* (*Sedco, Inc. and National Iranian Oil Company et al.*, 10 *Iran-US Claims Tribunal Reports*, pp. 180, 182 [27 March 1986]), the claimant sought its share of the liquidation value of a company. The award for certain of the company's assets took into account the calculations of book value that had been put forward by the claimant. It may be noted, too, that book value there was calculated on the basis of the « current cost accounting' method, which allows the upward adjustment of asset values to reflect inflation (15 *Iran-US Claims Tribunal Reports*, pp. 23, 103-115 [2 July 1987]).

A number of awards have used a claimant's original investment as a proxy for the fair market value of property, when other measures were inappropriate. This approach was adopted in the *Phelps Dodge case* (*Phelps Dodge Corp. and The Islamic Republic of Iran*, 10 *Iran-US Claims Tribunal Reports*, pp. 121, 132-133 [19 March 1986]), in which a market value based on projected earnings was considered too uncertain in the circumstances. It was also adopted in the *INA case* (*INA Corp. and The Government of the Islamic Republic of Iran*, 8 *Iran-US Claims Tribunal Reports*, pp. 373, 380 (13 August 1985)], in which the claimant's investment was recent and the cost of determining fair market value by other means would have been excessive. A similar approach was adopted in the *Benvenuti et Bonfant case* (*Benvenuti et Bonfant* v. *People's Republic of the Congo*, XXI ILM, pp. 740, 759-760 at paras. 4.73-4.79 [1982]).

In the particular circumstances of this case, book value is the only practicable and therefore the only fair measure. First, ELSI was not a profitable enterprise, so the traditional formulations that would recognize future profits are inapplicable. Second, book value is simply the closest approximation of the value of ELSI's plant and assets that we have. The events at issue occurred more than 20 years ago. After 20 years, it would be exceedingly difficult to reconstruct the value of ELSI's product lines, spread as they were over markets that vary by product line.

I emphasize once again that the adoption of a book value approach in this case is called for by special circumstances. Nothing in the approach of the United States to this case should be construed to suggest that the United States would view book value as necessarily proper in other cases, especially where the property to be valued is primarily of an income-generating kind.

In this case, book value represents a conservative approximation of the equivalent value of ELSI's assets on the open market. The book value on ELSI's financial statements as of 31

March 1968 was 17.05 billion lire. In aggregate, this value represents a fair accounting of ELSI's assets. It was prepared on a basis consistent with the balance sheet of 30 September 1967. That balance sheet had been audited by the internationally reknowned accounting firm of Coopers & Lybrand.

I will shortly be calling upon Timothy Lawrence, a member of Coopers & Lybrand, to provide expert testimony explaining how book value in this case fairly reflects the value of ELSI's assets. His testimony will refute statements by Dr. Mercadante and adopted by the Respondent in its written pleadings suggesting that book value did not fairly reflect ELSI's value. Before receiving his testimony, however, I would like to focus the attention of the Court on the figures that make concrete the losses suffered by Raytheon and Machlett. For that purpose, I would respectfully direct your attention to the chart appearing on p. 60 of the United States Memorial. (This is also set out on a transparency that we have provided for your convenience).

Column 1 charts the basis for the United States claim for reparation in this case. It starts from the conservative premise that ELSI's physical and intangible assets were worth at least book value. In fact, ELSI's assets may have recovered more than book value if the orderly liquidation had proceeded as planned. However, as I have indicated, for the purpose of this claim the United States bases its request for reparation on book value. Thus, the top line of the chart — Proceeds for Distribution — reflects ELSI's book value as of 31 March 1968, an amount totalling 17,053.5 million lire.

The other figures that appear in Column 1 are taken from Schedule E attached to the affidavit of Mr. Arthur Schene, formerly the Vice President–Controller of Raytheon. His affidavit appears as Annex 13 to our Memorial. As that schedule and the chart make clear, if ELSI had been liquidated as planned and if book value had been recovered, preferred creditors would have been paid first in the amount of 1,036.8 million lire. Secured creditors would also have been paid in full in the amount of 3,819.5 milion lire. Raytheon, in its capacity as unsecured creditor, would have been paid in full in the amount of 1,143.8 million lire. The reamaining unsecured creditors — these were the small creditors, the banks with unguaranteed loans, and the banks with guaranteed loans — would have been paid in full in the total amount of 10,292.4 million lire. Finally, 370 million lire would have been paid to cover the estimated administration and liquidation costs. Subtracting all of these payments from 17,053.5 million lire would have left Raytheon and Machlett with 391 million lire as a recovery of a very small portion of their investment after paying all creditors in full.

Now compare the results of the planned liquidation with what actually happened in bankruptcy. Column 3, which is on the far right side, depicts the distribution of the proceeds in bankruptcy. In this case, the figures are taken from Attachment B, Schedule A, to the affidavit of Mr. Dominic Nett, formerly the Controller of ELSI. His affidavit appears as Annex 30 to our Memorial. The proceeds realized in bankruptcy, and their distribution, are matters of record and are not disputed by the respondent.

Line one shows the proceeds actually recovered by the trustee in bankruptcy from the sale of ELSI's assets to the Respondent's IRI subsidiary, ELTEL — an amount of 6,373.8 million lire.

Preferred creditors who filed claims in bankruptcy were paid in the amount of 1,961.7 million lire, while the secured creditors who filed claims in bankruptcy were paid in the amount of 3,705.1 million lire (I would note that these figures are slightly different from those appearing on the chart; however, their total is the same). The administrative costs of the bankruptcy proceeding were paid in an amount of 673.6 million lire. This left only 33.4 million lire available for payment on a pro rata basis to unsecured creditors. As you can see, unsecured creditors recovered less than 1 per cent of their claims. Raytheon itself lost the full value of its own unsecured loans — the so–called « open accounts ». This explains the zero figure on the line marked « Unsecured Raytheon » as well as the figure of 1,143.8 million lire which appears on the line marked « Open Accounts ». In addition, because proceeds from the sale in bankruptcy were insufficient to pay the guaranteed creditors in full, Raytheon paid the guaranteed loans and interest out of its own pocket in the amount of 5,787.6 million lire. That figure is derived from Schedule II of Mr. Schene's affidavit (US Memorial, Annex 13).

Now, you may ask why Raytheon did not share in the pro rata payment to unsecured creditors. The answer is an economic one, but has no legal relevance. Because Raytheon determined that the expense of filing a claim in bankruptcy would likely be greater than any pay–out, Raytheon refrained from filing a claim in bankruptcy. This is immaterial to the claim, however. As you see from Column 1, Raytheon stood to recover the full value of its loans from the sale of ELSI's assets in an orderly liquidation.

Having lost the open accounts and having paid the guaranteed loans, Raytheon suffered actual losses totalling 6,931.4 million lire. Now contrast this with the small return of 391 million lire that Raytheon and Machlett would have received from sale at book value. The sum of these two figures is 7,322.4 million lire, which in dollars translates to US$11,739,200, and this represents the United States claim for reparation for this category of injury.

What we have proposed — book value — is in these circumstances a reasonable proxy, and the only fair measurement for ELSI's value. As Mr. Lawrence will explain in some detail — and I would emphasize this point here — the valuation that was ordered by the bankruptcy court, which we will refer to as the « Puglisi valuation », supports the recovery of at least book value when one takes into account the depreciation in the intervening period. The Puglisi valuation does not even purport to value the substantial intangible value of ELSI's business. Thus, in this case book value is a conservative — indeed understated — value of ELSI.

As Mr. Lawrence will also explain, the valuation submitted by a member of the IRI group, which we will refer to as the « Siemens valuation », does not reflect the fair value of ELSI's assets. Indeed, not even the Respondent has seriously argued that the Siemens valuation should be accepted by this Court. It values ELSI's assets many months after the requisition. It wholly fails to value ELSI's intangible assets. Moreover, it fails to value the X–ray, semi–conductor, complex components, and other products. Finally, that valuation cannot be treated as objective. It was prepared by ELTEL's parent, Siemens, as a basis for reducing further the minimum bids established by the bankruptcy judge.

This brings us to the only other value on the record in this case, the quick–sale value. In the course of planning the orderly liquidation, Raytheon management instructed the liquidation team to prepare a worst–case scenario of the sale of ELSI's assets. This worst–case scenario was to be used for internal Raytheon planning purposes only. It would allow Raytheon and Machlett to determine whether orderly liquidation in the worst of circumstances was indeed feasible. It was not meant to form a basis upon which ELSI's assets would be offered, nor did it attempt to predict the actual value that ELSI's assets would bring under the liquidation plan. Obviously, the incentive was to provide the parent — Raytheon — with as low a number as possible. Against this low number, the actual proceeds recovered on the open market for ELSI's physical and intangible assets could be treated as reflecting the successful efforts of ELSI personnel.

Consequently, the liquidation team prepared an estimated minimum value of ELSI's assets. This value has been referred to by both Parties throughout their written pleadings as the « quick–sale value ». To start, the liquidation team arbitrarily assigned a zero value to ELSI's intangible assets. Next, the liquidation team artificially reduced the value of each category of ELSI's assets to reflect what those assets might recover if put for quick–sale on the market. Using this approach, the liquidation team established a quick–sale value of 10,838.8 million lire.

The liquidation team had every reason to expect that ELSI's physical and intangible assets would have recovered far more than quick–sale value given the steps taken by Raytheon and Machlett to obtain the maximum possible value for ELSI's assets. As you will recall, these steps included the sale of ELSI as a business, the alternative offer of sale of ELSI's assets by product line, the aggressive marketing of ELSI's product lines to potential purchasers all over the world, and the commitment by Raytheon and Machlett to supply, as part of the package, patents, trademarks, technical assistance and know–how, in the context of their own established reputations in the electronics industry. Thus, the quick–sale value substantially undervalues what Raytheon and Machlett would have recovered for ELSI had the orderly liquidation been completed as planned.

The quick–sale value served as the basis of the request by the United States in its diplomatic claim in 1974. However, this was by no means a concession of the propriety of relying

on quick-sale value in litigation. The diplomatic claim was an attempt by the United States to achieve an amicable and rapid settlement of the dispute with a good friend and ally, Italy. Indeed, the diplomatic note of the United States dated 7 February 1974 made this clear, expressly stating that the United States was prepared to enter into negotiations with the Italian Government « with a view to concluding an expeditious and equitable settlement of the claim... ».

As a settlement effort, the diplomatic claim represents neither an expression of opinion that such artificial reduction of value corresponds to the international standard of compensation — it does not — nor an evaluation of the worth of the claim. Many factors go into such settlements — including the recognition that a small but certain recovery now may be more valuable for a commercial enterprise like Raytheon than a larger recovery that may come much later, if at all. The fact that a party may attempt to settle for a smallar sum early in the process by no means vitiates its right to full compensation later, when its offer of settlement has been rejected. This principle is illustrated clearly in the judicial system of the United States, in which the Federal Rules of Evidence preclude reference to the terms of settlement offers made during negotiations (see Federal Rules of Evidence, Rule 408).

Let us consider, however, for purposes of comparison, what would have been the result if the orderly liquidation had proceeded as planned and if Raytheon and Machlett had recovered only 10,838.8 million lire for ELSI. The numbers show that even if no more than quick-sale value had been recovered, Raytheon and Machlett would still have been significantly better off than with the sale in bankruptcy.

May I again respectfully invite you to turn your attention back to the chart. In this case the Middle Column is the relevant one, and the figures are taken from Schedule F to Mr. Schene's affidavit (US Memorial, Annex 13). The first line—Proceeds for Distribution—shows the quick-sale value of ELSI's assets: 10,838.8 million lire. This amount would have been sufficient to pay first all preferred creditors in the amount of 1,036.8 million lire — exactly as in Column 1. It would also have been sufficient to pay all secured creditors in full, in the amount of 3,819.5 million lire — again exactly as in Column 1. The amount would also have been sufficient to pay the administrative and liquidation costs of 370 million lire.

The remaining funds would have been used to pay the claims of the unsecured creditors. As I indicated earlier, there were four categories of unsecured creditors: the small creditors, banks with unguaranteed loans, banks with guaranteed loans, and Raytheon itself.

Raytheon and Machlett had planned to pay the small creditors' claims in full in the amount of 520.6 million lire. They had planned to settle the unguaranteed bank loans at 50 per cent of value, which would have been 2,030.2 million lire. This would have reduced the funds available to 3,061.7 million lire, which would then have been used to pay the banks with guaranteed loans and Raytheon itself on a pro rata basis at 44.66 per cent (I would note in this connection that this is the correct percentage, rather than the 42.89 per cent that appears in the heading of Schedule F.). The banks with guaranteed loans would have received 2,550.9 million lire. This amount, added to the amounts I have just mentioned for the small creditors and the banks with unguaranteed loans, results in the figure of 5,101.7 million lire, which is reflected in the chart. In the pro rata distribution, Raytheon would have received 510.8 million lire, and again this is the figure that is reflected in the chart.

The bottom portion of the chart shows the cost to Raytheon under this scenario. Raytheon would have had to pay the balance of the guaranteed bank loans and interest in the amount of 3,160.6 million lire. Raytheon would also have had to write off the uncollected balance of 633 million lire of their accounts receivable. This would have resulted in a cost to Raytheon of 3,793.6 million lire, or in dollar terms US$6,082,600. Compared with the actual bankruptcy proceeds, Raytheon would have been better off with a quick-sale liquidation by a margin of 3,137.8 million lire, or US$5,031,000.

No matter how one views the orderly liquidation, therefore, Raytheon and Machlett would have done significantly better in such a liquidation than they did as a result of the sale and distribution in bankruptcy. As Mr. Lawrence will discuss in more detail, however, book value is the most appropriate measure of ELSI's assets in this case. All other valuations should be rejected.

At this time I would like to call upon Mr. Lawrence to make a statement explaining his analysis and conclusions. Mr. Lawrence is a Fellow of the Institute of Chartered Accountants in England and Wales and is a partner in the United Kingdom firm of Coopers & Lybrand. He joined Coopers & Lybrand in 1960, became a partner in 1967 and a member of the firm's Governing Board in 1975. He is now vice-chairman of that Board.

Mr. Lawrence has been a member of the Parliamentary and Law Committee of the Institute of Chartered Accountants in England and Wales since 1980 and is a past member of that Institute's Technical and Technical Advisory Committees. He has served as chairman of the London Society of Chartered Accountants. Mr. Lawrence has considerable expertise in the field of valuation of securities and business assets. He has lectured widely in courses and seminars on valuation organized by the Institute of Chartered Accountants in England and Wales, and other organizations. He is the author of two audio-cassettes on the subject, published by the Institute as part of its training materials.

In 1974, Mr. Lawrence was appointed by Her Majesty's Secretary of State for Foreign and Commonwealth Affairs to act as an independent expert valuer and has been appointed as arbitrator or independent expert in valuation disputes, including those in the electronics industry. Mr. Lawrence has also appeared extensively as an expert witness in the United Kingdom courts and before arbitration tribunals, including the International Chamber of Commerce.

Mr. Lawrence has examined the pleadings in this case, including the documents attached by each Party. He will be providing his professional opinion as to the amount that would have been realized from ELSI's assets if Raytheon and Machlett had been permitted to proceed with an orderly liquidation. May I now request the Court to invite Mr. Lawrence to make his statement, please?

The PRESIDENT: Thank you. Would Mr. Lawrence please take the floor. Before giving your statement you have to make a solemn declaration, according to Article 64 of the Rules of Court. You have it provided with the text.

Mr. LAWRENCE: I solemnly declare upon my honour and conscience, that I will speak the truth, the whole truth and nothing buth the truth, and that my statement will be in accordance with my sincere belief.

1. Mr. President, distinguished Members of the Court, I have been asked to explain to the Court why I believe that if the management of ELSI had been permitted to proceed with a well-managed and orderly disposal of its assets and business they could have realized at least the amount of 17 billion lire, at which they were stated in the company's books.

2. In considering the relevance of book values to the issues in this case it is necessary to refer first to the way in which companies draw up their balance sheets, and to the conventions that are used. A balance sheet is a summary of the financial position of a company at the end of its accounting period and summarizes the assets owned by a business, the liabilities owed by it, and the shareholder's capital and reserves, the capital and reserves being equal to the amount by which the assets exceed the liabilities.

3. The amounts at which the various assets appear in the balance sheet are referred to as book value. These are the balances standing in the accounting records of the company and are not necessarily the same as their current market value. They are based on certain principles and practices that are widely accepted internationally. One of the fundamental accounting concepts is the concept of prudence, which requires that losses in value should be recognized as soon as they are anticipated but that profits should not be recognized until they are realized. The effect of this is that book values will generally be no greater than market value but may be substantially lower.

4. For example, fixed assets such as land and buildings are normally recorded at their cost to the company at the time of purchase. The value of the land will be retained at that amount but provision will be made for depreciation of buildings to reduce their book value year by year over their expected useful life. The market value of the property may rise substantially above book value but there is no accounting requirement to adjust the book value upwards, nor is adjustment normal practice. It should also be appreciated that intangible assets may have very

substantial values that are not reflected in the company's books. The benefit to a company of such matters as its technological know–how, its customer base and distribution channels, its market share, the training and technical competence of its work force, its relationships with its suppliers and its new product development and research activities represent a very great difference between a new company just starting out with none of these advantages and an established company which has them. These benefits have a substantial value that is not included in the company's accounts.

Mercadante.

5. Before proceeding to consider the question of value, Mr. President, I should refer first to certain criticisms of ELSI's accounting made in a report by Dr. Giuseppe Mercadante which is amongst the papers before the Court. It is clear that this report was prepared some six months after the ELSI plant had been requisitioned. During this period no accounting records were maintained and some of those that existed before may well have disappeared. It is extremely difficult for any accountant to establish from a retrospective examination of accounting records alone the exact nature and explanation of all of the company's transactions and the reasonableness of its expenditure.

Professional auditors have access to the accounting staff and to the management of the company when they carry out their audit and are able to obtain from them important supplementary information and explanations to aid their understanding and their ability to draw the right conclusions. Dr. Mercadante had no such access to those responsible for the accounting and management of ELSI and he makes it clear that this imposed substantial difficulties on his task.

6. Making full allowance for those difficulties, I found Dr. Mercadante's report confused and lacking in objectivity. He appears to have set out with a positive intention to discredit or blame ELSI's management and Raytheon and to treat every matter which he did not understand as evidence of wrong–doing on their part. Many of his conclusions are manifestly unjustified by the premises upon which they are based. In general, his report does not aid the determination of the value that should be placed on ELSI's assets and I will not dwell on it further.

Valuation.

7. Turning then to the question of values, the evidence of value before the Court includes three sources. First, there is the so–called « quick–sale » valuation, prepared by Raytheon personnel in March 1968. Next there is a valuation of some, but not all, of ELSI's fixed assets, made by Siemens in May 1969 and, finally, there are the book values of ELSI's assets.

Quick–Sale Value.

8. Dealing first with the quick–sale valuation, the affidavit of Mr. Joseph Scopelliti shows that the objective of the so–called « quick–sale » value was to prepare a very conservative plan reflecting the minimum prospects of recovery of values which Raytheon could be sure of, in order to ensure an orderly liquidation process. It concluded that the absolute minimum figure for the proceeds of the tangible assets was 10.8 billion lire, the recovery of which could be relied upon from a liquidation in any event. It took nothing into account for any amounts which might be received for intangible assets.

9. In my experience, it is quite normal, when consideration is being given to the liquidation or disposal of part of a group of companies for estimates to be prepared of the possible outcome. Such estimates are normally made on a very cautious or pessimistic basis. This is to ensure that the subsequent outcome should not be a disappointment to the management or to the creditors who may have agreed to a course of action based on such estimates. Where those making such estimates are also to be responsible for the realization of the assets, there is a natural tendency to underestimate the proceeds so that their subsequent efforts will appear successful.

10. In my view, the « quick–sale » valuation is only of limited direct relevance. It must be recognized that the intention of those preparing it was to establish an extremely conservative « worst case » figure which would have been considerably lower than the proceeds they expected to realize in an actual orderly disposal of ELSI's assets.

The Siemens Appraisal.

11. I turn next to the Siemens appraisal. I do not propose to discuss the Siemens appraisal in any detail but I would draw the attention of the Court to three points. The first is the fact that it did not extend to all the company's fixed assets but omitted assets of a substantial value. The second is the date of the report. It was produced shortly after the third auction which was held on 3 May 1969, over a year after the requisition of ELSI's assets. In the intervening time those assets must have deteriorated rapidly due, among other things, to lack of maintenance and possibly pilferage. My final observation is that it was produced by the majority shareholder in ELTEL which was seeking to buy ELSI's assets at the lowest possible price. It is clearly subjectively based and aimed at securing the bankruptcy court's consent to a substantial reduction of the auction price. While I would not criticize Siemens for seeking to obtain the best possible bargain, I do not believe that their document can be regarded as a fair and objective assessment of the situation when it was prepared and, still less, the situation as it existed in March 1968.

Book Values.

12. This brings me to the book values. With your permission, Mr. President, I would now like to present to the Court, in the form of a chart, a summary of the book values of ELSI at 31 March 1968. I believe that the Court has copies of the charts before it. The figures shown in this chart are derived from Attachment A to the affidavit of Mr. Dominic Nett, a document which is already before the Court as Annex 30 to the United States Memorial. I have produced the charts solely with a view to bringing together the key figures in a way that I hope the Court will find convenient.

13. I understand that the balance sheet at 31 March 1968 was drawn up by those responsible within ELSI using the same accounting principles and practices as had been adopted for the purpose of the audited balance sheet at 30 September 1967.

14. That balance sheet was audited by the Milan office of Coopers & Lybrand who, with minor exceptions to which reference was made in their audit report, reported that the balance sheet was drawn up in accordance with generally accepted accounting principles.

15. I propose to refer in turn to each of the main tangible assets in the 1968 balance sheet and to explain to what extent it can be regarded as a reasonable reflection of the amount realizable in the conditions applicable to a well–planned and successfully executed liquidation. I shall then refer to the values that might have been obtained for the intangible assets of the business.

16. The balance sheet is expressed in millions of Italian lire and all the figures that I shall refer to in what I have to say are also expressed in millions of Italian lire.

FIXED ASSETS

17. I turn first to the fixed assets of the company.

18. The Court will see that the total book value of 5,764.4 was made up of 5,300.8 in respect of actual assets and 463.6 which is described as « taxed reserve ». This latter amount represented expenditure which was disallowed by the Italian Revenue Authorities for tax purposes. The company had reinstated it in its books in order that they should meet the Italian legal requirement that the books should be kept in line with the tax position. It seems clear that the taxed reserve had no definite separate realizable value and I have therefore excluded it and have used the lower figure of 5,300.8 as my starting point.

19. During the course of the bankruptcy proceedings of ELSI, the Court appointed Professor Mario Puglisi of the University of Palermo as a technical consultant for the purpose of appraising the value of the fixed assets of ELSI, with a view to determining the base price to be set for the sale of its assets by auction. Professor Puglisi carried out his appraisal towards the end of September 1968, some six months after the plant had been requisitioned by the Government of Italy. His report describes his approach to the appraisal exercise as follows:

> « this report ... is designed to determine the current market value of ELSI as a whole, if sold to a third party which intends to operate the facility without substantially changing the nature of the products or mode of manufacture. All valuation criteria applied must therefore be seen in the light of this concept ». *Counter-Memorial,* Unnumbered, Documents, Exhibits, III-41.

It appears from the Puglisi appraisal that he had access to a physical inventory of fixed assets and was able to consider item by item the value of each of the main assets in this category. His appraisal took into account the effects of obsolescence and the physical condition of the assets. His approach appears to me to be entirely consistent with the assumption that the sale of the assets should be achieved as part of a well-planned orderly disposal in which all the assets were disposed of together to a single purchaser or as groups of assets disposed as a series of packages each comprising all the assets associated with a particular product or product group.

21. It is my opinion that the Puglisi appraisal, which directly addressed the question of realizable market values (albeit at a date some six months after the requisition of ELSI's property) provides an appropriate basis for estimating the realizable value of its fixed assets.

22. The Puglisi appraisal concluded that the aggregate current value of ELSI's land and buildings at Palermo was 1,716.9 which is in excess of the book value of 962.5. 17,169.9 was the value at the end of September 1968. The value at 31 March 1968 may have been somewhat higher, having regard to the deterioration of the fabric of the buildings following their requisition when, I understand, the company's normally high maintenance standards lapsed.

23. The assets covered by the heading « Machinery and Equipment » in my summary of fixed assets also include furniture, fixtures and automobiles and had a book value of 4,154.2. Not all of the assets included against this balance sheet heading were considered by Professor Puglisi. He placed a value on those that were included in his appraisal of 2,843.6. This may be a somewhat conservative assessment since no less than 3,691 had been expended on new machinery and equipment within the past five years. His aggregate valuation of the land, buildings and other fixed assets was 4,560.5.

24. However, he did not consider any of the assets at the Rome and Milan premises of ELSI nor the automobiles. Something clearly needs to be added to the amount of his appraisal in respect of those assets.

25. It must also be kept in mind that Professor Puglisi was considering the value at a time when the plant had been idle for six months, during which no maintenance and repair work had been carried out. Also, of course, all of the assets were six months older. These factors could, in my view, easily account for a difference of some 10 per cent between the value at 31 March 1968 and the value at the time of the Puglisi appraisal.

26. I would also mention that it is unclear whether the inventory of fixed assets which Professor Puglisi used for the purpose of his appraisal included the items of construction-in-process which are shown in the books at 184.1. If not, some further addition should be made for these.

27. If allowance is made for the fall in the value between 31 March 1968 and the time of the Puglisi valuation, for the automobiles, for the assets in Rome and Milan and for assets that may have been omitted from the inventory, the apparent gap between the amount of the Puglisi valuation of 4,560.5, and the book value of 5,300.8 can reasonably be accounted for.

28. I conclude that, to the extent of 5,300.8 the book value at 31 March 1968 is substantially corroborated by the Puglisi valuation and that it can properly be regarded as a fair indication of the amount that would have been recovered in a well-planned orderly disposal.

29. In considering the reasonableness of the belief that the amount of 5,300.8 was fully realizable, I would invite the Court to bear in mind that ELSI had incurred substantial expenditure in the years immediately preceding 31 March 1968 in upgrading its plant and providing the equipment needed for the manufacture of sophisticated electronic equipment. No less than 4,175.3 had been expended on property, plant and equipment during the five years ended 30 September 1967. This supports the view that much of ELSI's fixed assets comprise modern up-to-date plant.

30. With allowance made for the effects of inflation and for Professor Puglisi's finding that the land and buildings were worth some 750 more than their book value, the prospects of realization of the total book value appear to me to have been very good.

Inventories

31. The next main group of assets is the inventory of materials and work-in-process which had a book value at 31 March 1968 of 6,534.6.

32. This amount included a taxed reserve, similar to that which I referred to in respect of fixed assets, of 1,015 and this figure should be eliminated as having no recoverable value, so reducing the book value to 5,519.6.

33. The accounting principles upon which balance sheets are drawn up require that a company's inventory of materials and work-in-process should be valued at cost, unless their realizable value is lower than cost, in which case the book value is required to be reduced to net realizable value.

34. A reduction amounting to 294.4 was made at 30 September 1967 but the corresponding adjustment may not have been made in arriving at the book value at 31 March 1968.

35. I have therefore assumed that a similar provision would have been required at that date and have reduced the book value further to 5,225.2.

36. The book value of the inventory, under generally accepted accounting principles, must be equal to or lower than its realizable value on a going concern basis. I believe that the book value as adjusted of 5,225.2 would have been recoverable in the context of a well-planned and orderly disposal, in which the inventory associated with each product group was disposed of as part of a package together with the associated plant and machinery, to a purchaser who would also obtain the benefit of the established business connections with customers and suppliers.

Accounts Receivable

37. I turn next to ELSI's accounts receivable, which appear in the balance sheet at a total of 2,412.4. This amount is made up as shown in this chart.

38. It will be seen that at 31 March 1968 the amount receivable from ELSI's customers was 2,150.8. Against this a reserve of 80.6 had been made for bad debts. Mr. John Clare has testified that a thorough purge of accounts receivable had been carried out in 1967. The provision of 80.6 established at that date was arrived at after seeking positive confirmation from all customers of amounts that they owed, thoroughly investigating accounts that were not agreed and making appropriate adjustments. Mr. Clare has also told the Court that Raytheon would have been prepared to guarantee these accounts receivable at their full face value. On the basis of this information, I conclude that the net book value of 2,070.2 fairly represents the realizable value of these assets.

39. The amount of 106.0 was shown in the accounts as owing to ELSI by its two subsidiary companies in Zurich and Stockholm. These balances appear to have been regarded as recoverable at 30 September 1967 notwithstanding the fact that the subsidiaries had made losses which had the effect of reducing the value of ELSI's investment in them. I can see no reason why these

balances should not have been regarded as recoverable in full in the context of an orderly liquidation.

40. I have reviewed the items making up the other accounts receivable totalling 236.2, which appear, for the most part, to be likely to have proved fully recoverable but include some small items for which some adjustment might be appropriate. I have, therefore, rounded this figure down to 200 by deducting an allowance of 36.2 for the amounts that might prove irrecoverable, such as certain pre–paid expenses.

41. I conclude that the book value of accounts receivable, of 2,412.4, would have been realizable to the extent of 2,376.2.

OTHER ASSETS

42. Other assets included in the balance sheet of 31 March 1968 totalled 621. This included a number of smaller balances, cash and bank balances, notes receivable, investments in subsidiary companies, accrued receivables and pre–payments as shown in this chart.

43. I have carefully considered the items making up each of these headings and have identified some minor respects in which adjustment appears appropriate in considering what might have been realizable.

44. It appears that the two subsidiaries would probably not have realized any significant amount and I have therefore eliminated their value. I have also deducted an allowance of 71.3 for certain other minor amounts included within these headings that might not prove recoverable, including part of a claim for a price adjustment on a sale contract relating to klystrons.

45. I conclude that these assets could be regarded as having a value of the order of 430.5.

46. In addition to these amounts appearing in the books, ELSI's outstanding claims to grants under the *Mezzogiorno* legislation were expected to be met to the extent of 300. Nothing was included in the balance sheet, pending agreement with the administering authority, but it seems reasonable to bring this amount into consideration as a further recoverable asset, and I have therefore increased the figure of 430 to 730.5.

INTANGIBLE ASSETS

47. Turning back to the chart showing the summary of the book values of ELSI's assets at 31 March 1968, the final category that has to be considered is the intangible assets of the company. As the Court may appreciate, the value of a company's intangible assets is not normally fully reflected in its balance sheet. Some book value may be attributed to certain items of an intangible character, the cost of which is being carried forward into future accounting periods, but these do not tell the whole story. ELSI's balance sheet included certain headings which contained items of this sort, such as studies in process, deferred costs of production, improvements and reorganization. Such items totalled 1,721.1. While no separable value could be attached to these items there was, in my opinion, a real prospect that intangible assets would have realized a substantial value in connection with the sale of ELSI's businesses.

48. The purchaser of a business does not acquire simply its land, buildings, machinery and equipment, its inventory of stores and materials and the right to collect its debts. It acquires also the whole of the benefit of its continuing business connections and of the cost and management effort devoted to establishing and developing the business. This is sometimes referred to as the goodwill of the business. It is my opinion that there was a good prospect that a purchaser of any or all of those businesses would have been prepared to pay a substantial premium over the value of the tangible assets for the benefit of this goodwill, particularly if there was competition between more than one prospective purchaser to acquire the business.

49. The particular features of ELSI's business connections that should have commanded a substantial premium for goodwill were the following.

50. It had a strong technical base with great experience of the production methods required for the manufacture of complex electronic products, such as microwave tubes for the Hawk missile programme.

51. It had the benefit of well–established sources of supply.

52. It had a well–established customer base and a substantial market share in certain markets, such as the Italian cathode ray tube market of which, as Mr. Clare has testified, ELSI held some 20 per cent.

53. It had a well–trained and technically competent workforce.

54. It had a strong technology base, which had been strengthened over the recent past to form the basis for new product development.

55. It had close connections with Raytheon, with that company's great technical strength and the prospect of future access to the results of Raytheon's research and development activity. Its existing technology included microwave ovens, for which there was an enormous potential market, as well as new and improved Raytheon defence systems being introduced for production in Europe.

56. And finally, there was the possibility that the acquiring company might obtain the benefit of past losses against its future tax liabilities.

57. In my opinion there was a good prospect that the benefit of these intangible assets would have produced a premium of at least 3,500 above the values attributable to the tangible assets. And this would have had the effect of bringing the total amount realizable to a figure somewhat higher than the total book value appearing in ELSI's 1968 balance sheet.

CONCLUSION

58. By way of summary, I would present to the Court this chart, which sets out a comparison of the book values shown in the chart produced earlier with the realizable values that I have arrived at in considering each separate category in turn: out of the book value 5,764.4 for the fixed assets, I concluded with the support of the Puglisi appraisal that some 5,300.8 would be recoverable, but that the amount described as taxed reserve should be eliminated.

59. Out of the book value of 6,534.6 for the inventories of materials and work–in–process, I concluded that the taxed reserve of 1,015 should be eliminated and that a further provision should be made to reduce the realizable value to 5,225.2.

60. The accounts receivable appeared to require only very minor adjustment to eliminate certain irrecoverable accruals and I reduced those from 2,412.4 to 2,376.2. The other assets of 621 have been adjusted to eliminate the investments in the subsidiary companies and some further small irrecoverable amounts that have been increased by an estimated amount of 300 which was expected to be recoverable from the authorities administering the Mezzogiorno legislation.

61. Finally, in place of certain balance sheet categories of an intangible nature totalling 1,721.1, I have concluded that a premium above the value attributable to the tangible assets could reasonably have been envisaged of the order of 3,500. This would bring the total prospective recovery on a well planned properly conducted liquidation to a figure marginally higher from the book value which the United States of America claims is the minimum amount that might have been realized if the management of ELSI had been permitted to carry out an orderly disposal of its assets and undertakings.

Mr. President, distinguished Members of the Court, that concludes my evidence.

The PRESIDENT: Thank you very much. Mr. Matheson.

Mr. MATHESON: Mr. President, I have discussed with the Agent for the Respondent the order of proceeding, and on the basis of that conversation I would suggest that we break now. When we resume, Mr. Lawrence would be available for questions either by the Respondent or

Members of the Court, after which Mr. Ramish would conclude our presentation on this aspect of the case. I will then offer a final summary of the oral argument of the United States.

The PRESIDENT: Very well, we are going to proceed according to this agreement of the Parties. Thank you very much.

The Court adjourned from 11.20 to 11.35 a.m.

The PRESIDENT: Please be seated. I call upon the Italian delegation to examine Mr. Lawrence as an expert, please.

Mr. FERRARI BRAVO: Mr. President, with your permission, Professor Bonell will put some questions to the expert and after that I might have another request to the Court.

The PRESIDENT: Very well. Please, Mr. Bonell.

Mr. BONELL: Thank you Mr. President, distinguished Members of the Court. I shall be very brief, I promise you I do not want to duly postpone our debate. Mr. Lawrence, are you familiar with Italian accounting?

Mr. LAWRENCE: I do not profess to be familiar with Italian accounting. I have some experience of Italian subsidiaries of British companies with which I have been concerned.

Mr. BONELL: I see. Now, in your opinion, would a top manager of a United States company normally be in a position to read and fully understand an Italian financial statement? I mean, drawn up by an Italian company, in Italian, according to principles generally adopted in that country?

Mr. LAWRENCE: As I understand the position, the accounts of ELSI were drawn up not only so as to comply with Italian law but also so as to comply with the requirements of its parent company Raytheon. Therefore I would expect information to be available to the parent company management in a form which it could understand.

Mr. BONELL: I see. This leads now to my next question precisely. You, earlier on this morning, told us that the last regular balance sheet of ELSI, the one dated 30 September, was audited, certified by your firm. Is that correct?

Mr. LAWRENCE: Yes.

Mr. BONELL: On the basis of that balance sheet then ELSI's management extrapolated and prepared the balance sheet of 31 March which you did not certify. Is that correct?

Mr. LAWRENCE: We did not. My firm did not carry out an audit at March 1968.

Mr. BONELL: Now could you tell us please how many kinds of audit reports do there exist? I understand that if an auditing firm certifies or approves, so to say, a balance sheet, it states all right without any further qualification or it states no, that is not all right and does not thereby certify. Is there something in between? In other words, can it be that an auditing firm certifies a balance sheet but, under certain conditions, subject to certain qualifications? Is that correct?

Mr. LAWRENCE: The word certify is one which auditors prefer not to use because no audit report is a certificate of accuracy. It is a professional opinion that the accounts give a fair presentation. An audit opinion can be expressed with no qualification at all or it may be qualified in some respect, or it may contain an observation that doesn't amount to a qualification of opinion but which refers to a matter which the auditors feel should be brought to the attention of the readers of those financial statements.

Mr. BONELL: Thank you very much. Could you give us an example of such a qualification. I mean what kind, what sort of qualification could you envisage and indicate to us here and now?

Mr. LAWRENCE: Well, if the auditors considered that, for example, the value of the investment in the subsidiary companies which was carried in the books at 119 million lire was not

supported by their examination of the financial statements of those subsidiary companies, they might make a reference to that in their audit report.

Mr. BONELL: I see. You, several times in your previous statement, refer to the fact that your figures were based on the assumption that the balance sheet related to a going concern. Could you imagine that the qualification added to an audit report, or contained in an audit report, is made along these lines subject to being and remaining a going concern?

Mr. LAWRENCE: Yes.

Mr. BONELL: I see. You told us that your Milan Branch did do the job. I mean they prepared the audit report.

Mr. LAWRENCE: Yes, that is right.

Mr. BONELL: Have you seen the report?

Mr. LAWRENCE: Yes.

Mr. BONELL: Very recently?

Mr. LAWRENCE: Yes.

Mr. BONELL: I see. Well, Mr. President, thank you very much. I have no further questions.

The PRESIDENT: Thank you very much. Oh, I am sorry, I forgot that Professor Ferrari Bravo wants to put some question or questions.

Mr. FERRARI BRAVO: Mr. President, it appears from the argument of counsel this morning and from the statement of the expert that it is essential for the Court to have before it the complete financial reports concerning ELSI as at 30 September 1967 from which the book value has been extrapolated. Those reports were prepared by Coopers & Lybrand, the same firm to which today's expert belongs and which was referred to this morning specifically by Mr. Lawrence. May I ask the Court to request, under Article 62 of the Rules, the Applicant government to produce these reports as soon as possible. I understand that it should not be difficult to find them by applying either to Raytheon or to Coopers & Lybrand. Thank you Mr. President.

The PRESIDENT: Thank you. I think if there is no objection from my colleagues we are going to require the American delegation to provide the evidence that has been requested by the delegation of Italy.

Mr. MATHESON: We will be happy to do so.

The PRESIDENT: Thank you very much Mr. Lawrence. Now I think Mr. Ramish will give us his statement.

Mr. RAMISH: Mr. President, before moving on to the other elements of the reparation the United States claims, I would like to address a number of contentions that have been put forward by the Respondent. The Respondent attempts to chip away at a major element of Raytheon's damages from this portion of the claim: the loss Raytheon incurred when it made good on its guarantee of certain ELSI loans. The Respondent's arguments on this issue are difficult to make out. However, the Respondent appears to suggest that the United States is attempting to shift the burden of the guarantee payments to the Respondent and that this is unfair. The plain and simple fact is that the payment of the loan guarantees was an out-of-pocket cost that Raytheon would never have incurred, but for the Respondent's wrongful acts and omissions. Since those acts and omissions caused this injury, the Respondent must pay compensation that will make the injured party whole. There can be no justification for any other result.

The Respondent raises another objection that the United States has already addressed, but which bears repeating. The Respondent asserts that, whatever wrong it may have committed, it did not cause Raytheon's injuries. The Respondent argues that ELSI's bankruptcy and the injuries that flowed from it resulted solely from ELSI's poor financial condition and from Raytheon's unwillingness to invest further funds. According to the Respondent, the requisition of

ELSI's assets, the delay in deciding the appeal against the requisition, and the subsequent manipulation of the bankruptcy proceedings all had nothing to do with Raytheon's injury. The only thing the Respondent admits to have caused is the « temporary unavailability » of ELSI's assets.

This is sophistry, pure and simple. The « temporary unavailability » of ELSI's assets is precisely what caused — immediately, directly and predictably — ELSI's bankruptcy. ELSI had valuable assets, the reasonable worth of which was lost because of the requisition, exacerbated by the Respondent's foot-dragging during the appeal and by the Respondent's manipulation of the bankruptcy.

To be sure, ELSI was in bad financial shape. No one has ever denied it. That was precisely why Raytheon, after investing substantial sums in ELSI, finally decided to liquidate it. No rule of law or equity required Raytheon to invest additional funds in ELSI. In Raytheon's business judgment, it was better to liquidate. The Respondent had no right to second-guess Raytheon's business judgment and hinder its execution, without compensating Raytheon for the consequences.

The Respondent also asserts that no duty to compensate can arise if the benefits anticipated by the claimant, and destroyed by the Government, are too speculative. However, the cases relied upon by the Respondent provide no support for the unrealistically strict standard it asserts.

The *Rudloff case* (IX *Reports of International Arbitral Awards*, pp. 244, 259) involved a claimant who sought compensation for 18 years of future income from a marketplace he had not yet built. In the decision in the case, such income was labelled speculative and it was emphasized that the claimant's enterprise was not an « established business » — a sharp contrast from the present case, in which ELSI was an established business and in which no future income is claimed.

In *Rice's case* (IV J.B. MOORE, *History and Digest of the International Arbitrations to which the United States has been a Party*, p. 3248, [1898]), the claimant sought the profits of the « business which he would have done » during a period of unlawful imprisonment. However, the umpire found it « impossible to say what the loss of profits may have been to claimant, if there were any, for he cannot find out whether claimant pursued any distinct line of business ». Again, the contrast with the present case could hardly be more evident.

In the case of *Mora and Arango* (IV J.B. MOORE, *supra*, pp. 3728-3783) the claimants sought an indemnity for the wrongful stoppage of their firms' business with Cuba during an embargo. The Tribunal found, without explanation, that the firm's prospective earnings were very speculative in character. But it did not deny compensation altogether, as the Respondent's out-of-context quotation suggests. Instead, the Tribunal did what we are asking this Court to do: it employed a reasonable proxy to measure the loss — in that case, an award in the nature of interest on the stated capital of the firm.

Surely the Respondent cannot mean to suggest that any damages not proven by having an actual contract of sale in hand are excluded. Under such a standard, compensation for the fair value of a business could rarely be awarded. The many cases awarding going concern value, calculated not as a certainty but according to reasonable methods of prediction and valuation, refute the narrow position suggested by the Respondent.

In any event, ELSI's anticipated liquidation value was anything but speculative. We have established ELSI's value, and we have shown that it would have been liquidated in an orderly manner, rather than being forced into bankruptcy, if it had not been for the Respondent's wrongful intervention. That intervention caused Raytheon and Machlett to lose the entire return on capital and all of the open accounts with ELSI. In addition, it resulted in Raytheon's having to pay ELSI's guaranteed debts. As a result, as we have shown, Raytheon and Machlett suffered a loss of US $ 11,739,200.

I now turn to the remaining categories of the United States claim. May I recall that these relate to Raytheon's legal expenses and interest.

Raytheon's legal expenses

Raytheon incurred three kinds of legal and related expenses as a result of the Respondent's unlawful acts. It incurred such expenses in connection with ELSI's forced bankruptcy; in connection with the lawsuits brought against Raytheon by government-controlled creditor banks to recover on ELSI's debts; and in connection with its efforts to recover compensation from the Respondent. These were all predictable and foreseeable results of the requisition and resulting bankruptcy, and are therefore recoverable under international law.

The first and third of these categories are most straightforward, and I will take them up first. As we have detailed in our Memorial (Annex 40 and Annex 13, Schedule K), Raytheon incurred legal expenses of US $ 115,638 in connection with the bankruptcy. Those legal expenses were unavoidable costs associated with the bankruptcy.

We have also detailed (Annex 40 and Annex 13, Schedule K) the US $57,226 in legal and related expenses that Raytheon incurred in pursuing its claim against the Respondent up to the time when this proceeding was commenced. The precedents are clear that an injured party may recover costs sustained in pursuit of a successful international claim. The Respondent does not contest the law on this point, so I will simply refer the Court to the discussion of the relevant cases that appears at p. 62 of our Memorial and at p. 156–157 of our Reply.

Raytheon also incurred very substantial legal expenses in defending against the lawsuits brought by the Italian banks. As reflected in the chart to which I referred earlier, the unsecured, unguaranteed creditor banks received less than 1 per cent of the value of their loans to ELSI in the bankruptcy distribution. Consequently, five Italian government-controlled banks brought suit against Raytheon for payment of these unsecured, unguaranteed loans. The Italian courts subsequently dismissed all of the lawsuits as groundless, but only after several years of litigation and great expense to Raytheon.

The lawsuits were the direct and foreseeable result of the Respondent's requisition of ELSI. In fact, the President of the Sicilian Region had advised Raytheon, even before the requisition, that such suits would be brought. They would not have been brought — they would have been unnecessary — but for the Respondent's requisition of ELSI. Had the orderly liquidation been completed as planned, these banks would have been paid in full or would have settled their debts with ELSI. However, the requisition prevented Raytheon and Machlett from settling ELSI's debts with the creditor banks. Then, to compound the problem, the diminished proceeds from the bankruptcy sale directly and proximately caused the banks to be paid a mere fraction of the value of their loans. Although the bank suits were utterly unfounded — and were ultimately dismissed as such — Raytheon's legal defence cost US $766,936 (see US Memorial, Annex 40, and Annex 13, Schedule K).

In arguing that the banks were reasonable in pursuing Raytheon, the Respondent clinches the causal connection. If, as the Respondent argues, the lawsuits against Raytheon were normal and reasonable responses to ELSI's bankruptcy, then — as forecast by President Carollo — they were the predicatable, foreseeable consequences of that bankruptcy, which was itself caused by the Respondent. It is undisputed that international law requires reparation for all injuries caused by an internationally wrongful act. Such injuries can include expenses arising from third-party lawsuits. In the case of *Cerruti* (II J.B. MOORE, *supra*, p. 2117), Colombia seized the assets of the claimant's firm, and thus destroyed his ability to liquidate the firms's debts. The arbitrator recognized that this could predictably lead to suits by the firm's creditors against the claimant. To make the claimant whole against all the injuries flowing from the wrongful act, the arbitrator required Colombia to gurantee the claimant against potential third-party suits, and to pay not only all judgments, but also the claimant's costs of defence.

The Respondent points out that the Italian courts, in dismissing the bank suits, awarded Raytheon costs. Although legal fees were included, the costs were limited in accordance with Italian law. The Respondent contends that the United States must be content with this, and not seek Raytheon's actual legal expenses. But it is well established that municipal law cannot

control a State's international obligations. As the Italian–United States Conciliation Commission stated in the *Wollemborg case*:

> « one thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation » (Commentary to Art. 4, Chap. I of the International Law Commissions' Draft Articles on State responsibility, II *Yearbook of the International Law Commission*, 1973, p. 186; see also Eagleton, *The Responsibility of States in International Law*, pp. 12–13 [1928].

International law requires that Raytheon be returned to the position in which it would have been absent the Respondent's wrongful acts and omissions. This requires compensation of Raytheon's actual legal expenses.

The award of interest

The final element of the claim of the United States against the Respondent is for interest on the total amount of damages, including lost value and legal expenses, or US $12,679,000. Interest is an essential component of full compensation. Its function is to redress one of the most significant injuries flowing from an illegal action: delay in the payment of compensation. During such a delay, the benefits from the productive use of the claimant's property are diverted from the claimant to the respondent. An award of interest merely rectifies this inequity — it is not a windfall to the claimant, nor is it a punishment of the respondent.

The essential compensatory role played by interest is widely recognized by the commentators. As Professor Lillich observes:

> « Interest as part of an award by an international arbitral tribunal, i.e., ' compensatory interest ', is recognized by customary international law ... as an element of damages *inherent* in just compensation » (R. LILLICH, « Interest in the Law of International Claims », *Essays in Honor of Voitto Saario and Toivo Sainio*, pp. 51, 59 [1983]) (italics added).

The « inherent » compensatory role of interest is reflected by the practice of international tribunals, which have routinely awarded it. As the Permanent Court of Arbitration stated in the *Russian Indemnity case*:

> « Legal interest allowed a creditor for a sum of money ... is the legal compensation for the delinquency of a tardy debtor exactly as interest–damages or interest allowed in the case of ... the non–fulfillment of an obligation, are compensation ... » (*The Russian Indemnity case* [1912], 1 *Hague Court Reports*, pp. 297–313 [1916]).

The Permanent Court of International Justice approved and awarded interest (see *S.S.* « *Wimbledon* », 1923, *PCIJ*, *Series A*, *N.* 1, p. 33; *Factory at Chorzow*, *Merits*, 1928, *PCIJ*, *Series A*, *N.* 17, p. 47). So have the vast majority of other international tribunals. A brief discussion of some oft he prominent cases may be found at p. 63–64 of our Memorial. A Chamber of the Iran–US Claims Tribunal has summed up the state of the law in these terms:

> « The first principle [that can be deduced from international practice] is that under normal circumstances ... interest is allocated on the amounts awarded as damages in order to compensate for the delay with which the payment to the successful party is made » (*McCollough & Company, Inc. and The Ministry of Post, Telegraph and Telephone et al.*, 11 *Iran-US Claims Tribunal Reports*, pp. 3, 29 [22 April 1986]).

And more recently, the same body, sitting as the Full Tribunal confirmed that « it is *customary* for arbitral tribunals to award interest as part of an award for damages », and that the power to do so is «*inherent*» in the authority to decide claims (*The Islamic Republic of Iran and the United States of America, Request for a decision of the Full Tribunal on whether the Claims Settlement*

Declaration empowers the Tribunal to grant interest on its awards, Decision N. 65–A19–FT, p. 8 [30 September 1987]) (italics added).

The Respondent, in its Rejoinder (p. 239), makes the surprising assertion that « international case law is virtually unanimous [...] in refusing to ackowledge a right to interest. ... ». It should be clear from the foregoing discussion that the Respondent's position in this regard is simply untenable. The Respondent cites the *Corfu Channel case* as an instance in which interest was not awarded, but this can hardly serve to establish any proposition at all on the subject, since interest was not requested in that case and the Court was very careful in applying the principle of *ne ultra petita*.

The award of interest a ta commercially reasonable rate, from the date of injury to the date of payment.

In order to provide full compensation, an award of interest must be at a rate that will actually compensate a claimant for the loss of the use of his money. In determining that rate, the Court should enquire: « [W]hat could the claimant reasonably have expected had he had the use of the property? » (D. O'CONNELL, 2 *International Law*, p. 1213 [1965]).

International tribunals have varied in their approaches to this question. But over time a clear consensus has emerged that interest must be awarded at a « commercially reasonable » rate. The Court must, as in the *Wimbledon case*, take account of « the present financial situation of the world », including contemporary rates of interest (*S.S.* « *Wimbledon* », supra, p. 32).

In the discussion at pp. 64–65 of our Memorial, we show that a « commercially reasonable » rate in the present case would be the average annual prime rate in the United States during the relevant period. The Respondent appears to concede this point. In order to update the information in our pleadings, I may add that for the last two calendar years the appropriate rates were 8.21 per cent and 9.32 per cent, respectively.

As to the period during which interest should run, under the generally accepted rule interest accrues from the date of injury until the date of payment of the award. Again, the Respondent does not quarrel with this general proposition, and I refer the Court to the discussion that appears at p. 66 of our Memorial. In this case, for the sake of simplicity, the United States respectfully suggests that the Court calculate interest from the end of the calendar year in which the injury occurred.

The Respondent does, however, quarrel with the application of this general rule in the present case. According to the Respondent, the lapse of time between Raytheon's injury and the presentation of the case to this Court should reduce, perhaps even eliminate, an award of interest. This argument is wholly without foundation.

As a matter of fact, the time between the injury and this claim's presentation was anything but excessive, and the Respondent has in no way been prejudiced. The trustee's suit for recovery of ELSI's loss of value due to the requisition was resolved against the trustee only in 1973. In 1974 the United States formally presented its diplomatic claim to the Respondent. Only some four years later did the Respondent send a reply to the note, asserting that the claim on behalf of Raytheon and Machlett was groundless. Thereafter, the two Governments engaged in diplomatic communication over the claim, up to the time it was placed before this Court. The Respondent proposes to penalize the United States for attempting over a reasonable period to settle Raytheon's claim amicably. But the Respondent can cite no authority suggesting that the time spent in attempting to settle the claim was excessive or that any prejudice has resulted.

The controlling fact is that the Respondent has had the benefit of Raytheon's and Machlett's property for all of these years; in no way could it fairly be said to be disadvantaged by having to restore that benefit now. The award of interest does not punish here — interest simply avoids a windfall to the Respondent, and it provides full compensation to Raytheon and Machlett.

The award of interest on a compounded basis.

I turn now to the question whether interest should be simple or compound. The United States recognizes that arbitral tribunals historically have not shown much inclination to award compound interest. Indeed, the Iran–US Claims Tribunal has not awarded compound interest. We submit, however, that in this case compound interest is fully justified.

In preventing the sale of ELSI's assets in the orderly liquidation, the Respondent effectively deprived Raytheon and Machlett from recovering and using a sum of money, money that would have been invested by each company throughout the period. Deprived of this investment, Raytheon and Machlett were at the same time deprived of all of the fruits of this investment. Those fruits included the interest or savings that accumulated over time, which themselves would have been put to work, earning further interest or savings. In consequence, the reparation due here should also include compound interest.

The underlying purpose of interest — to provide full compensation — makes further evident why in this case interest should be compounded. As Dr. Wetter observes:

> « the issue as to whether or not compound interest is permissible as an element of damages must be resolved with reference to the ultimate legal rationale for awarding interest » (G. WETTER, « Interest as an Element of Damages in the Arbitral Process », 5 *International Financial Law Review*, pp. 20–22 [1986]).

Dr. Mann explains it forcefully:

> « [I]t is necessary ... to take account of modern economic conditions. It is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest ... On the other hand, many are compelled to borrow from banks and therefore must pay compound interest. This applies, in particular, to business people whose own funds are frequently invested in brick and mortar, machinery and equipment, and whose working capital is obtained by way of loans or overdrafts from banks . ...
>
> If, in accordance with the usual formula, damages are intended to afford *restitutio in integrum* (complete compensation for the wrong suffered) such items of damage should not be excluded » (F.A. MANN, « Compound Interest as an Item of Damage in International Law », 21 *UC Davis Law Review*, pp. 577, 585 [1988]).

Similarly, in commenting on the issue of compound interest in the *Starret case* (*Starret Housing Corporation et al. and The Government of the Islamic Republic of Iran et al.*, Award N. 314–24–1 (14 August 1987), Concurring Opinion of Judge Holtzmann, p. 24), judge Holtzmann of the Iran–US Claims Tribunal observed that, whether or not a rule against compound interest may have existed in the past, « it is no longer appropriate or justifiable. ... [T]imes change and the law should not be oblivious to such change ».

Some arbitral decisions have, in fact, awarded compound interest and these cases are instructive (see, e.g., *Affaire Fabiani* (France and Venezuela) (1896), V MOORE, *supra*, p. 4878, *summarized* in III M. WHITEMAN, *Damages in International Law*, pp. 1785–1788 [1943]); *Affaire des Chemins de fer Zeltweg–Wolfsburg et Unterdrauberg–Woellan* (Austria and Yugoslavia), 3 *Reports International Arbitral Awards* pp. 1795–1808 [1934]; *Government of the State of Kuwait and The American Independent Oil Company* (*AMINOIL*), XXI ILM, p. 976 [1982]). In this connection, I would call to the Court's attention particularly the *Fabiani case*. In *Fabiani*, the rationale offered for awarding compound interest was precisely that urged by Dr. Mann:

> « The compounding of interest is authorized in the field of current accounts and of similar operations since the legislator presumes that in commerce money does not nemain unproductive » (V MOORE, *supra*, at p. 4914) (translation).

Even the case primarily relied upon by the Respondent, *Great Britain* v. *Spain* (*Spanish Zone of Morocco* (2 *Reports of International Arbitral Awards*, pp. 615–650 [1924]), suggests that compound interest may be awarded in appropriate circumstances. The circumstances suggested there are cases in which the goods that the damages awarded are intended to replace increase by

geometric rather than arithmetic progression. As Dr. Mann observes, this analysis is compelling in the case of money claims, for money invested at compound interest *does* « increase by geometric progression » (MANN, *supra*, p. 579).

As a final objection, the Respondent raises the spectre that an award of interest could exceed the principal sum awarded. The Respondent apparently believes that the incongruity and inequity of such a result is self-evident. In fact, that result is entirely reasonable and realistic.

The Respondent should have compensated Raytheon and Machlett at the time they suffered their losses, but it did not. Since that time, the Respondent has in effect enjoyed the use of the monetary equivalent of their property, which should have been paid over. Since that time, the Respondent has avoided the cost of that amount of money, which on the world's financial markets would have been available at compound interest. Since that time, too, Raytheon and Machlett have been deprived of that money, which they could have invested at compound interest (or could have used to avoid borrowing the equivalent sum at compound interest). As Dr. Mann puts it:

> « [I]t is completely wrong to attach any significance to the fact that the award of interest or compound interest may lead to the payment of a sum exceeding the capital due from the wrongdoer. This may happen in many cases as a result of the wrongdoer's delaying tactics or the court's work load. But during that period the wrongdoer has enjoyed the fruits of the money withheld » (MANN, *supra*, p. 585).

Indeed, the perverse result of the Respondent's reasoning is that the more the wrongdoer delays, and thus aggravates its victim's injury, the safer it is from having to cure that injury completely. It cannot be that international law would more readily impose compound interest on a wrongdoer who promptly erases the effects of his illegal act, than on one who obstinately refuses to do so for a protracted period. Such reasoning offends both good sense and equity.

Summary of the compensation sought

It may be helpful at this point to summarize the compensation requested by the United States. As we have shown, Raytheon and Machlett's general financial injury consists of the difference between the position they would have been in had they been permitted to proceed with liquidation, and the position in which they actually found themselves as the result of the Respondent's unlawful intervention. This difference amounts to 7,322.4 million lire, or US $11,739,200 dollars.

Raytheon's legal expenses are broken down as follows: US$115,638.35 in legal expenses in connection with the bankruptcy; US $766,936.77 in legal expenses in connection with the successful defense against the lawsuits brought by the Respondent's government-controlled banks; and US$57,226.38 in legal expenses in connection with the pursuit of its claim against the Respondent up to the time when this proceeding was commenced.

The total of these claims is US $12,679,000.

The United States respectfully urges the Court to award this amount, together with interest calculated at the United States average annual prime rate, from the date of the injury until the date of payment, compounded annually.

This concludes my presentation. Thank you for your attention and, at this time Mr. Matheson will present the closing statement.

The PRESIDENT: Thank you Mr. Ramish. I give the floor to Mr. Matheson.

Mr. MATHESON: Mr. President, distinguished Members of the Court. It is now my honour to conclude the oral presentation of the United States in this case. We of course reserve the right to rebut points of fact and law made by the Respondent in its oral presentation, through further argument or, if necessary, testimony.

As we have noted, bilateral commercial treaties have been of great importance for many years in helping to structure economic relations. In the era following the Second World War,

the need to encourage and protect foreign investment was critical to the reconstruction of the European economy. Consequently, in 1948 the United States and Italy signed a Treaty of Friendship, Commerce and Navigation. The principle objective of this Treaty and other FCN treaties that followed was to develop an environment conducive to the flow of investment capital.

As we have explained, the 1948 Treaty protects investors in a variety of ways, both as individuals and as corporate entities. The case before this Court — involving an investment through establishment of a locally incorporated subsidiary — is a good example of the investment practices which the Treaty was specifically designed to prevent, as a means of encouraging foreign investment.

The facts of this case are not complicated. To recapitulate briefly, in 1956, Raytheon invested in and became a minority shareholder of ELSI, at that time a relatively new Italian company. By 1967, Raytheon and Machlett owned 100 per cent of ELSI.

As you have heard, ELSI never became financially self–sufficient, in spite of extensive efforts and financial contributions by Raytheon. Raytheon made every effort to give Italian authorities the opportunity to keep ELSI alive and its workers employed through normal and lawful means, but the Italian authorities ultimately were not interested in doing so. Consequently, Raytheon and Machlett decided to place ELSI through an orderly liquidation. We have shown that this orderly liquidation plan had a high likelihood of success, for ELSI had a number of successful product lines, with established customer and supplier relationships, which were supported by Raytheon's patents, technical assistance and worldwide reputation. By selling ELSI as a unit or by its individual product lines, ELSI's creditors could have been satisfied and ELSI's shareholders could have avoided further losses.

This orderly liquidation, of course, never occurred. In April 1968, when the Respondent discovered the steps Raytheon intended to pursue, the Respondent requisitioned ELSI's plant and equipment. As a result, Raytheon was unable to maintain the plant and equipment, to complete work–in–progress, to show the plant and equipment to prospective buyers, or to sell any of ELSI's assets.

ELSI unsuccessfully appealed to the Mayor of Palermo and other Italian officials to set aside the requisition order. It promptly filed an appeal with the Prefect of Palermo. The next day, the President of Sicily threatened that the requisition would be maintained indefinitely unless Raytheon abandoned its liquidation plan. He made clear that the Government would ensure that in the meantime no potential buyers — whether public or private — would buy ELSI or its assets. With debts continuing to come due, and with no prospect of regaining custody of ELSI's assets and conducting an orderly liquidation in the near future, ELSI's Italian counsel advised the Board of Directors that, under the conditions brought about by the Respondent, they were required to file a petition in bankruptcy. A bankruptcy petition was accordingly filed and ELSI was declared bankrupt.

In July 1968, the Government of Italy made public its intention to take over ELSI's assets through a subsidiary of IRI. In December, IRI formed a new subsidiary, ELTEL, in order to implement this decision.

The bankruptcy judge scheduled three auctions, in January, March and May of 1969, at which ELSI's plant and other assets were offered as a single unit, at a set minimum price. Despite the announced intention of the Government of Italy to take over ELSI, ELTEL did not bid at these auctions. Nor were there other bidders. The planned Government takeover of the plant had been publicized and, by the time of the second auction, was well on the road to completion. The terms of the auction, moreover, effectively excluded those whom Raytheon had earlier identified as the most likely purchasers — companies interested in buying individual product lines.

ELTEL therefore was able to negotiate its own terms of sale with the bankruptcy authorities. As a first step, ELTEL leased the plant for nominal rental and acquired the work–in–process at a bargain price. Once it was firmly in control of ELSI's assets, ELTEL then offered to purchase the plant and most of the remaining tangible assets for substantially less than their fair market value. The bankruptcy judge accepted this offer and ordered a fourth auction, at which the minimum bid was set at the negotiated price. As a result, in July 1969, ELTEL purchased ELSI's plant and equipment, and certain of its other assets, at a price well below its real value.

In August 1969, 16 months after the requisition began but only shortly after ELTEL had acquired ELSI's assets, the Prefect of Palermo finally acted on the Mayor's order of requisition. He annulled that order, finding that it was not justified by any legal grounds and, moreover, appeared to have been motivated by improper considerations.

The law in this case is also not complicated. Indeed, the Respondent's steps were precisely the type of action the FCN Treaty prohibits. Raytheon and Machlett were stripped of their ability to manage and control ELSI when the Respondent prevented the exercise of a fundamental shareholder right: the right to dissolve ELSI and dispose of its assets in an orderly manner. As we have demonstrated, interference with management and control violates Articles III and VII of the Treaty and Article I of the Supplement.

The Respondent's failure to overturn the requisition in a reasonable period of time further interfered with management and control, and ultimately resulted in the impairment of the investment rights of Raytheon and Machlett in violation of Article I of the Supplement.

The requisition was finally declared unlawful under Italian law, but only after the Respondent's State-owned enterprise had bought ELSI's plant and equipment at bargain prices. The Respondent's refusal to pay just and effective compensation for the taking of Raytheon and Machlett's property violated Article V, paragraph 2, of the Treaty.

By allowing ELSI's plant to be occupied after the requisition and by failing to overturn the requisition in a reasonable amount of time, the Respondent failed in its obligation under Article V, paragraphs 1 and 3, to provide to Raytheon and Machlett the most constant protection and security for their property.

The Respondent's defence is based on the clearly incorrect proposition that the FCN Treaty protects neither the rights and interests of a foreign investor in its locally incorporated subsidiary, nor the rights and interests of the subsidiary itself. Essentially the Respondent concludes that the Treaty protects only the foreign shareholder's right to hold in its hand pieces of paper proving ownership, but not the foreign shareholder's rights and interests that make those pieces of paper valuable. The Respondent's interpretation is contrary to the ordinary meaning of the Treaty's provisions, contrary to the object and purpose of the Treaty, and contrary to the relevant supplementary materials.

To vindicate their rights and interests, Raytheon and Machlett had pursued every remedy known to them to prevent these actions and to mitigate the damage caused by the Respondent. Efforts were made to overturn the requisition. Efforts were made to avoid the bankruptcy and its deleterious effects. Decision of the bankruptcy judge were appealed, such as the decisions to lease the plant to ELTEL, and to sell the plant, equipment and supplies to ELTEL.

When the Prefect of Palermo finally ruled that the requisition was unlawful, the Trustee of ELSI — who represented Raytheon and Machlett's interests as creditors of ELSI — brought suit against the Respondent seeking damages for the unlawful requisition. The Respondent appeared before the Court of Palermo and rejected all the claims brought against it. Indeed, the Mayor of Palermo asserted that the claims were « inadmissible, unacceptable, unfounded, and reckless ». When the Court of Palermo ruled in favour of the Respondent, the decision was appealed to the highest court in Italy, which required the Respondent to pay compensation, but only for the six-month « use » of the plant.

To be absolutely sure that no further remedies were available under Italian law, Raytheon sought two separate legal opinions from eminent Italian lawyers who were leading experts in their field. After extensive scrutiny, both of them opined that no such further remedies existed. We have provided the Court with expert opinion that strongly supports that conclusion.

Despite all of these efforts to get the Respondent to remedy its injuries, the Respondent now asserts that local remedies were not exhausted, and that this renders the entire claim inadmissible. With all due respect, invoking the local remedies rule in this case is improper and unfair, whatever the situation under Italian law. The United States does not concede that the local remedies rule is applicable to violations of this FCN Treaty and, in any event, there is clearly no requirement for suit in Italian courts prior to obtaining a declaration from this Court that the Treaty has been violated. Further, the Respondent was provided every opportunity through its domestic procedures to cancel the requisition or to pay for the damage caused by it, but it

refused to do so. Consequently, the local remedies rule — even if it were applicable to this case — has been satisfied.

As you have heard, when the United States filed its claim with the Respondent on a diplomatic basis in 1974, it expressly stated to the Respondent that further local remedies did not exist. The Respondent simply replied that Raytheon and Machlett were not entitled to damages under Italian law. Had the Respondent believed that further local remedies existed, it would have and should have so stated. The failure to assert this objection estops or precludes the Respondent from asserting the local remedies rule now.

Now having established that the FCN Treaty was violated and that the Respondent's objection to the admissibility of the claim should be rejected, we request the Court to provide appropriate relief. The United States seeks a declaration that the Respondent, through its acts and omissions, violated several provisions of the FCN Treaty. It is important that the Court pass on these issues, both to resolve the present dispute and to provide guidance for commercial relations between our two countries in years to come.

The United States also seeks reparation for the violations of the Treaty, which may be measured by the total economic loss caused to Raytheon and Machlett. We have demonstrated that if the management of ELSI had been permitted to proceed with the orderly liquidation, they could have realized at least 17 billion lire, the amount of assets stated in the company's books which, as you have seen today, is a conservative estimate of the value of those assets. The Trustee in bankruptcy, however, ultimately received just slightly more than 6.3 billion lire for ELSI's assets. The planned liquidation, had it been allowed to occur, would have generated sufficient funds to satisfy ELSI's outstanding Italian bank loans, some of which had been guaranteed by Raytheon, and ELSI's debts to Raytheon for goods and services provided on open accounts. It would also have provided a small return to Raytheon and Machlett on their investment in ELSI. Because of the bankruptcy, however, Raytheon itself had to pay the guaranteed loans, and recovered none of its investment or what was owed to Raytheon on the open accounts.

Thus, the actual losses of Raytheon and Machlett were significantly greater than they would have been, had they been allowed to proceed with the orderly liquidation. In addition, Raytheon incurred substantial expenses in the bankruptcy itself, in defending against the lawsuits brought by Italian government–controlled banks, and in pursuing its claim for redress.

The United States has provided extensive documentation and expert testimony to establish all of these losses. As reparation for the violations of the FCN Treaty, the United States seeks a total of US $12,679,000 plus interest compounded annually.

Mr. President, distinguished Members of the Court, you have before you a clear case in which treaty rights have been violated. You have the opportunity to uphold the rule of law in the area of economic relations, an area which is essential to harmonious relations between States.

Therefore, on behalf of the Government of the United States, I respectfully request that the Court render a decision in favour of the United States, declaring that the FCN Treaty has been violated and awarding reparation in the full amount sought.

The formal submissions of the United States are as follows:

> « The United States requests that the objection of the Respondent be dismissed and submits to the Court that it is entitled to a declaration and judgment that:
>
> 1) the Respondent violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated Articles III, V and VII of the Treaty and Article I of the Supplement; and
>
> 2) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to reparation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and

3) that Italy accordingly should pay to the United States the amount of US $12,679,000 plus interest ».

Mr. President, this concludes the oral presentation of the United States. We thank the Court for its consideration of our claim.

The PRESIDENT: I thank Mr. Matheson and the American delegation for the assistance given to the Court.

Do any of the judges want to put some questions at this stage? Judge Schwebel.

Judge SCHWEBEL: Thank you, Mr. President. I should like to put a question to the Co-Agent of the United States.

It appears that the United States confines itself to allegations of violations of the Treaty of Friendship, Commerce and Navigation and to what it maintains flows from those violations — the submissions we have just heard so indicate. Earlier there were what I understood to be suggestions, perhaps no longer maintained, of a kind of conspiracy among certain officials of the Italian Government and companies, notably IRI and a subsidiary of IRI, to purchase ELSI's assets at a very depreciated price. Now the United States has pointed out that it was at the same time the policy of officials of the Italian Government to keep ELSI operating at all costs, provided at any rate that the costs were met by Raytheon. The United States has also pointed that among the principal unsecured creditors of ELSI were banks controlled by IRI. Can those two facts be reconciled with any kind of conspiracy theory, if, in fact, that theory is indeed maintained? Thank you.

Traduction:

Il apparaît que les Etats-Unis se bornent à alléguer des violations du Traité d'amitié, de commerce et de navigation et qu'ils se limitent, à ce qui, selon eux, découle de ces violations, ainsi que l'indiquent les conclusions que nous venons d'entendre. J'ai cru comprendre précédemment qu'on laissait entendre, ce qui n'est peut être plus le cas, qu'il y avait eu une sorte de conspiration entre de hauts fonctionnaires italiens et des dirigeants de sociétés, notamment l'IRI et une filiale de l'IRI, en vue d'acheter les biens d'ELSI à un prix très abaissé. Or les Etats-Unis ont indiqué que les autorités italiennes avaient en même temps pour politique de maintenir ELSI en activité, à tout prix, à condition tout au moins que Raytheon en supportât le coût. Les Etats-Unis ont aussi souligné que des banques contrôlées par l'IRI figuraient parmi les principaux créanciers chirographaires d'ELSI. Ces deux faits sont-ils conciliables avec une quelconque théorie de la conspiration, pour autant que cette théorie soit effectivement soutenue?

The PRESIDENT: Thank you, judge Schwebel. Mr. Matheson, you do not have to reply to this question right now. I think that, perhaps, it would be useful if you could reply before the Italian delegation begins on Monday, in order to have all the elements to proceed. Therefore, in the course of tomorrow and during the weekend, I expect that the American delegation could reply to the question put by judge Schwebel.

Are there any other questions? No. Therefore, we shall continue next Monday, 20 February, to hear the oral arguments of the Italian delegation, at 10 o'clock. Thank you very much.

The Court rose at 12.35 *p.m.*

ELSI – FIXED ASSETS

	Book value	Puglisi valuation
Land and buildings	962.5	1,716.9
Machinery and equipment	4,154.2	2,843.6
	5,116.7	4,560.5
Construction in process	184.1	
	5,300.8	
Taxed reserve	463.6	
	5,764.4	

ELSI – ACCOUNTS RECEIVABLE

	Book value	Realisable value
Customers	2,150.8	
Less: Reserve for bad debts	(80.6)	
	2,070.2	2,070.2
Affiliates	106.0	106.0
Other	236.2	200,0
	2,412.4	2,376.2

ELSI – ASSETS AT 31 MARCH 1968

	Book value	Realizable value
Tangible assets	—	—
Fixed assets	5,764.4	5,300.8
Inventories	6,534.6	5,225.2
Accounts receivable	2,412.4	2,376.2
Other assets	621.0	730.5
	15,332.4	13,632.7
Intangible assets	1,721.1	3,500.0
	17,053.5	17,132.7

ELSI – INVENTORIES OF MATERIALS AND WORK IN PROCESS

Book value	6,534.6
Less: Taxed reserve	(1,015.0)
	5,519.6
Less: Further provision	(294.4)
	5,225.2

ELSI – OTHER ASSETS

		Book value	Realizable value
Investments		119.2	0.0
Cash and bank balances	21.3		
Notes receivable	128.1		
Accrued receivables and prepayables	352.4		
		501.8	430.5
		621.0	430.5
Mezzogiorno grants			300.0
			730.5

C 3/CR 89/5
Monday 20 February 1989, at 10 a.m.

MR. FERRARI BRAVO – MR. GAJA – MR. LIBONATI

The PRESIDENT: Please be seated. We have to hear today the Italian delegation. Therefore I give the floor to the Agent, Professor Ferrari Bravo.

Mr. FERRARI BRAVO: Mr. President, distinguished Members of the Court.

It is for me a great honour and pleasure to appear before this glorious Court of Justice as Agent for the Italian Government. This is perhaps one of the greatest aspirations of an international lawyer.

I would like at the beginning of my statement to thank the Members of this Chamber on behalf of the Italian Government for having consented to form a part of it.

I would like in addition to thank President Ruda, whose high sense of the sacred interests of international justice persuaded him to accept to preside over this Chamber when, only a few weeks before the hearing of these oral pleadings, the former President Singh passed away unexpectedly.

And I wish, finally, to endorse the words expressed at the opening of these oral pleadings first by President Ruda and then by the Agent for the United States Government, the Honorable Judge Sofaer, touchingly recalling the life and work of President Singh, whose untimely death is so much regretted by us all.

Mr. President, distinguished Members of the Court.

The case you are called upon to decide arises from an Application filed by the Government of the United States.

This Application represents a unilateral initiative on the part of the Government of the United States under Article XXVI of the Treaty of Friendship, Commerce and Navigation between the United States of America and Italy, signed in Rome on 2 February 1948.

We therefore have proceedings in which there is an Applicant, the Government of the United States, and a Respondent, the Government of the Italian Republic.

These are not proceedings in which the two Parties appear jointly before the Court on the basis of a special agreement or in any other way expressing their common will to have this particular dispute settled by the Court. Nor would it be accurate to describe Italy's acceptance of the jurisdiction of the Court as resulting from the Counter–Memorial, as was suggested by counsel for the Applicant (see C 3/CR 89/3, p. 302). The jurisdiction rests on the Treaty and on a unilateral Application by the United States Government.

Before the Government of the United States of America filed its Application, the Italian Government merely acknowledged that the Government of the United States had expressed its desire to bring this case before the International Court of Justice. As made clear in a press statement issued by the United States Department of State, it was the United States Government that:

> « determined to approach the International Court of Justice with a view to submitting that dispute to a special chamber as provided by the Court's Statute and Rules of Procedure, subject to mutually satisfactory resolution of implementing agreements » (14 *International Legal Materials*, 1985, p. 176).

Italy took note of the intention expressed by the United States Government. The claim, therefore, remains only a United States claim, nor has any counter–claim been put forward.

This is not a case in which the two Parties have jointly requested the Court to settle points of fact or of law under dispute between them.

In order to facilitate the course of international justice, the Italian Government accepted the request made by the Government of the United States for the dispute to be settled by a special chamber and not by the full Court. Specific acceptance in relation to the case refers only to the composition of the Court. This does not affect the applicability to the present case of the provisions of the Statute and the Rules of Procedure which are applicable when a case is brought before the Court by means of an unilateral application.

That the International Court of Justice has jurisdiction in the present case is not disputed. Italy did not insist that the United States should, as provided for by Article XXVI of the Treaty, first bring to the negotiating table all the basic contentions relating to the infringement of Treaty provisions.

Negotiations over the claim have been spread over a long period. They have resulted in the claim being brought before the Court by the Applicant. Some alternative means of settlement were discussed by the Parties, but talks over this did not lead to any conclusion. Certainly, the profound divergence of opinion of the Parties over the merits of this claim have made negotiations at times difficult. The Italian Government chose, as it was perfectly entitled to do, not to respond in writing to the lengthy 1974 Claim and the enclosed Memorandum of Law and several annexes. Any accusations that « [t]he Respondent has not demonstrated good faith in its diplomatic negotiations with the United States regarding this claim », as suggested by counsel (C 3/CR 89/3, p. 308) are totally out of place. The blame for the lack of success for the negotiations can hardly be put on the Respondent if only one considers that the Applicant kept increasing the amount of its claim. However, as the question of how negotiations were conducted has not been the subject of either the Application or the submissions, it may be preferable to leave it aside. This attitude corresponds to the general need for governments to be able to engage in confidential negotiations with relative freedom. I may only add that the Italian Government could well give its own account of the history of the negotiations.

The acknowledgement of the jurisdiction of the Court with regard to the claim in accordance with Article XXVI of the 1948 Treaty does not imply a recognition that the claim is admissible. On the contrary, in its Counter-Memorial, the Italian Government presented an objection concerning the failure by Raytheon and by Machlett to exhaust the available local remedies. In order to simplify the proceedings, the Parties agreed under Article 79, para 8, of the Rules of Court that the objection should be heard and determined within the framework of the merits. This objection will be discussed by counsel.

The Italian Government requests that the Court declares the application inadmissible for non-exhaustion of local remedies and has already made corresponding submissions both in the Counter-Memorial and the Rejoinder. This objection is an essential par tof the case for the Respondent and will accordingly be dealt with first in the course of the pleading.

Mr. President, distinguished Members of the Court, I would like now to make a brief outline of some key aspects concerning the merits of the dispute.

One of these relates to the way in which arguments put forward by the Parties should be examined.

In the present proceedings the Government of the United States requested the Court to adjudge and declare that Italy infringed obligations under the Treaty and Supplementary Agreement and that reparation by means of the payment of a very large sum of money should be made as a consequence.

The case involves therefore the law of State responsibility, to which the Court has not failed to contribute significantly.

In order to establish that an international obligation was infringed and that there is a duty to make reparation, several conditions need to be fulfilled.

First, there must be conduct (consisting in one or more acts or omissions) in violation of an international obligation. Secondly, such conduct must be attributable to the defendant State. Thirdly, such conduct must have been capable of causing damage. Fourthly, there must be an actual causal relationship between the conduct in question and the damage for which reparation is sought. And fifthly, and lastly, the damage must be correctly quantified. The existence of

all these elements must be ascertained; in order to obtain a favourable decision the party claiming damages for the illegal behaviour must prove its assertions in relation to each of them.

Let us now rapidly examine the proceedings as they stand.

With regard to the first point the Government of the United States has failed to prove the existence of any breach of an international obligation. One thing that is not under dispute, is that on 1 April 1968 the Mayor of Palermo ordered the requisition of the ELSI plant: a plant which the company had already decided to shut down and whose workers had been laid off without due notice.

The requisition was later declared to be unlawful, but only under Italian law, by the Prefect of Palermo. As a result of legal action, taken again in Italy and again in accordance with Italian law, damages were paid to the receiver of the ELSI bankruptcy estate to compensate for the requisition.

The requisition of the ELSI plant was intended to last for a period of six months, but in practice it was effective for only five weeks — that is the time that elapsed between the requisition itself (1 April 1968) and the declaration of bankruptcy (7 May 1968) following a petition filed on 25 April 1968 by the management of ELSI under Italian law. Notwithstanding the eloquence of its counsel, the Government of the United States has not established that the requisition represented a breach of any international obligation, and in particular of the 1948 Treaty or the Supplementary Agreement. The Applicant has distorted the meaning of several provisions and suggested some interpretations which contradict both the letter and the spirit of the Treaty and the Supplementary Agreement.

As established by Article 31 of the Vienna Convention on the Law of Treaties of 1969, which reflects international custom on the matter, as was recognized by the Applicant (C 3/CR 89/3, p. 314) treaties must be interpreted « in accordance with the ordinary meaning to be given to the terms » contained in them, unless it can be proved that a « special meaning » in the Convention was intended.

The Italian Government strongly objects, as a matter of principle, to the way in which counsel for the Applicant suggested that treaties with authentic texts in different languages should be interpreted. In the Reply (at p. 146, n. 22) the Applicant said: « the United States agrees that the Rules of the Vienna Convention apply to the interpretation of this Treaty » — the Vienna Convention in general. Now counsel for the Applicant has dropped any reference to Article 33 of the Vienna Convention and contends that treaties should be interpreted in the language in which they were negotiated (C 3/CR 89/3, p. 321) supposedly that is, they were negotiated in English. This is in order to give predominance to the English version over the Italian version of the Treaty. Should the Court approve such a position, negotiations concerning international treaties, particularly under the auspices of the United Nations, would be seriouslay impeded. Obviously, for practical reasons, negotiations are held in the language that is most widely understandable by the negotiators, but this in no way affects the equal status of the authentic texts.

And, if you go back through the history of the Vienna Conference, the reason why reference to *travaux préparatoires* was put on the second rank is probably just because of the situation of today's world.

Now, it is to be recalled that both the FCN Treaty and the Supplementary Agreement had both English and Italian authentic texts. It is a matter of concern for all the contracting States to a multilingual treaty that the fact that the proceedings are held in English and French should not result in more weight being given to the English and French texts as opposed to the texts written in other languages.

Mr. President, distinguished Members of the Court, apart from the requisition of the ELSI plant ordered by the Mayor of Palermo, which is not prohibited under the terms of the Treaty and the Supplementary Agreement, the Government of the United States has not proven any relevant factual circumstance from which one can legitimately infer any internationally unlawful conduct by the Italian authorities.

The Applicant made much of a statement which the President of the Sicilian Government made with regard to ELSI. This statement has been distorted, as will be shown by counsel.

I challenge the Government of the United States to show that no governor of a State of the American Union has ever, in similar circumstances, expressed himself in such terms. It is quite

obvious that the political leader of a regional government should be concerned with the consequences on employment of the closing of an industrial plant that employs a large workforce! This is part of his job. Furthermore, this kind of activity is carried out at the political level. Why should Mr. Carollo's words be taken any more seriously than those of the ministers that Mr. Clare disparagingly referred to in his testimony?

Mr. President, the entire allegation of unlawful conduct on the part of Italy rests on three major points:

1) the requisition of the ELSI plant but, as has been pointed out, this was unlawful only under municipal law, while the existence of an internationally wrongful act has by no means been proved by the United States;

2) the words of the President of the Sicilian Region which allegedly terrorized the Raytheon Company; and

3) the fact that IRI, which ultimately purchased the ELSI plant at the conclusion of the affair, is a State–owned holding company.

Mr. President, distinguished Members of the Court, this chain of arguments is pure fantasy and reveals a total ignorance of the way a mixed economy system works in Italy, and in many other countries. In these countries, except in the case of extraordinary circumstances, State-owned companies operate in accordance with market principles, in the same way as private companies do. Such exceptional circumstances arose when an IRI company had to move in in order to save 1,000 jobs in a region that badly needed them. These 1,000 workers had been laid off without due notice in a ruthless move that Raytheon used again in Belgium in the well–known *Badger* affair (to which the book by *Blancpain, The Badger Case* published in Deventer in 1977, which may be found in the Library of the Peace Palace, refers). With regard to ELSI, as from March 1968 the salaries of the laid off workers had to be paid out of public funds provided by the Sicilian Region, as did those for March 1968.

Co–Agent for the Applicant, Mr. Matheson has dedicated a substantial section of his opening pleading under the heading « Undisputed facts » (C 3/CR 89/1, pp. 251–253). With respect, this presentation is a clear attempt to distort the truth of the Parties' contentions. What Mr. Matheson presented was the Applicant's case — or the Raytheon story. Not only are most of the facts listed there controversial, but their statement, presentation and interpretation also differ widely.

One example may be sufficient to illustrate this. In the section of undisputed facts Mr. Matheson said, at page 30:

> « The state of ELSI's profitability is not disputed in this case, nor is it relevant to this proceeding. Regardless of the state of ELSI's profitability, the Respondent wrongfully prevented ELSI's shareholders and creditors from realizing the full value of the company through the orderly liquidation of its assets » (C 3/CR 89/1).

Are these undisputed facts? Or is this not a restatement of the Applicant's case?

The Respondent has clearly pointed out the fundamental importance to this case of the fact that ELSI was no longer a going concern before the requisition took place; the Respondent has also described as pure fiction the idea of conducting a so–called orderly liquidation on the lines suggested by the Applicant.

Mr. President, there is no proof of the existence of the facts alleged to be unlawful; furthermore, it has not been shown that they were unlawful under international law and that the Italian State is responsible for them. The whole chain of facts making up the alleged internationally wrongful act referred to above is lacking, as will be demonstrated in due course by counsel.

No evidence has been produced to show that the requisition of the ELSI plant caused any damage to the plant. No production line was destroyed or even damaged. The buildings did not collapse, despite the contrary impression given by the Applicant's presentation where it appears that on 1 April 1968 perhaps a second earthquake occurred in Palermo concentrating all

its force on the ELSI plant. Moreover, there is no evidence in support of another crucial point: that 24 days after the requisition Raytheon had no option but to file a petition for bankruptcy on behalf of ELSI, thus foregoing the « orderly liquidation » so dear to the Applicant but which Raytheon had never even prepared, let alone attempted to implement.

Absolutely no evidence has been produced in support of this and there are well-founded indications, as we shall see, that Raytheon's true intention in the period immediately prior to the requisition of the Palermo plant was quite different.

These points will be dealt with in the Italian defence in order to show clearly that there is not the slightest connection between the situation in Palermo on 1 April 1968 and the damage Raytheon claims to have suffered.

But, while there is no proof of the causal link between the alleged facts and the consequent alleged damage, there is even less proof of a link between what actually occurred and the alleged damage.

The argument of the Applicant rests on the assumption that ELSI was a jewel of a company. Nothing is further from the truth.

There is no evidence whatsoever that ELSI could be viewed in this way. Indeed, it was a worthless company and Raytheon was perfectly well aware of this.

When ELSI was purchased by IRI from the bankruptcy estate, the only value accruing to the latter was, if anything, that of the land and buildings, the rest of the company's assets being almost valueless. No intangibles worth speaking of existed with regard to the plant. Technology was mainly obsolete and obtained from Raytheon at a high price.

In all probability, once the whole matter has been brought into its correct prospective, and one considers the use that ELTEL could make of the product lines — which had to be dismantled — one could hardly describe the purchase at the fourth auction as a bargain.

There is thus no causal link between the actual facts and the real damage; indeed, no real damage occurred.

Mr. President, distinguished Members of the Court, if I have pointed to several salient aspects of the wide range of arguments which will be dealt with further by my colleagues, it was to draw your attention from the very outset to the importance in the present case of the problem of the burden of proof and that of persuasion. This is a crucial matter because, in our opinion, the Applicant has failed to prove its claims or to give any convincing evidence of the soundness of its argument.

In a proceeding of this kind, in which there is almost total disagreement between the Parties over the facts, as well as over the interpretation of the relevant Rules, the question of the burden of proof becomes a very important issue. In this connection, the Court's jurisprudence is clear. The burden of proof regarding the fact on which a claim is based lies with the party making the claim. This jurisprudence is embodied in a large number of precedents, including those cases in which the Court has refused when the defendant failed to appear, to accept without adequate evidence arguments concerning points of fact raised by the applicant during the proceeding. The Court has repeatedly maintained that even in those circumstances it is necessary, as far as possible, to ascertain that the arguments put forward by the applicant are founded.

To save time I will simply make a general reference to the judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*ICJ Reports*. 1986, p. 14) and the case concerning *United States Diplomatic and Consular Staff in Tehran* (*ICJ Reports* 1980, p.3).

But it is important to recall more specifically those precedents regarding cases where both applicant and respondent were present. Thus, in the *Corfu Channel case* (Merits), the Court said:

> « It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point,

be bound to supply particulars of the use made by it of the means of information and enquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof ». (*ICJ Reports* 1949, p. 18).

Even when a matter has been submitted to the Court by special agreement between the parties (the *compromis*) the Court has nevertheless subdivided the burden of proof, relating it to the fact that one of the parties had alleged the existence of specific circumstances. The relative burden of proof lies with the party making the claim. This is what results from the case of *Minquiers and Ecrehos* where the Court stated that:

« Having regard to the positions of the Parties, both claiming sovereignty over the territory, and in view of the formulation of the task of the Court in Article 1, and the terms of Article II, the Court is of opinion that each Party has to prove its alleged title and the fact upon which it relies ». (*ICJ Reports* 1953, p. 52).

A similar line of thinking was followed in the Judgment on the Merits in the *Temple of Preah Vihear case* when the Court stated that:

« Both Cambodia and Thailand base their respective claims on a series of facts and contentions which are asserted or put forward by one Party or the other. The burden of proof in respect of this will of course lie on the Party asserting or putting them forward ». (*ICJ Reports* 1962, p. 16).

Similar principles have been applied in arbitration awards. Reference may be made to the *Norwegian Shipowners case* (1 *Reports of International Arbitral Awards*, p. 332) and the *Heirs of Jean Maninet case* (10 *Reports of International Arbitral Awards*, p. 77).

The attempts by the Applicant to shift the burden of proof are clearly unreasonable. This applies particularly to Mr. Matheson's statement that he would « present a brief summary of the more important facts » which the Applicant considers undisputed and that « [i]f the Respondent disagrees with any of these facts we invite the Respondent to specify them and to identify any documents before the Court which support its position » (C 3/CR 89/1, p. 250).

The only evidence produced by the Applicant has come from Raytheon. The two witnesses produced in Court were the very people who planned and executed the closing of operations. With regard to this type of evidence I would like to recall what was stated by this Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua*:

« In the general practice of courts, two forms of testimony which are regarded as *prima facie* of superior credibility are, first the evidence of a disinterested witness — one who is not a party to the proceedings and stands to gain or lose nothing from its outcome — and secondly so much of the evidence of a party as is against its own interest ». (*ICJ Reports* 1986, p. 43).

I do not consider it necessary, in this introductory part of our defence, to dwell at length on these concepts. What is important is to emphasize that if what I have said is applied to the case in point the total lack of proof of the facts alleged in the United States arguments should lead to the rejection of the Applicant's case.

The answer given by the United States on 17 February to a question from the bench contains unusual and far-reaching implications for the case of the United States.

In that answer the United States has formally rejected any argument or claim « that the acts and omissions of the Respondent that violated the Treaty amount to a ' conspiracy '». It has stated that it « has never argued and does not now argue » that there was a conspiracy. This change in the case of the United States is quite dramatic.

As Avvocato Caramazza, Professor Bonell and Mr. Highet will point out in the next several days, the US pleadings — including their oral arguments — are replete with suggestions that

there existed what, in effect, was a conspiracy among representatives of the Italian Government, local authorities, representatives of IRI, the bankruptcy trustee, and even (by necessary implication) the judiciary. It is not possible to resile from this position now, merely by saying so.

The United States answer of 17 February, referring to the word « conspiracy », states that: « That characterization is not found in any of the written or oral pleadings of the United States ». It adds [i]t is the Respondent that describes the US claims as based upon a diabolical plot hatched by the Italian public authorities ... (the Rejoinder on p. 183) ».

Now, it is true that we have so described the United States case. It is possible to describe the case on something far less dramatic than a « diabolical plot », however, I have just to get the essential points across and what is the essential point? It is that, with almost no exception, the case of the United States requires there to be a continuity of events, a causal and consequential relationship, between one act of one Italian authority and the next.

In order to find Italy responsible as asserted in this case, the Court has to find that there was indeed a unified plan. Whether one calls it « conspiracy », or a « diabolical plot », or something more neutral such as « concerted action » — or even, in the language of anti–trust lawyers, « conscious parallelism » — the point remains the same.

It is that — working backwards — the United States must connect the acquisition by ELTEL, and the absence of bidders at the auction, to the alleged delay in review by the Prefect of Palermo and the actions of the Italian judicial authorities, and must in turn relate those back to the actions of the Mayor of Palermo, and then again to the statements of President Carollo of the Sicilian Region, in order to make the claims that it is doing.

Nothing else, save a necessary and sufficient line of mandatory cause and effect, could connect these acts together. As Mr. Highet will point out at the close of our presentation, there is in fact a remarkable absence of evidence in this case.

It is therefore an intellectually impossible challenge to the United States for it to supply proof of a chain of causation. Thus, the United States, unable to meet this challenge, has doubtless substituted the implication and suggestion that there was concerted action for the element that it would otherwise have to prove: that the events followed one another and were linked by causal necessity and inexorable fate. And in order to do this, the United States must bear both the burden of proof and the burden of persuasion.

One might have thought that the contents of the United States response of 17 February are so startling that they should have been reflected in a withdrawal of all or most of the United States claim. The difficulty in which the United States now finds itself is indeed a painful dilemma.

Without assuming that the actions here were concerted, or conspiratorial, or consciously parallel, one cannot conclude that there is any relationship between the act of the mayor, for example, and the ultimate sale to ELTEL, unless one assumes further that there is an unbroken line of causation between them.

It should be noted, of course, that no claim as such is made by the United States for many of these other incidents or events, save that they have formed part of an assumed or implied secret concerted plan of action by the Italian authorities.

Has the United States requested the Court for relief, for instance, based upon the conduct of or publicity for the first bankruptcy auction, at which no one appeared? No. Or the second, or the third? No. Has the United States specified the claim for relief based on the actual sale to ELTEL? No.

Of course not. They are only joined together by the implied premise that there was somehow concerted action — if you will, a large–scale and subtle conspiracy — by the Italian authorities against Raytheon. Therefore the case of the United States begins to dissolve from the head down. It is in fact experiencing a « disorderly liquidation ».

One by one, the incidents complained of will « fall away », as long as the Applicant concedes that they are unsupported by an assertion of concerted action or conspiracy, and as long as they are not supported either by the clear and unequivocal establishment of a chain of causation.

As Professor Capotorti and Mr. Highet will point out, the same thing happens to the Treaty and the Supplement upon which the United States claim is based. The provisions of those instruments can ben discarded, one after the other, as clearly inapplicable to the case in hand, until

we are left with only the barest suggestion of a legal justification for a claim against my Government.

I should now like to briefly illustrate the way in which the presentation of the case for the Respondent has been organized. First, the objection that local remedies have not been exhausted will be examined by Professor Gaja this morning.

And also this morning Professor Libonati will then illustrate the fortunes and prospects of ELSI as a manufacturer in the electronics field; in this context he will demonstrate that in reality the investment in ELSI was a disaster right from the start and only got worse over the years.

Tomorrow, Avvocato Caramazza will examine the acts of the Italian authorities which allegedly caused the bankruptcy of ELSI and the further damage to the shareholders, such as the lack of the concession of Mezzogiorno incentives, the failure to react to the workers' occupation of the ELSI plant, and finally the requisition. He will go into the details of its motivation and examine the appeal which eventually led to the requisition being held unlawful under municipal law.

Professor Bonell will then consider the impact of the requisition on ELSI's so–called « orderly » liquidation and, in this context, he will illustrate in particular that when Raytheon decided on ELSI's « orderly » liquidation, ELSI was already insolvent and had been under a duty to file for bankruptcy, so that no causal connection can be claimed to exist between the requisition and the bankruptcy.

He will also demonstrate that IRI had no interest in the acquisition of ELSI's plant and only did so when it became clear that there was no other way to prevent the loss of 1,000 jobs in an area of chronic unemployment; and further that the price paid by IRI in the end for ELSI's plant was totally reasonable given the circumstances.

The problems relating to the interpretation of relevant provisions of the Treaty and the Supplementary Agreement will then be dealt with by Professor Capotorti. He will show that the meaning of these provisions, while they also protect investments to some extent, cannot be stretched to a point in which the host State would not be in a position of being able to ascertain what are its obligations in relation to property situated on its territory.

Then Professor Monaco will address some remarks on the principles relating to reparation.

Now, in view of the material contained in the audited financials of ELSI for the fiscal year ended 30 September 1967, that was described by Applicant on 17 February as requested by the Court, and particularly in the context of the testimony of Mr. Lawrence on related subject–matters, we would also request that Mr. Hayward, listed an an advisor to our delegation, be permitted to address the Court on matters raised by this testimony and these financial statements.

And finally, Mr. Highet will give a general summing up of the case, and will consider the balance of the various arguments in the submissions of the Parties and, in particular, the burden of proof.

And, at the end of all this, I will read out the final submission of the Italian Government.

This is all. I thank you, Mr. President and distinguished Members of the Court for your kind attention and, with your permission, I would like to call now on Professor Gaja. Thank you.

Mr. PRESIDENT: Professor Gaja please. Thank you.

Professor GAJA: Mr. President and Members of the Court. A student of international law cannot fail to feel a sense of privilege and honour in being called upon to address the Court. I fully share this feeling today. I shall divide my pleading into three parts. The first part will deal with the content of the local remedies rule and its applicability in the present case. The second part will discuss the remedies available to Raytheon and Machlett. The last one will consider the effects of the FCN Treaty in Italy.

A. The content of the local remedies rule and its applicability in the present case.

1. The local remedies rule is hardly controversial. As the Court stated in the *Interhandel case*, « [t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well–established rule of customary international law ... » (*ICJ Reports* 1959,

p. 27). Mr. President, with your permission, I would like to leave out the references they will be found in the written record. In a more recent report to the General Assembly, the International Law Commission noted that:

> « ... the requirement that private individuals directly affected by measures taken by an organ of the State in which they reside and carry on their activity should exhaust the local remedies has always been a safeguard which the countries invested in have applied against a tendency unduly to extend obligations concerning the treatment of foreign natural and juridical persons » (*Yearbook of the International Law Commission*, 1977–II, Part Two, I, p. 49, para. 56).

A well–known definition of the local remedies rule was given by the Institute of International Law in 1956 at the Granada session. This definition was quoted approvingly in the Memorandum of Law annexed by the United States Government to its 1974 claim on behalf of Raytheon (Unnumbered Documents attached to the Counter–Memorial, Vol. I, p. 133). According to this definition:

> « when a State claims that an injury to the person or property of one of its nationals has been committed in violation of international law, any diplomatic claim or claim before a judicial body vested in the State making the claim by reason of such injury to one of its nationals is irreceivable if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be effective and sufficient so long as the normal use of these means of redress has not been exhausted » (46 *Annuaire de l'Institut de Droit international*, 1956, p. 364).

According to the Italian Government, this is precisely what occurs in the present case: there were means of redress available to the allegedly injured person; these means have not been used, let alone exhausted; therefore the claim is irreceivable or, in another word, inadmissible.

2. The local remedies rule is certainly applicable to claims made by a contracting State on behalf of one of its nationals under the 1948 Treaty of Friendship, Commerce and Navigation and the 1951 Supplementary Agreement between Italy and the United States. The present claim does not concern any direct injury allegedly caused to the United States. It is on the contrary a case of diplomatic protection. As was stated by the international arbitral award in the *Ambatielos case*, which also concerned a claim alleging the infringement of a bilateral Treaty of Commerce and Navigation:

> « the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State » (12 *Reports of International Arbitral Awards*, p. 118 *et seq*).

There is nothing either in the Treaty or in the Supplementary Agreement to suggest that the local remedies rule has been discarded with regard to claims under the Treaty and the Supplementary Agreement.

An exclusion of the application of the rule with regard to a claim under the Treaty and the Supplementary Agreement has been contended on behalf of the Applicant for the first time by Mr. Murphy when he said: « In the case of this particular treaty, there is no reason to believe that the parties intended such a rule to apply » (C 3/CR 89/3, p. 303). The arguments put forward by Mr. Murphy, namely that « there is no express inclusion of the local remedies rule » in the Treaty and further that:

> « under Article XXVI of the Treaty, both parties agreed that disputes between the parties as to the interpretation or the application of the Treaty not satisfactorily adjusted by diplomacy shall be submitted to the Court »,

have little substance. In view of judicial and arbitral practice it may well be said that when there is a general agreement covering disputes which may arise in the future, such an agreement is not normally viewed as waiving the rule.

3. It has been further argued by the Applicant that the Italian Government is estopped from invoking the local remedies rule in relation to the claim put forward by the Applicant on behalf of Raytheon and Machlett, (for the sake of simplicity, further references will be made only to Raytheon, as Machlett, a fully-owned subsidiary of Raytheon, held only a few shares in ELSI and never took independent action in this case).

No explanation is offered by the United States Government as to why the Italian Government should have taken a self-defeatist attitude implying either a waiver of any right under the local remedies rule or an estoppel. The search for plausible reasons would any way be pointless, as no waiver has ever taken place, nor has there been any attitude on the part of the Italian Government which could justify the existence of an estoppel. Not only has the Applicant failed to provide evidence to this effect, it has also given clear indications that it expected that the issue of whether existing remedies had been exhausted would have been one of the central issues in any adjudication procedure over the claim. In the Memorandum of Law submitted by the United States Government in 1974, five pages were devoted to this issue; no suggestion was made at that time that there had been a waiver or an estoppel (Unnumbered Documents attached to the Counter-Memorial, Vol. I, pp. 133-137).

Counsel for the Applicant, Mr. Murphy, has tried to elaborate on the fact that an undated and unsigned Aide-Mémoire was delivered to the United States Embassy in Rome in 1978 and that it did not contain an objection with regard to the non-exhaustion of local remedies (C 3/CR 89/3, pp. 306-307). This document was referred to in a letter — which was filed by the Applicant on 20 January 1989 together with the document — as a « confidential juridical memorandum » (the letter was from the Secretary General of the Italian Ministry of Foreign Affairs to the United States Ambassador). It clearly in no way represented Italy's final position on the case. Moreover, it only dealt with a few aspects of the claim, which was described as unmeritorious. The question of local remedies was not discussed in the document. If this could be seen to represent an estoppel or an implicit waiver of the application of the local remedies rule, negotiations between States over claims would be put under an unbearable strain. If Mr. Murphy's argument were correct, the Italian Government would have been precluded from raising any defence against a claim which had not been referred to in the confidential juridical memorandum, nor could the Applicant present any argument which was not invoked in the 1974 Claim or even in confidential representations made earlier on. It is anyway a fact, which can be supported by written evidence if the Applicant insists upon it, that the Italian Government had made it clear to the United States Government that as a Respondent it would raise the objection of non-exhaustion of local remedies in judicial proceedings and that no estoppel had been invoked by the Applicant at that time.

4. When the 1974 Claim was presented, an action by Raytheon for compensation of damages for the alleged injuries would have already been barred by the five-year limitation set by Article 2947, paragraph 1, of the Italian Civil Code — incidentally, five years is a longer period than that which is generally provided for in municipal systems for claims against the State or State authorities.

Thus, the attitude taken by the Italian Government in respect of the 1974 Claim cannot in any way affect the issue of whether local remedies have been exhausted or not. Moreover, no authority suggests that the respondent State is under an obligation to prompt the use of available remedies. However, Mr. Murphy contended that «a State is under an obligation to recommend legal action against itself » (C 3/CR 89/3, p. 307). He will therefore no doubt be horrified if I suggest that even in the hypothetical case that the Italian Government had mistakenly asserted that no local remedies existed, the non-exhaustion of local remedies would still not be justified. There is no less authority for this proposition than the following passage in the Court's judgment in the *Interhandel* case:

« The Court does not consider it necessary to dwell upon the assertion of the Swiss Government that ' the United States itself has admitted that Interhandel had exhausted the reme-

dies available in the United States courts '. It is true that the representatives of the Government of the United States expressed this opinion on several occasions, in particular in the memorandum annexed to the Note of the Secretary of State of 11 January, 1957. This opinion was based upon a view which has been proved unfounded ». (*ICJ Reports* 1959, p. 27).

As is well known, the United States Supreme Court had in the meantime granted a writ of certiorari. My point is that no relevance was then given to the attitude taken by the United States Government with regard to the existence of remedies.

Mr. Murphy introduced another argument with regard to the application of the local remedies rule. He said: « there is clearly no requirement in international law that a State must exhaust local remedies before it can seek to vindicate its own rights through declaratory relief » (C 3/CR 89/3, p. 303). This argument is hard to grasp. Could one really say that submissions requesting payment of over 12 million dollars plus interest are in fact seeking declaratory relief? For the sake of his argument, Mr. Murphy attempts to split the claim for a declaration that the Treaty has been violated from the claim for reparation. A similar attempt had been made by the Swiss Government in the *Interhandel case*, but the Court noted that « one interest, and one alone, that of Interhandel » had « induced the Swiss Government to institute international proceedings », and that this interest, being the basis of the international claim, « should determine the scope of the action brought before the Court by the Swiss Government in its alternative form as well as in its principal form » (*ICJ Reports 1959*, p. 29). Thus, even if the attempt to split the submissions were insisted upon, and eventually became successful, the local remedies rule would still be considered fully applicable.

5. The Parties agree that, in order to measure compliance with the local remedies rule, the Applicant's contentions on the merits are decisive. Were it necessary to establish the truth with regard to issues of law and fact pertaining to the merits before considering whether local remedies were exhausted or not, the local remedies rule could hardly be held as providing a bar to the admissibility of a claim, and the objection as to the non-exhaustion of local remedies could never be disposed of in proceedings relating to preliminary objections. As was stated by the arbitrator in the *Finnish Shipowners case* — in an award which the United States Memorandum of Law of 1974 described as « a landmark decision » (Unnumbered Documents attached to the Counter-Memorial, Vol. I, p. 133) — « every relevant contention, whether it is well-founded or not, brought forward by the claimant Government in the international procedure, must under the local remedies rule have been investigated and adjudicated upon by the highest competent municipal court » (3 *Reports of International Arbitral Awards*, pp. 1503 *et seq*). In other words, for the sake of applying the local remedies rule, one must assume that the Applicant's contentions are correct: for instance, in the present case, that — contrary to the Italian Government's argument — the requisition of the ELSI plant made it impossible for Raytheon to liquidate ELSI's assets in a profitable way and also that the requisition and the subsequent actions of the Italian authorities, up to the sale of the plant, were taken by them in order to cause Raytheon detriment. From the point of view of the application of the local remedies rule, one would have to answer the following questions: (*a*) supposing these allegations were true, were there any judicial or other remedies available in Italy for securing redress? (*b*) If there were any remedies, have they been used?

B. The remedies available to Raytheon.

1. In considering whether Raytheon used the remedies which were available in Italy, one has to acknowledge that, as one of ELSI's creditors, Raytheon could have challenged several measures taken during the bankruptcy proceedings: for example, the lease of the plant to ELTEL. Appeals could have been lodged to a higher court and subsequently to the Court of Cassation against decisions by the bankruptcy court. Raytheon did take an appeal against the decision of the bankruptcy court concerning the terms of the fourth sale, but did not take a further appeal to the Court of Cassation against the judgment by the Court of Palermo of 20 June 1969, which

confirmed the terms of the fourth sale. By failing to challenge some of the decisions of the bankruptcy court and by not resorting to the Court of Cassation in the matter of the fourth sale, Raytheon did not avail itself of the various opportunities available at least to mitigate the damages asserted to result from the bankruptcy proceedings. A similar comment applies to ELSI's previous failure to seek judicial or administrative remedies with regard to any *Mezzogiorno* benefits to which ELSI was allegedly entitled (refer to the cross-examination of Mr. Clare by Mr. Highet, C 3/CR 89/2. pp. 285–286).

A more radical remedy was available to Raytheon. Raytheon could have brought a claim against the Italian State under Article 2043 of the Italian Civil Code. This is a judicial remedy in which compensation is sought for wrongful acts committed by the Italian State or one or more of it officials. The provision of the Civil Code has a wide scope. It reads as follows: « Any act committed either wilfully or through fault which causes wrongful damage to another person implies that the wrongdoer is under an obligation to pay compensation for that damage » (the Italian text is reproduced in Annex 16 to the Rejoinder).

The claim under Article 2043 could have been based on the same set of facts which are alleged in the present proceedings; the same amount of damages could have been claimed. The Italian State's liability is unlimited. Moreover, the Italian State's resources would certainly be adequate to meet any obligation to pay compensation resulting from a judgment. Needless to say, claims for compensation for wrongful damage are frequently brought against the Italian State; many have been successful.

It is a fact that Raytheon did not make use of this radical remedy, which would have provided complete redress — if the Applicant's contentions are assumed to be correct, as is necessary when applying the local remedies rule.

2. Professor Fazzalari, now wearing his hat of Adviser to the Applicant, contended that Article 2043 was of no avail to Raytheon (C 3/CR 89/2, pp. 295–299). The argument, if I understand it correctly, partly rests on his assumption that the Treaty cannot be invoked in Italian courts — an incorrect assumption to which I shall come later. The other part of the argument is that Article 2043 does not apply when an « obligation is provided for [the ?] benefit of the whole community »; he gave us as an example rules for « conducting competitive examinations for public employment » (p. 299). Now Raytheon was engaged in a competition of a quite different kind! On a more serious note, one can say that Raytheon complains of measures which specifically affected its own rights and interests. Violations of its rights as shareholder are alleged. This clearly brings a claim for compensation within the scope of Article 2043. Suffice to recall what was said in the judgment of the Court of Rome in the *Talenti case*. The text of this judgment was supplied by the Applicant last week. The Court said (in the translation supplied by the Applicant):

> « Now, according to the principles ruling Italian juridical order, legal action for compensation for damages as per Aquilian responsibilty — such as the action proposed by the plaintiff — postulates as necessary assumption the performance, by the subjects bound to pay the compensation, of specific intentional or unintentional actions that injure an interest of the private citizen and, as such, are the cause of unjust damage ». (p. 3).

The Talenti claim had been made under Article 2043. The Court of Rome rejected it because it noted that the plaintiff had:

> « in no way specified, in any of his pleadings, the individual and specific illicit acts committed by each of the accused authorities, limiting himself to generic complaints and complaining about equally vague persecutory actions to this detriment on part of the Italian State » (p. 3).

This would not have been Raytheon's case, if one assumes, as one has to according to the local remedies rule, that the Applicant's contentions are correct.

Little needs to be said about Professor Fazzalari's contention: « ELSI's successful suit based on the specific remedy of an appeal to the Prefect eliminates any other remedies »

(C3/CR 89/2 p. 300). Professor Fazzalari argues that no interim measures of protection could have been granted by a judicial court against the requisition (p. 301). But his argument can in no way lead to conclude that actions for compensation are also barred. One only has to refer to the action brought by ELSI's receiver under Article 2043 requesting compensation from the Italian State: as is well known, the claim was admitted and the receiver was partly successful on the merits (see decision by the Court of Cassation of 26 April 1975, Annex 82 to the Memorial).

3. The fact that the receiver brought a claim under the same Article 2043 of the Civil Code, for compensation against the Italian State, does not absolve Raytheon of its failure to avail itself of the radical remedy previously described. First of all, the receiver only complained of the unlawful character of the requisition decree, which affected the ELSI plant and equipment for six months, and claimed the related damages; he did not envisage the existence of any plot or concerted action undertaken to Raytheon's detriment, nor could he have been expected to bring before the Court a set of facts similar to those later alleged by the Applicant. Secondly, the receiver could only act on behalf of ELSI in the interest of all the creditors: any sum awarded would have had to have been distributed on an equal basis, first among the secured creditors and then among the unsecured creditors. Any right stemming from the Treaty and the Supplementary Agreement to Raytheon's benefit could only have been invoked by the individual creditor concerned: by Raytheon. Moreover, if Raytheon suffered as the result of an alleged plot or other wrongful act committed to the same company's detriment, it stands to reason that compensation should accrue to Raytheon only, and not to other ELSI creditors such as the banks.

4. Raytheon's failure in making use of available remedies can in no way be justified by an assumption that Italian courts had an attitude of bias against Raytheon. Quite to the contrary, when Raytheon was sued by the Italian banks, which had lent money to ELSI on the basis of Article 2362 of the Civil Code which allows claims against a limited company's sole shareholder, the Court of Cassation decided in Raytheon's favour, although Raytheon had more than 99 per cent of the shares and the other shareholder was one of Raytheon's fully owned subsidiaries. In forming these judgments the Court of Cassation took a formalistic line and went against a considerable body of opinion (see Counter-Memorial, p. 94 *et seq.* and Rejoinder, p. 201). It is worth noting that, in settling a controversial issue concerning the shareholder's liability, the Italian Court of Cassation decided against Italian banks, including publicly-owned banks, and in favour of United States company, whose Italian subsidiary had borrowed large sums from these banks and had not paid them back. To be sure, there is nothing unusual in this attitude of the Italian courts. However, the attitude taken by the Italian Court of Cassation when Raytheon was sued clearly demonstrates that remedies were available to Raytheon not only in theory. Even the allegations of a plot which were made by the Applicant Government, or the concerted action, do not involve the judiciary except, to a limited extent, one bankruptcy judge.

5. Instead of seeking redress in Italy through the use of judicial process, Raytheon put its hopes in diplomatic intervention. This may be explained by Raytheon's comparatively easy access to diplomatic protection. In the entire post-war period, there are no instances of diplomatic protection being exerted by the United States Government against Italy — or, for that matter, by the Italian Government against the United States — which may in any way be likened to the claim put forward on behalf of Raytheon.

Clearly, with regard to the prospects of diplomatic protection, the existence of local remedies always presents itself as an obstacle, as it affects the admissibility of the claim.

As early as December 1971, Professor Antonio La Pergola, who had been consulted by Raytheon, expressed the question put to him in the following terms:

> « The question posed to me is whether (given all the happenings and circumstances surrounding Raytheon-ELSI S.p.A. of Palermo and in the event that the United States Government intends to make a claim against the Italian Government for unlawful acts against the US national shareholders of the said company) the prerequisite of exhausting all available local remedies can be considered as fulfilled and an international claim advisable » (Unnumbered Documents attached to the Counter-Memorial, Vol. I, p. 161).

Given Raytheon's intention to resort to diplomatic protection, it is understandable that Raytheon was content with the positive conclusion reached by their consultant, although in his opinion no single argument was devoted to the issue. All the arguments in the 22 pages of the Opinion (12 in the English translation) dealt with the diplomatic protection of shareholders: curiously, writing in 1971, he quoted the *Delagoa Bay* award twice, but totally ignored the *Barcelona Traction* judgment. In any case, the Opinion would appear to lend support to Raytheon's attempt to move their claim to the international level, and was thus certified by the United States Vice-Consul in Rome on the same day — 9 December 1971 — on which it had been delivered in Bologna (see Unnumbered Documents attached to the Counter-Memorial, Vol. I, pp. 173 and 195). The opinion was annexed to the 1974 claim presented by the United States Government on behalf of Raytheon and was later invoked in the Reply (p. 138). Mr. President, I am coming to the third part of my pleading, that will take about 10 minutes.

Mr. PRESIDENT: We are going to take a break now.

Mr. GAJA: Thank you Mr. President.

The Court adjourned from 11.25 *to* 11.40 *a.m.*

Mr. PRESIDENT: Please be seated. Professor Gaja please.

Mr. GAJA:

C. The Effects of the FCN Treaty of Italy.

1. In bringing a claim for compensation for damages arising from one alleged wrongful acts of Italian authorities, the 1948 Treaty and the 1951 Supplementary Agreement as interpreted by the United States Government, would have given Raytheon an adequate basis in establishing the wrongfulness of all the acts causing the damages.

All the contentions concerning the Treaty and the Supplementary Agreement could have been used before Italian courts. Once laws containing an implementing order (*ordine di esecuzione*) of the Treaty and the Supplementary Agreement had been enacted in Italy — and this was done before both texts entered into force between the contracting States — Italian courts would have applied all the provisions in the Treaty and the Supplementary Agreement. True, Italian courts may hold that a Treaty provision cannot be invoked by a party to a judicial proceeding if it is regarded as a non-self-executing provision. However, Italian courts do not come to such a conclusion lightly.

Whenever the Italian courts have considered one of the provisions of the 1948 Treaty or the 1951 Supplementary Agreement, they have applied it. The Court of Cassation gave two decisions on provisions of the Treaty. Their text is reproduced in Annexes 11 and 12 to the Rejoinder. The influence of these decisions as precedents both for the same Court and for lower courts is to be acknowledged on the basis of the attitude generally taken by Italian courts. The first decision was given as early as 1960; the text was published both in the well-known *Rivista di Diritto Internazionale* (1961, p. 113) and in the widely read *Il Foro Italiano* (1961, Part I, 304). Both decisions are referred to in the yearly volumes *Il Foro Italiano, Repertorio*, where they can be easily traced (1961, at pp. 2991 and 323; 1984, at pp. 3395 and 764).

Although these two decisions do not specifically concern the same provisions of the Treaty as are invoked in the present proceedings, there is no reason why Italian courts should have viewed these provisions under a different light. Reference may be made to a more recent decision by the Court of Cassation, N. 4811 of 28 July 1986, *Parzinger and Nowak* v. *Provinia Autonoma di Bolzano* (the text was published in *Rivista di Diritto Internazionale Privato e Processuale*, 1987, p. 788 *et seq.*; it will be supplied together with an English translation to the Registrar and the Agent for the Applicant). This decision applies Article VI of the Treaty of Freindship, Commerce and Navigation of 21 November 1957 between Italy and the Federal Republic of Germany, which provides for adequate compensation in the case of expropriation, with wording that

largely corresponds to that of Article V of the 1948 Treaty. The Court gave, on the basis of the Treaty, a larger compensation than that was due to ordinary municipal rules.

The attitude of Italian courts, which is generally in favour of the self-executing character of treaty provisions, was recalled in the Rejoinder, at pp. 183-185. It may be added that Italian courts strive to give effect to treaty provisions even when they are not considered to be self-executing. Reference may be made here to what was written by Mr. Waelbroeck in his book *Traités internationaux et juridictions internes dans les pays du Marché commun* (1969, p. 187). He said:

> « A certains points de vue, on peut même considérer que la théorie italienne de l'ordre d'exécution assure une efficacité plus complète aux traités, et notamment à leurs dispositions « non self-executing », que certains systèmes prétendument monistes qui limitent l'applicabilité interne aux seules dispositions stipulant directement au profit et à la charge des citoyens, en vertu de l'ordre d'exécution, le juge italien est renvoyé à l'ensemble du texte de l'accord, et non aux seules dispositions directement applicables ; il doit considérer comme émises dans l'ordre interne toutes les normes nécessaires à l'exécution du traité dans la mesure où celui-ci impose des obligations à l'Etat ».

Thus, it may well be that a claim concerning compensation for wrongful damage caused by State authorities does not in fact depend on the question whether the Treaty provisions, from which the existence of an injury is drawn, are or are not self-executive.

No question of reciprocity is raised by Italian courts when they decide whether a treaty provision may be invoked by a party to judicial proceeding. The decision N. 4811 of 1986 by the Court of Cassation, which was quoted earlier, expressly rules out the relevance of the absence of reciprocity for the said purpose. In any case United States courts, when they have considered some of the provisions in the 1948 Treaty, decided that these provisions are self-executing. Reference may be made here to the decisions in the *Matter of Colella* and in the *Matter of Iannone*, published in the collection *American International Law Cases*, Vol. 10, p. 195 *et seq.* and Vol. 14, p. 449 *et seq.*, respectively. A more general statement to the effect that the Treaty of Friendship, Commerce and Navigation treaties are « self-executing treaties » may be found in a decision by the United States Court of Appeals for the Fifth Circuit, which was more fully quoted in the Counter-Memorial, p. 100, n. 6.

2. Professor Fazzalari attempted to destroy the value of the two decisions referred to by the Respondent in which the Italian Supreme Court applied the Treaty. His only argument appears to be that the Treaty provisions which were applied contain a most-favoured-nation clause (C 3/CR 89/2, p. 297). It is difficult to see why this element, to which no importance was given by the Supreme Court, should affect the status of Treaty provisions as self-executing provisions. In no way did the Court of Cassation require, as Professor Fazzalari would have it, « additional legislation incorporating the Treaty into Italian law with greater specificity » (p. 295).

Reference could any way be made to a further decision by the Court of Cassation which applied Article VI of the Supplementary Agreement — a provision that does not contain a most-favoured-nation clause. The decision was given on 27 February 1970 in *Louis Dreyfus Corporation* v. *Oriana Società di navigazione* and was published in 6 *Rivista di Diritto Internazionale Privato e Processuale*, p. 394. *et seq.* (1970).

Unable to find any judicial decision in favour of their contention, Professor Fazzalari (C p. 298) and later Mr. Murphy (C 3/CR 89/3, p. 310) attributed great weight to an opinion given by one of Rome's State attorneys in the *Talenti case*. Although Professor Fazzalari spoke of « an expropriation of property in violation of Article V of the FCN Treaty » (p. 298), the State attorney contended that no expropriation had taken place and that no specific measures were alleged to have been taken against Mr. Talenti's property, as he only complained of town planning measures concerning the areas of Rome in which his properties were located. The State attorney argued that the Treaty did not confer any rights in this regard. In the passage which was quoted by Professor Fazzalari and which is not quite intelligible in the translation supplied by the Applicant, the State attorney argued that the legal protection granted by Italian law against town planning measures was not in fact enhanced by the Treaty.

There is no argument, either in the State attorney's opinion or in the Court of Rome's judgment, to the effect that, had there been an additional protection under the Treaty, this could not have been invoked by the interested party before the Court. The Court of Rome simply rejected the claim as totally unmeritorious.

Had there been, as contended on behalf of the Applicant, an argument against the self-executing character of Treaty provisions in the State attorney's opinion, one would then have to take into consideration that the opinion of State attorneys, including the one in the *Talenti case* are the result of the personal work of the individual State attorney and are never published. True, State attorneys have sometimes argued before Italian courts that provisions of treaties other than the FCN Treaty are not self-executing. However, as examples in the Rejoinder (pp. 216-217) show, Italian courts have not followed this line and have taken the opposite view, i.e., that provisions in the GATT and in the Peace Treaty with Italy are self-executing.

From the point of view of international law, municipal courts are State authorities no less than State attorneys are. Moreover, it would be difficult to deny that when one considers whether the provision of a treaty may be invoked before a court, it is the attitude of the courts that matters. As one would say it in French: *M. de La Palice en aurait dit autant.*

3. Mr. President and Members of the Court, the attitude of national courts in favour of recognizing the self-executing character of treaty provisions deserves encouragement as a matter of policy. For private parties the difference between self-executing provisions and non-self-executing provisions is often fundamental. In the first case, private parties may invoke rights and interests before national courts and thus secure on their own initiative the enjoyment of the full protection granted them by the treaty — irrespective of the presence or absence of willingness on the part of the national State to espouse a diplomatic claim on their behalf. When, on the contrary, a treaty provision is not self-executing, treaty obligations cannot be enforced, as a rule, through national courts. Inevitably, the respect of international obligations, as between States, becomes less certain.

Negotiations between States do not necessarily lead to the complete fulfilment of treaty obligations. The result may be more limited than what is required, but it may well also go beyond it, depending more on the circumstances that lead the contracting States to a settlement than on the merits. There is no doubt that it is in the interest of the complete application of treaty provisions which are there to protect private parties, that those provisions should be considered, as far as possible, self-executing.

D. Conclusion.

When local remedies have not been exhausted, a claim put forward on behalf of the non-complying national must be declared inadmissible.

Inadmissibility does not necessarily imply that the claim may no longer be espoused. For example, in the *Interhandel case*, when a writ of certiorari was granted to the Swiss company, local remedies appeared to be still available. The inadmissibility of the claim was intended to affect the claim only until a final decision had been handed down by the United States courts. On the contrary, in the *Finnish Shipowners case* and in the *Ambatielos case*, the inadmissibility was permanent, as the opportunities offered by the relevant municipal system, which had not been used, were no longer available. This is an unavoidable result of the application of the local remedies rule, which is not designed simply to provide a temporary bar to premature international claims. As the Court stated in the *Interhandel case*, the purpose of the rule is rather that « the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system » (*ICJ Reports* 1959, p. 27).

In civil matters, that opportunity depends on the party which has allegedly been injured bending a claim to domestic courts. If the party does not put forward any claim, the State is in no position to redress the injury by its own means, within the framework of its own domestic legal system. It is then reasonable that the inadimissibility should not be temporary,

This is what has occurred in the present case. Judicial remedies existed but were not resorted to; the provisions in the 1948 Treaty and in the Supplementary Agreement which are invoked by the Applicant Government were never brought to the attention of an Italian court by the party whose rights and interests were allegedly affected. Those remedies were available over a span of five years, giving ample opportunity for their use. However, they were ignored. As a result, the claim put forward by the United States Government is inadmissible, and not only temporarily. Negotiations over the claim may continue, but the claim cannot be put forward in law.

Mr. President and Members of the Court, this concludes my pleading. Thank you for your attention.

The PRESIDENT: Thank you very much. I call upon Professor Libonati.

Professor LIBONATI: Mr. President and distinguished Members of the Court. It is for me a great honour and privilege to appear for the first time before this highest of tribunals.

1. *Preamble.*

My pleading concentrates on several facts, and also many figures, on which there is strong disagreement between the Parties, and which were in no way proven by the Applicant. This contradicts Mr. Matheson's statement that « the vast majority of facts relevant to this case are not in dispute » (C 3/CR 89/1, p. 250).

The matters on which I shall be concentrating my attention are those on which the United States Government dwelled upon to the greatest extent:

– was ELSI, or was ELSI not, a going concern at the end of March 1968?

– were ELSI's assets, or were they not, of sufficient value to cover the company's debts?

– is there any justification in the theory by which ELSI could sell its assets at their book value in an orderly liquidation if the Mayor of Palermo's requisition order had not taken place?

2. *ELSI's permanent economic and financial crisis.*

In May 1967, almost a year before ELSI was declared bankrupt, the company's management prepared a Project for the Financing and Reorganization of the Company, which was then passed to the ESPI (Ente Siciliano per la Produzione Industriale) on May 31 of the same year; the Project forms Annex 22 of the US Memorial submitted by the United States Government.

In the « Conclusions and Requested Action », put forward from page 40 onwards of the Project, the following conditions are identified in order to avoid the crisis looming ahead of the company:

(*a*) additional capital of the order of 6 billion lire (the company's capital at that time was 4 billion lire). As already specified at page 1 of the Project, in the opinion of ELSI's management the investment of 6 billion lire ought to be made by the Sicilian Regional Government;

(*b*) new products — not only from Raytheon but also from Italian Government sources; in particular orders « by direct Government assistance » for 3 billion lire (p. 37 of the Project);

(*c*) financial help, available for transport costs, capital investment and training (p. 40 of the Project).

The necessity of such interventions was due to ELSI's chronic inability to adopt a competitive structure, and its equally chronic ability to generate only losses.

As early as far-off 1950 in fact — I shall not repeat all the technical details reported in the Project; I shall try to summarize — ELSI's production lines were not sufficient to enable the company to compete on the market. « It was to add », one may read in the Project, « other products » (p. 4).

The successive interventions — by La Centrale (an Italian company with its head office in Milan) for 70 per cent and Raytheon for 30 per cent — did not improve the situation. ELSI

continued stubbornly to make only losses. Again in the aforementioned Project we read that (*a*) « the technical and production ... costs were high »; (*b*) « the creation of a wide and stable market was very costly, both directly and indirectly »; (*c*) « Both in Italy and abroad all major customers ... were reluctant to grant (to ELSI) constructive confidence as long as ELSI appeared like a small company with no real technical strength behind it » (see p. 6 of the Project).

Soon afterwards, faced with a greater intervention by Raytheon, the Sicilian company realized that (see p. 9 of the Project) (*a*) products for military usage, if technically interesting, « cannot constitute a correct exclusive operating basis », and (*b*) « the products for the consumer market ..., such as cathode ray tubes and semiconductors for radio and TV, etc., ... cannot « be taken as a basis of ... an industrial operation »; moreover, they had to suffer « the heavy costs incurred to deliver the product to the customer's factory ».

After all, in the words of the company's American management the undertaking was not and never had been competitive on the market, so that ELSI could not continue as it always had done up until that point, to accumulate losses. And the proposed reorganization, in the opinion of the American experts, required not only a massive injection of capital by the Italian State to the extent of 6 billion lire, but (*a*) that « the Government subsidies will be available to cover the additional transport costs, not only for incoming material but for the export of completed goods to other countries » (see p. 25 of the Project), and (*b*) that in the search for new products, these had to come « from Government-owned agencies in Italy », with the desired Government procurement order amounting to some 5,000 million lire (see pp. 6 and 37 of the Project).

3. *ELSI's collapse of* 1967–1968.

In short, a desperate situation which saw ELSI by now completely out of the market.

The fact is that right from the start ELSI could not have been anything other than an uneconomic enterprise.

The bulk of the production — cathode ray tubes and semiconductors — in order to be profitable would have to have been situated in the immediate vicinity of the suppliers of the raw materials (particularly the glass tubes, which on the contrary — as far as we learn from Mr. Ravalico, most senior person responsible for the manufacturing group belonging to SIT-Siemens [see Doc. 14 attached to the Rejoinder] — came all the way from Russia) and of the customers for the finished product, and there are no television manufacturers in Sicily.

ELSI's products therefore — as we learn from O.J. Scott (*The Story of Raytheon*, New York, 1974, p. 364) — cost from the very outset 10 per cent more than competing products. They were unsaleable right from the start, other than with a great deal of luck.

As if that wasn't enough, there were products being manufactured using clearly outmoded methods. Engineer Busacca, who was responsible at ELSI for the planning of the microwave tube sector up until his dismissal on 29 March 1968, tells us for example (Annex 44 to the Counter-Memorial) that:

« in the semi-conductor line — the machinery was unserviceable and idle, because it had been designed for germanium technology, which had been obsolescent for many years »;

« in the X-ray tube line — the machinery was very old and the processing was carried out at great risk to the operators ».

Furthermore:

– the workforce exceeded the requirements; only by increasing production — as we learn from the Raytheon management Project — or by changing production — as Mr. Clare has declared before the Court — could the structure thereby created ever hope to become profitable;

– the management was lacking; Raytheon, the new totalitarian shareholder, kept the technicians who had previously been with the previous owners — Professor Calosi and Engineer Profumo — who were only dismissed in 1967, when it was too late, and when all the President of Raytheon could do was to let off steam with Calosi, telling him: « You have made a terrible mess of things » (Scott, p. 365);

– ELSI was undercapitalized, with bank debts of over 13 billion lire, giving rise to an average interest charge of 1 billion lire per annum — as Mr. Clare has admitted in his testimony — without counting the interests on medium term loans, therefore with an intolerable financial burden from the very start, and completely lethal for an undertaking which produced losses at the rate of the Sicilian company.

And there is still more.

ELSI always made only losses — 902 million in 1963, 331 million in 1964, 48 million in 1965, 859 million at 30 September 1966, 2,681 million at 30 September 1967, rising to 3,750 million at 31 March 1968 for new losses of 1,069 million lire in the half year (Annex 13, Schedule B1 to the US Memorial) — and was therefore in a permanent financial crisis.

ELSI was however still a worthwhile lemon, there to be squeezed by the American parent company. As can be read in the technical consultancy document of Dr. Giuseppe Mercadante, the expert appointed by the Tribunal of Palermo to draft a technical report on ELSI's pre–bankruptcy management for the accounting periods from 1964 to 1968, « among the various costs which have raised some perplexity in the survey, we note the huge disbursements incurred under the item *Assistance to Raytheon company* » (in spite at the fact that ELSI was incurring losses); disbursements that must be added — as we again learn from Dr. Mercandante — to the royalties paid to the American company, on top of reimbursements for travel and accomodation out of all proportions, etc. (around 340 million in 1968 alone) [see Technical Report of Mr. Mercadante, Counter–Memorial, Annex 36, pp. 16–19 of the Italian text, pp. 14–15 of the English translation]. And all this to maintain a deficient production, given — and I quote again from Dr. Mercadante's Technical Report (p. 14) — « returned goods, return by customer, the faulty goods » that afflicted ELSI's profit and loss account.

Thus onto the uneconomic production costs were added conspicuous outlays to the advantage of the parent company, which, if explaining Raytheon's insistence in maintaining the Italian subsidiary for its own profit, also impose, under a merely technical business profile, an even more negative consideration of the Sicilian enterprise.

4. *The lack of cash and the end of ELSI's operations.*

Let us talk a little about the figures.

The consistency of ELSI's accounting periods showing losses is in itself appalling.

As if that was not enough, 902 million in 1963, 331 million in 1964, 48 million in 1965, 859 million at 30 September 1966, 2,681 million at 30 September 1967, rising to 3,750 million at 31 March 1968 (forgive me if I repeat these incredible sums). In March 1967 Raytheon had to cover losses by pouring in over 4 billion lire.

The deficit at 30 September 1967 — as we read in the report of Coopers & Lybrand (p. 9) — « exceeded the total of the paid–up capital stock, capital reserve and stockholders subscription account by an amount of 881.3 million »; and under Articles 2447 and 2448 of the Italian Civil Code — as Coopers & Lybrand emphasized in their note 10 — the directors were obliged « to convene a stockholders' meeting forthwith to take measures either to cover the losses by providing new capital or to put the company into liquidation ».

The directors of ELSI did not do so. Months passed. And by March 1968 further losses of over 1.068 billion lire had been produced. The losses amounted thus to 3.7 billion lire. But these figures — being those which appear from the available documents — are still lacking.

There are certainly non–existent credits in ELSI's 1967 accounts; for example for over 246 million lire with a certain Noya Alfred Enacktemer of Quickborn, West Germany (see p. 20 of Dr. Mercadante's Technical Report, Annex 36 to the Counter–Memorial).

There is certainly an overvaluation of the stock of between 1,500 and 2,000 million lire (see p. 20 of Dr. Mercadante's Technical Report, Annex 36 to the Counter–Memorial).

There is certainly a fictitious increase in sales, with values that were left illegally as assets under the heading *Clients with Credits Due* (see p. 20 of the Technical Report by Mr. Mercadante).

There are certainly accomodation papers for 1,200 million lire (see p. 38 of the Technical Report by Mr. Mercadante).

The actual amount of ELSI's losses at the start of 1968 was therefore — to put it briefly — overwhelming. Raytheon's management was however completely aware of the situation, and this is sufficiently evident from the fact that on 21 February 1968, Mr. Adams, Mr. Clare, Mr. Hillyer and Mr. Profumo met with the Honourable Carollo, and on that occasion «Adams stressed that ELSI cannot survive without immediate cash help, which Raytheon cannot provide ».

8 March 1968 was considered by the management of the American company to be the last date of ELSI's survival, to the extent that « this date of 8 March was stressed repeatedly as the absolute limit for a shutdown due to financial crisis » (I quote from the handwritten minutes of the meeting, annexed as N. 19 to the Rejoinder, p. 6).

Mr. Clare even indicated a precise « time chart ». In his opinion there would have been (see Annex 19 to the Rejoinder): « on 26 to 29 February — inevitable bank crisis; on 8 March — we run out of money and shut the plant ».

This forecast did not prove to be exaggerated.

On 31 March 1968 ELSI's cash amounted to a total of 21 million lire (see the provisional balance sheet attached sub A to Annex 30 to the US Memorial); but facing the company were 283 million in short–term debts with suppliers, 12 billion in debts with the banks, 1.2 billion in accommodation papers which required to be honoured on maturity, 800 million lire with Banca Nazionale del Lavoro maturing on 18 April for long–term loans (see Unnumbered Documents annexed to the Counter–Memorial, p. 179), and 100 million lire which, on average, was the monthly requirement to pay the workforce (if not an even larger sum).

Thus, at the end of March, ELSI could not even pay its workforce, and the same is probably true of the telephone, electricity, etc. Furthermore, a few days later, another mine would have exploded, the impossibility of meeting loan repayments falling due, with the consequential dishonouring of issued bills. From here we have the decision to close down, since the financial help requested did not arrive.

« The business situation of the company has deteriorated to a point too critical to be ignored, ELSI's President observed on 16 March 1968 (see p. 444 of the Unnumbered Documents submitted by Italy). Thus, the Board decided that cessation of production will be effected immediately, while cessation of trading and dismissal of employees will be effected on 29 March 1968.

In actual fact, on 29 March 1968, at the wish of its directors, ELSI, overwhelmed by the losses resulting from its inability to produce profitably, and by the hopeless financial crisis that naturally followed, ceased to be a going concern and became a dead and obsolete plant, fit — in order not to produce further losses, since it never knew how to do anything else — only for sale on a break–up basis, almost at « scrap » value.

5. *ELSI was not « a going concern ».*

These indisputable and proven facts, which result from documents, are important, as far as we are concerned, in two contexts.

In the context of substance, it has been demonstrated that ELSI was not a going concern that was distroyed by the requisition ordered by the Mayor of Palermo; the losses of ELSI began a long time before the order of the Mayor, and even M. de La Palice would admit that 29 March 1968, the day of the closure of ELSI's plant, precedes 1 April 1968, the day of the requisition.

In the context of form, it has further been shown that as far as concerns the economic and financial disaster which arose, and the decision taken by ELSI's directors, Italian law did not permit any sort of liquidation other than the bankruptcy procedure.

The very nature of ceasing to be a going concern naturally brings with it a depreciation in the business undertaking, which in this case, as we have already seen, used obsolete production lines to produce goods which were unable to find a market. In such cases, the plant and machinery can only be sold as scrap, since they are unable to produce profitably. In addition, in ELSI's case, the plant had been formally closed at the wish of the directors and the shareholders, so that absolutely nothing of any sort of business worth could be offered, the goodwill — if there ever was any in a company which only ever produced losses (and we shall come back to this point later) — having been reduced to zero by the management's decision.

Now, in terms of Italian law — Article 5 of Royal Decree of 6 March 1942 — « the entrepreneur who finds himself in a state of insolvency is declared bankrupt », and « the state of insolvency is manifested by defaults or other external facts which would demonstrate that the debtor is no longer in a position to satisfy his own obligations in a regular manner ».

In this case it is the debtor himself who admitted to no longer being in a position to satisfy his own obligations in a regular manner. In these circumstances, as Professor Jaeger points out in his statement, « the Board of directors of ELSI should have filed a petition in bankruptcy, or at least, request to the Palermo Tribunal to be admitted to the procedure of judiciary settlement (concordato preventivo) » (Rejoinder, Annex 32).

Professor Bonell will return shortly to the particulars of Italian law, and that of other civil law countries, in the area of bankruptcy. Here we need merely note that the « orderly liquidation » under the control of the management is thus a convenient hypothesis which is now bandied about for reasons of convenience. The reality is completely different. Perhaps in September 1967 — as suggested by Coopers & Lybrand — there could have been place for a liquidation. But at March 1968, with six months of added losses, 1,069 million lire in six months, being « out of money » as admitted by its directors, ELSI was insolvent before the requisition took place and should have been declared bankrupt.

The fact that it was no longer a going concern, the mounting losses and the obsolescence of the plant and equipment, made it impossible in Italian law, as in the law of many other civil law systems, to conduct the liquidation other than through the control of a receiver in bankruptcy nominated by the Tribunal. It thus follows that the first theory of the United States Government — that the Italian authorities prevented an orderly liquidation of ELSI — is completely unrealistic.

6. *The impossibility of negotiations for settlement.*

Mr. President, distinguished Members of the Court. All that I have said up to now is entirely confirmed by the testimonies of Mr. Adams and Mr. Clare, and in the statements of Professor Bonelli.

Professor Bonelli underlined — and I believe that everyone would agree with him — that when a company is insolvent, it can avoid bankruptcy if the shareholders put up new capital, or if it reaches an agreement with its creditors. The first alternative obviously cannot be taken into consideration in this case, since we have clearly seen that Raytheon did not want, or was unable to continue covering ELSI's losses. The second alternative requires — according to the scheme described by Professor Bonelli — a compromise of some of the major unsecured debts, especially with the large creditors, or a « concordato stragiudiziale », which means a settlement with all creditors.

Now, in order to enter into an agreement, especially with all of the creditors, you require long and often tiring negotiations, which must logically begin before the company finds itself « out of money ». The failure to pay a small supplier or the employees wages is sufficient to upset the balance and destroy the whole scheme. Exasperated employees or irritated suppliers have every reason for going to the judge and asking for the bankruptcy of the non–paying debtor.

However, in ELSI's case, Mr. Adams and Mr. Clare have confirmed that the idea of the liquidation was deliberately kept quiet. Mr. Clare has even admitted that « plans for an orderly liquidation were not in place » when, at the end of March, the management decided to go into liquidation (C 3/CR 89/2, p. 288). It thus clearly follows that no negotiations with the creditors had been begun up to the point where ELSI was « out of money » and, at that point, there was no longer time for negotiations, since ELSI — as Mr. Clare has confirmed — could not even pay « the first payroll in April » (in fact it did not even pay March's wages, as we shall see later).

ELSI thus found itself insolvent, and materially prevented by the lack of time from looking for alternatives. It is a typical example of bad management, but this is not our problem. What is now relevant is that the directors, if they had stuck to the law, should have gone to the Tribunal and presented a petition for bankruptcy, as the Respondent has stated on several occasions.

Mr. President, distinguished Members of the Court, I do not think that I need go any further on this point, since the argument is confirmed in the passages of the texts cited by the Applicant and in the Applicant's defense.

7. *The dismissal of the workers.*

A further comment on Mr. Clare's statements.

As has already been mentioned, the workforce of ELSI exceeded the requirements.

Mr. Clare further specified that the search for new products — those which according to the Programme for Reorganization were to be ensured by the Italian State — was required « because ELSI could not fire 200 people ». « We got rid of two people off the television line » — Mr. Clare remembers — « we had a strike for about three weeks on the line ».

It is not pleasant to hear one speak — in 1989 — of workers as objects which one can « fire ». But this is not what brings us back to the question. The fact is, as far as we can see in the in the US 1974 Claim (pp. 20–21), that in June 1967 ELSI had already announced the dismissal of 300 employees; but the Sicilian Region came to ELSI's help, and in the end 168 workers were sent home, their wages being paid by the Region.

Thus, changes in the scale of ELSI's operations were possible, despite what Mr. Clare has said.

It is just that it was not possible in 1968, as it had not been possible in 1967, to resolve the company's problems, since ELSI's products would still never have found a place in the market, and ELSI would have remained insolvent.

8. *The incongruence of the calculations based on the hypothesis of an orderly liquidation.*

The insolvency of ELSI in March 1968 in itself closes the discussion on the « orderly liquidation » which was supposedly prevented by the Mayor of Palermo's requisition order. If ELSI was insolvent, its bankruptcy was inevitable; if the bankruptcy was inevitable, the hypothesis of an orderly liquidation could not and cannot be put forward.

The Applicant now indeed clings strongly to the idea that in an orderly liquidation ELSI could have realized the book value of the assets. The reasons for its taking this stand are obvious:

1) If one keeps in mind, for instance, the more reasonable (but nevertheless still utopian) quick-sale value, we have the admission *tout court* of ELSI's insolvency, since the proceeds at this value would have been sufficient to pay only 50 per cent of the debts with the banks; and we all know that anyone who approaches a bank proposing to repay only 50 per cent faces most certainly an execution on his personal belongings a few days later.

But if one has recourse to the book value, ELSI appears to balance its accounts.

2) Furthermore the Applicant has been forced to use book value by the fact that there was no proof of an open market for the ELSI business. No proof has been offered supporting the fact that there were potential buyers in the wings for all or part of the ELSI business (see Mr. Adams' testimony: C 3/CR 89/2, p. 271) any more then there were buyers for the various products made by the different sections of ELSI's business. The sale of a business, just like the sale of a piece of electronic equipment, requires a certain depth in the market. It requires a willing buyer. Without such a market there can be no sale of an enterprise as an entire business or as separate product lines. The business becomes a collection of assets to be realized piecemeal, and at greatly reduced prices.

The book value has been presented to us however as a sensible and reliable calculation.

Mr. President, it is not true.

I do feel it necessary, before continuing with my submission, to apologize to the Court if I must dwell on matters which belong more to a commercial arbitration between Raytheon and the Sicilian Region, than to a case before this highest of Courts. But I am forced to in order to

reply to the singular approach taken by the Applicant, who has moved the discussion into most peculiar areas.

As I have said, it is just not true that the book value approach is a fair and reasonable one.

The book value shows the cost of purchase or of the production of the assets, reduced by depreciation due to their obsolescence. Mr. Lawrence has provided expert testimony on the evaluation of ELSI's assets according to these principles.

Even if we accept Mr. Lawrence's statement, the figures still do not balance. But before speaking of figliet, it would seem necessary, and useful, to stop for a moment and use our common sense. The opposition in such an important case as the one now before the Court cannot come out with hypothesis that has no basis in reality.

a) First, Mr. Lawrence has confirmed that his valuation is based on the premise that ELSI was a going concern (see C 3/CR 89/4, p. 343). But ELSI was not a going concern. It was an insolvent company, an economic and financial disaster, put into liquidation because it had run out of money, and was not even able to pay the wages of its employees (in fact, ELSI's workers' wages for the month of March were paid by the Sicilian Region: see Regional Law N. 12, of 13 May 1968, Document 37 attached to the Counter-Memorial). Incidentally, Mr. Adams in his testimony did not seem to remember this fact (see C 3/CR 89/2, p. 269).

Now, if ELSI was not a going concern, the book value becomes a totally incongruous point of reference. The going concern basis presupposes the continuation of the existing business in some form or another. That is to say, either as a complete business, or as business merged into another business, or as product lines assumed by other persons or businesses. Earning streams are deemed to continue.

When the company goes into liquidation, and above all when the company has continually produced losses and is insolvent, the principle of the book value cannot be used. The concept of going concern implies that the threat of liquidation is not hanging over the business; that the business can meet its liabilities as they fall due.

For example, Statement on Auditing Standards N. 59 of the American Institute of Certified Public Accountants puts among the conditions and events which may lead an auditor to question an entity's ability to continue as a going concern for a reasonable period of time:

- recurring operating losses;
- working capital deficiencies;
- negative cash flows from operating activities;
- adverse key financial ratios;
- need to seek new sources of financing;

and this was exactly the situation that ELSI was in.

Since ELSI was no longer a going concern, the Applicant should therefore have taken a completely different approach. But it did not do so. And it did not do so because the consideration of the sale of a no-longer-going concern, as a whole or divided up, would have given completely different results which would certainly have been far less to the liking of Raytheon. It would have destroyed the idea of an orderly liquidation and it would have painted a picture of the true situation: that is, that ELSI was a disaster from both points of view, financial and economic.

b) What we have just heard is totally confirmed if we go into further detail.

c) Let us start with the « Fixed Assets ».

The first heading — land and buildings — expresses the acquisition cost of land and the construction cost of the buildings.

But the buildings in question were, to a large extent, industrial sheds in which ELSI carried out its industrial activities and not city apartments which enjoy a natural increase in price. They lost all value once the industrial activity of ELSI was detached.

Moreover, three affidavits — Mr. Ravalico, Document N. 14 to the Rejoinder; Mr. Cavalli, Document N. 1 to the Rejoinder; Mr. Cammarata, Document N. 13 to the Rejoinder — show that the buildings were badly designed and badly constructed from the begin-

ning. And how then could the figures which make up the book value be considered consistent with an offer of sale, by a company in liquidation, of such assets?

d) Let us move on to the « Machinery and Equipment ».

Mr. Clare recalled that « the television tube line — that could be sold as an independent business because it was a separate entity » (C 3/CR 89/2, p. 279), and which in itself made up « half of the plant » (p. 281) — produced black-and-white tubes. But in Italy in 1968 colour television was already just around the corner. ELSI produced 23-inch tubes, completely unsaleable by this time (as we know from Mr. Ravalico's affidavit). It was thus necessary to find a purchaser willing to invest in a useless plant, with a remaining life of only a few years. Moreover, these were years in which all television producers would have tried to use up their own existing supplies and would certainly not have been running to ELSI to purchase their products.

These, in addition, could not compete on the market because of their price. Mr. Clare has underlined that the transport costs were very high and that only the receipt of concessions, which were not in any case due — as will be explained later by Mr. Caramazza — would have enabled acceptable cost levels to be reached.

And there is even more:

> « The production lines » submits Mr. Ravalico in his affidavit « were all old, broken down and obsolete. The semiconductor line (the most bankrupt), the X-ray tube line, the microwave oven line, etc., which had been of inefficient production capacity *ab origine*, were all written off at once as scrap. It was not that they were obsolescent as a result of having been shut down pending the bankruptcy proceedings. They were obsolescent due to prior industrial and technical reasons ». (Doc. 14 annexed to the Rejoinder, p. 8 of the English translation).

The obsolescence and poor state of repair of ELSI's machinery and equipment is, by the way, confirmed by the figures.

As an entity with fully working machinery and equipment, it could have produced articles that could have found a place in the market. Even if it had not made a profit, it would at least have ended up without making a loss. ELSI, on the other hand, not only made losses in 1967, but — and to the extent of the figures that we have already heard — in 1966, in 1965, in 1964 and in 1963. To even suppose that someone would be interested in paying book value for this plant and equipment is complete madness.

e) Let us now deal with the « inventories ». Half of the total plant — we are told by Mr. Clare — was made up of the television tube line which, however, produced tubes for black and white televisions which — as said above — no longer had a market at that time.

The stock certainly did not contain products used for military supply contracts, since these are produced according to specific orders and are not put into stock. Thus the major part of the stock could not have been made up of anything other than unsaleable items.

« The stocks were not able to cover even the cost of managing them », remembers Mr. Ravalico in his affidavit. « The stocks were full of unsaleable picture tubes, above all, and old, wholly unusuable, materials that were for the production lines that were going to be sold off as scrap ». (Doc. 14 annexed to the Rejoinder, pp. 9-10 of the English translation).

Nulla quaestio, therefore, as to what was the book value. But rather who on earth would have been willing to pay the book value for such useless stock?

f) A few words on the « Accounts Receivable ».

As it is well known, client debts receivable are calculated at the probable amount of realization, under the deduction of an amount for bad debts which it is believed will not be paid. The « Reserve for bad debts » in ELSI's and Mr. Lawrence's calculations amounts to 80.6 million lire.

Such a low reserve, equal to 3.7 per cent of the total debt figure, is irrational in principle.

But there is one fact which enables us to come at once to a conclusion. Mr. Lawrence has contested the evaluation criteria used by Mr. Mercadante. Mr. Lawrence cannot, however, contest the facts ascertained by Mr. Mercadante.

Mr. Mercadante observes (see his Technical Report attached as Document N. 36 to the Counter–Memorial, p. 20 of the English translation) that the amount of foreign accounts receivable at the date of 31 March 1968, included customers who had not received or had not even paid for the regularly invoiced goods.

For instance, Mr. Mercadante states that the goods dispatched to a certain Noya Alfred Enacktemer of Quickborn, West Germany, were returned and remained at the Customs. The extent of this debt, by someone who would obviously never pay, amounted to over 246 million lire. Therefore, only one case of bad debt was equivalent to three times the reserve of bad debts considered by Mr. Lawrence.

And in these circumstances who would trust the soundness of the book value of the accounts receivable?

f) In Mr. Lawrence's reports the figure of 300 million lire for *Mezzogiorno* grants appears. At point 46 of its statement, it is said that « ELSI's outstanding claims to grants under the Mezzogiorno legislation were expected to be met to the extent of 300 ». « Nothing was included in the balance shet (Mr. Lawrence remembers) pending agreement with the administering authority, but it seems reasonable to bring this amount into consideration as a further recoverable asset ».

Now, as Mr. Caramazza will explain later, ELSI had no right whatsoever to grants under the Mezzogiorno legislation, and had not even made an application for them. Thus to speak of a book value of 300 million for claims under the Mezzogiorno legislation is simply ridiculous. Even though the amount is relatively small, the circumstances of its inclusion are indicative of how sincere the Applicant's approach is, and how seriously the book value thesis presented by the Applicant must be considered.

9. *The « negative goodwill » in ELSI.*

Mr. Lawrence stated (see C 3/CR 89/4, p. 341) that in his opinion « there was a good prospect that a purchaser of any or all of [ELSI's] businesses would have been prepared to pay a substantial premium over the value of the tangible assets for the benefit of [the] goodwill ».

Values attributed to a business which exceed the book value of its constituent net assets are referred to as « goodwill ». In ELSI's case, one has to think of the goodwill related to out–of–market products, or to lines of production which produces losses for years. The market sometimes is surprising. But honestly, it is more surprising to hear that for a business that, even in the words of its managers, could not go on, somebody was expected to pay a substantial premium.

The United Kingdom definition of goodwill speaks also of negative goodwill: the amount found when the value of the business is lower than the aggregate value of its net assets.

Perhaps the Applicant should have spoken, instead, of such a negative goodwill. But also to open a discussion on negative goodwill, you need a business. And as we have seen, ELSI was not a business at all. It was only a set–up capable of stubbornly producing losses, an enterprise that nobody wanted (first of all Raytheon which, unable to find a purchaser, tried in every possible way to off load the disastrous concern on to the Italian public authorities). Again, the insistence of the Applicant that « goodwill » must be considered in this case, instead of « negative goodwill » — or even « ill will » — is an absurdity. What goodwill could possibly remain after Mr. Clare « fired » 800 workers over the weekend?

Now, I would like to raise two last points.

a) We have been told that the book value as presented by the Applicant is a conservative estimation. Mr. Lawrence has assumed that the value of ELSI's assets at 31 March 1968 was 17,132.7 billion lire.

Almost the same figure, 17,053, appears in Schedule B1, entitled « ELSI's balance sheets per books », of Mr. Schene's affidavit and shown to you last week. But we must now point out to the Court that these values are wrong.

Following production of the Coopers & Lybrand audited report for the year 30 September 1967, we now even note that the Company's own auditors did not agree with the book value of

the company as set forth in Mr. Schene's affidavit. To assist the Court, we would point out that the total assets as at 30 September 1967, appearing in Schedule B1 of Mr. Schene's affidavit, amounts to 17,956. In the audited balance sheet produced to the Court last Thursday, the unadjusted book figures also amount to 17,956. However, the balance sheet included among the 30 September 1967 financials prepared by Coopers & Lybrand indicate, under the heading entitled « Company's adjustments », a reduction of 3,062, and the revised total assets thus amounts to 14,803.

The 1989 figures in Mr. Schene's Schedule B1 are therefore incorrect. A similar error is to be found in the 31 March 1968 losses figures which, as the Court will recall, have been found by extrapolation from the 30 September 1967 figures.

b) The Applicant has presented the book value thesis in order to sustain its theory of an orderly liquidation.

We know that ELSI could not pay the workers wages for March 1968. In fact these wages were borne by the Sicilian Region, as were those of April, May, June, July, August and September 1968 (Doc. N. 37, 38 and 39 attached to the Counter-Memorial).

How on earth did ELSI imagine that it could proceed with an orderly liquidation when it could not even pay its workers, and when it sent the dismissal letters on Friday 31 March 1968, without any prior notice to either the workers or the trade unions, as obliged by Italian law (Collective Agreement of 20 May 1965, ratified by Law N. 604 of 1966)?

Mr. President, distinguished Members of the Court. I must apologize for the length of my submission. Facts alone are often boring. But the Respondent felt it necessary to bring the discussion back into its proper context. The Respondent has thus been able to demonstrate, with the support of the documents deposited before the Court:

(1) that ELSI was not a going concern, but rather an economic and financial disaster;

(2) that ELSI was not an industrial gem, but a structure capable of only producing losses, and that to the order of billions of lire;

(3) that its plant and equipment were not at all desirable, being obsolescent and industrially invalid;

(4) that the option of an « orderly liquidation » was not open to ELSI, since its accounts showed its clear inability to pay its debts;

(5) that ELSI's bankruptcy was not a consequence of the Mayor of Palermo's requisition order, since ELSI was already insolvent before this;

(6) that ELSI's plant was not closed as a result of the requisition, since it had been closed down — with cessation of production and dismissal of the workers — at the decision of the directors before the requisition took place;

(7) that an evalutation of ELSI's assets on a book value basis is totally out of the question.

Mr. President, this concludes my statement on ELSI's economic and financial situation in March 1968. Thank you for your attention.

The PRESIDENT: Than you very much Professor Libonati. We will continue tomorrow at 10 o'clock.

The Court rose at 12.55 *p.m.*

C 3/CR 89/6
Tuesday 21 February 1989, at 10 a. m.

Mr. CARAMAZZA – Mr. BONELL

The PRESIDENT: Please be seated. Before giving the floor to the Italian Delegation, I have to recall the provision of the Rules of Court regarding reference during the oral proceedings to new documents. The matter has already arisen when the counsel for the United States referred (in argument) to an opinion of the Attorney-General of Rome that was in the CR 89/2, pp. 298 and 301.

At yesterday's hearing, counsel for Italy referred to a Treaty of Friendship, Commerce and Navigation between the Italian Republic and the Federal Republic of Germany, and to a decision of the Italian Court of Cassation dated 28 July 1986. These documents had not been produced before the Chamber in accordance with Article 43 of the Statute and Article 56 of the Rules of Court. They cannot be regarded as forming « part of a publication readily available » within the meaning of paragraph 4 of that Article of the Rules; the Treaty with Germany, is not published in, for example, the United Nations Treaty Series. No objection was taken at the time by the United States Agent, and the Agent of Italy has now supplied a copy of the documents to the Registrar, with a translation into English of the Court of Cassation decision and of an extract from the Treaty. The Registrar has in turn transmitted a copy to the Agent of the United States.

Unless the Agent of the United States wishes to make any objection, the Chamber will treat these documents as regularly before it. I would however request both Parties to respect the requirements of Article 56 of the Rules of Court and not to refer to documents which have not been duly produced.

Mr. MATHESON: Mr. President I just wish to confirm that we have no objection.

Mr. PRESIDENT: Oh, you have no objection. Thank you very much. Now I understand that the first speaker of the Italian Delegation this morning will be Mr. Caramazza. Therefore I give the floor to Mr. Caramazza.

Mr. CARAMAZZA:

1. – *Préambule.*

Monsieur le Président, Messieurs les juges, c'est un très grand honneur de plaider au nom du gouvernment italien devant cette Cour qui représente la plus haute instance de justice dans la communauté internationale.

Parmi les nombreux sujets de discussion de ce cas, celui qui m'a été assigné selon le plan de travail du Collège de défense italien concerne certains actes et comportements des autorités de mon pays qui auraient été la cause de la faillite de l'ELSI et qui auraient causé des préjudices à ses actionnaires.

Ces actes et comportements sont les suivants:

– en premier lieu, le défaut d'octroi à l'ELSI des avantages prévus par les lois spéciales pour le sud de l'Italie, le *Mezzogiorno*;

– en deuxième lieu, la non-intervention de la force publique pour empêcher l'occupation de l'usine de Palerme par les travailleurs ou pour la libérer par la suite;

– troisièmement, la réquisition de cette même usine par le maire de Palerme; et enfin

– le retard mis par le préfet de la même ville à accueillir le recours hiérarchique formé par l'ELSI contre l'ordonnance de réquisition.

La défense du gouvernment italien entend démontrer que le comportement des autorités italiennes a été pleinement légitime ou, à tout le moins — là où les autorités italiennes elles-mêmes ont admis l'existence d'un vice de légalité — que ce comportement n'a nullement contribué à causer les conséquences alléguées par le demandeur et, en tout cas, qu'il n'était pas propre à justifier des accusations quant à son caractère arbitraire ou discriminatoire.

Mais avant d'examiner séparément ces quatre doléances, permettez-moi de faire une brève allusion d'ordre général à l'un des nombreux aspects singuliers de cette affaire, une affaire que le demandeur, contrairement à l'habitude, construit au fil des années de manière à former des accusations de plus en plus graves, formulées en termes de plus en plus virulents.

Je me réfère notamment à la différence surprenante qu'il y a entre le « *Claim* » de 1974 et les allégations actuelles exposées dans le Mémoire, dans la Réplique et dans les plaidoiries. Je fais référence à l'augmentation singulière des dommages-intérêts qui étaient établis en 1974 sur la base du « *quick-sale value* », alors qu'ils sont évalués aujourd'hui en fonction d'une « *book value* » bien plus élevée (voir Duplique, [p. 183,] n. 3). Mais une autre observation est d'ailleurs nécessaire en ce qui concerne plus particulièrement les comportements qui sont imputés aux autorités italiennes.

Dans le « *Claim* » de 1974, ces comportements étaient dénoncés d'une façon, dirais-je, neutre et, selon le demandeur, ils avaient causé dans leur ensemble un préjudice aux actionnaires de l'ELSI dont le gouvernement italien aurait dû répondre parce que c'était à lui que devaient être imputables tous les comportements préjudiciables (voir *Unnumbered documents* soumis por l'Italie, p. 1-155, particulièrement p. 105-108).

Dans le présent différend, le demandeur prétend, par contre, que tous les comportements des autorités italiennes étaient le résultat d'une entente réalisée à tous les niveaux officiels concernés pour permettre à l'IRI de racheter à bas prix un « joyau technologique » au détriment des actionnaires titulaires du paquet d'actions de l'ELSI.

Il est bien évident que ce changement de perspective est extrêmement grave et radical: dans le cadre de *l'illicéité*, il suppose un dol et non pas une faute; au niveau du droit interne, il détermine le passage d'une responsabilité civile à une responsabilité pénale; et sur le plan de l'image, il transforme un gouvernement « défaillant » en un gouvernement « délinquant », prêt à exploiter les pouvoirs de ses organes pour commettre de véritables vols au détriment d'étrangers.

La défense du gouvernment italien prend acte avec grande satisfaction de la déclaration d'après laquelle la défense des Etats-Unis prétend n'avoir jamais entendu accuser les autorités italiennes d'avoir ourdi un complot criminel, « *a conspiracy* », comme cela semblait pourtant résulter des défenses, aussi bien écrites qu'orales. Sans cette précision, la défense du gouvernement italien aurait dû protester le plus énergiquement possible contre un tel exposé des faits qui aurait représenté une offense gratuite, dépourvue de tout élément de preuve. Et il faut d'ailleurs relever que si l'hypothèse d'une entente criminelle, d'une « *conspiracy* », a disparu, la thèse du gouvernement américain, comme M. Ferrari Bravo l'a déjà souligné, se base toujours sur une connivence entre les autorités italiennes qui auraient commis les faits en question.

Les défenses écrites et les plaidoiries américaines sont formelles sur ce point: je me bornerai à citer M. Gardner qui, dans son discours du 15 février (C 3/CR 89/3, p. 315), disait: « *Through the ensuing bankruptcy process the Respondent's plan to take over ELSI through its own State-owned conglomerate was brought to fruition* ».

Quant aux autres orateurs, je dirai qu'aussi bien M. Matheson et M. Murphy ont dit la même chose d'une façon plus ou moins explicite: (Matheson, C 3/CR 89/1, pp. 251-252, 254, 264 et 265-266; Murphy, C 3/CR 89/3, p. 304; Gardner, C3/CR 89/3, pp. 313, 315 et 321; Matheson, C 3/CR 89/4, pp. 350-351).

Que la thèse d'une entente préalable persiste dans l'esprit de la partie demanderesse est d'ailleurs évident: c'est seulement dans la mesure où l'on affirme que toutes les actions qu'on reproche aux autorités italiennes reposent sur une entente, qu'on peut soutenir le bien-fondé des prétentions de la partie demanderesse. A défaut, il n'y aurait qu'une série d'événements malencontreux qui ont fait subir des pertes à une entreprise commerciale tout juste comme l'aurait fait une baisse ou une hausse de l'or, du dollar, ou du pétrole.

On peut citer à ce sujet la Mixed Claims Commission qui, dans la *Dix case* entre les Etats–Unis et le Vénézuela a affirmé: « *International as well as municipal law denies compensation for remote consequences in the absence of evidence of deliberate intention to injure* ». (*Reports of International Arbitral Awards*, Vol. IX, p. 121).

Tout en accueillant la déclaration faite par M. Matheson dans sa lettre du 17 février dernier, je dois donc insister sur le fait que, entre 1974 et 1987, il y a eu un changement de perspective.

Ce changement influe aussi d'une manière radicale sur le problème de l'épuisement des recours internes.

2. – *Le non–octroi des avantages et des encouragements aux investissements prévus pour le Sud de l'Italie.*

Le requérant se plaint de les avoir demandés en vain. Il se plaint d'avoir demandé en vain les encouragements prévus pour les entreprises situées dans le *Mezzogiorno* par les lois l'exception promulguées en vue de favoriser le développement industriel du Sud, notamment les facilités sur les tarifs des transports et la réserve de 30 p. cent sur les fournitures destinées aux administrations publiques (cfr. Mémoire, p. 8 et Réplique, p. 128).

Cette allégation de la Partie demanderesse, comme d'ailleurs la plupart de ses allégations, est trop générale, vague, non pertinente et de toute manière la prétention qui en découle serait irrecevable et dépourvue de fondement.

La défense du gouvernement italien entend, bien évidemment, rendre compte de toutes ces qualifications négatives en soulignant ce qui suit.

2.1. – *La doléance est trop générale, vague et non pertinente.*

Les avantages et les facilités en discussion sont réglementés dans un Etat de droit tel que l'Italie par la loi et sont reconnus sur la base de demandes formelles adressées aux autorités administratives compétentes qui doivent en constater le fondement.

Dans la présente affaire, il ne résulte pas que l'ELSI ait présenté aucune demande formelle, ni qu'elle ait engagé aucune procédure à ce sujet.

La documentation présentée par le demandeur à ce propos est très significative: il en ressort seulement que la direction de l'ELSI a soulevé à plusieurs reprises, à titre informel, au cours des entretiens avec diverses autorités italiennes, le problème des avantages et des facilités, et ce d'une manière tout à fait approximative.

Dans son affidavit du 17 avril 1987 (cfr. Mémoire, Annexe 9, para. 15), M. Adams (Président de Raytheon) a affirmé: « nous croyions (sic!) que les incitations à l'investissement fortement publicisées offertes par le gouvernment italien réduiraient les coûts et les difficultés du marché ». Son témoignage, rendu devant la Cour, a confirmé cette affirmation (C 3/CR 89/2, p. 275). M. Adams, à ce sujet, a précisé qu'il n'avait pas d'idées plus précises sur la question parce que le soin d'établir des détails était la tâche des fonctionnaires qui travaillaient sur place, comme M. Clare.

Arthur Schene, Vice–président de Raytheon, dans son affidavit de la même date (cfr. Mémoire, Annexe 13, para. 12), se réfère à « l'impossibilité d'obtenir les avantages qui étaient supposés (sic!) revenir aux entreprises en activité dans le Sud de l'Italie ».

Et enfin, M. Clare (nouveau Président de l'ELSI) qui, chargé de l'affaire sur place, était dans la meilleure situation pour se faire des idées précises, souligne dans son affidavit du 10 janvier 1987 (cfr. Mémoire, Annexe 15, para. 19, 28 et 29), le fait que les représentants de l'ELSI avaient demandé lesdits avantages dans toutes leurs discussions, dans toutes leurs rencontres avec diverses autorités italiennes et, dit encore M. Clare: « l'ELSI n'a jamais reçu de facilités dans les transports, ni de commande de la part du gouvernment suivant la règle des 30 p. cent». Au contraire, « le ministre de la Santé a adressé aux autorités médicales périphériques une circulaire dans laquelle il était précisé que la loi des 30 p. cent n'était pas applicable aux fournitures de tubes à rayons X » (cfr. Mémoire, Annexe 15, para. 41).

M. Clare toujours, dans sa lettre du 28 février 1968 adressée à M. Carollo (*Unnumbered documents* soumis par l'Italie, Vol. I, p. 427–430), a également affirmé que l'ELSI avait besoin d'« un associé qui nous aide (sic!) à obtenir les avantages revenant aux sociétés du Sud de l'Italie ». Il exprimait ainsi un avis très singulier mais partagé de toute évidence par les autres représentants de la société et on peut là faire référence à un autre affidavit, celui de M. Scopelliti (un autre cadre de Raytheon et conseiller financier de l'ELSI) (cfr. Mémoire, Annexe 17, para. 20), dans lequel celui–ci exprime sa conviction qu'il aurait été possible d'obtenir lesdits avantages et les facilités avec l'aide d'un associé italien.

Il y a donc la preuve par les documents fournis par la partie demanderesse, et cette preuve est confirmée par le témoignage de M. Clare, qu'aucune demande formelle n'a jamais été présentée. Il est évident que des instances verbales vagues, de nature générale, présentées au cours d'entretiens et de discussions avec les autorités les plus diverses relèvent du domaine des relations publiques, relèvent du domaine des contacts préliminaires, mais ne sauraient jamais représenter le fondement d'une demande en justice.

Permettez–moi, Monsieur le Président, d'ajouter ici qu'il est étonnant que la direction qualifiée d'entreprises d'une si grande envergure ait abordé avec un tel manque d'informations, d'une manière si superficielle, un problème d'une telle importance pour le budget de l'entreprise en difficulté et qu'elle l'ait fait en se basant sur de vagues « ouï–dire », des opinions personnelles, des conversations de couloir et sur l'aide d'amis « influents ».

Si, comme il semble ressortir de ces réflexions, tel est le style d'action des responsables des sociétés concernées, on ne saurait être surpris des résultats obtenus et qui ont été illustrés hier par M. Libonati.

Nous avons d'ailleurs tous entendu les déclarations de M. Clare lors de son contre–interrogatoire (C 3/CR 89/2, p. 285) quand il a expliqué de quelles sources il avait tiré la conclusion qu'ELSI avait droit aux facilités; de quelle facon ces facilités avaient été demandées et quelle avait été la réaction de l'ELSI au défaut d'obtention de ces facilités.

Permettez–moi de dire, Monsieur le Président, Messieurs les juges, que les idées du *management* Raytheon–ELSI en général et de M. Clare en particulier sont à cet égard complètement fausses.

Pour savoir si on a droit ou non à une facilité fiscale ou tarifaire dans un Etat de droit, on ne s'adresse ni aux autorités politiques ni aux autorités religieuses, on s'adresse à un conseiller juridique ou à un avocat. Et si l'avis de ce dernier a été positif et si les facilités sont refusées sur demande formelle, on ne recourt pas au Cabinet des ministres mais aux tribunaux. Il y en avait à Berlin au temps de Frédéric II le Grand, je vous assure qu'il y en a en Italie de nos jours.

2.2. Irrecevabilité de la prétention.

Qui plus est, en dépit de l'absence de demandes formelles, il y a eu des prises de position négatives très nettes de la part des autorités italiennes, telle que la circulaire du ministre de la Santé qu'on a déjà mentionée, ou les affirmations du ministre de l'Industrie dans son discours qui a été souvent cité per la partie demanderesse (cfr. Mémoire, Annexe 46, p. 3); le ministre de l'Industrie a expliqué devant la Chambre des députés que les avantages prévus pour le *Mezzogiorno* ne concernaient que les produits finis et ne pouvaient pas être accordés aux composants et que, par conséquent, l'ELSI n'avait pas droit à ces avantages.

Si Raytheon, ELSI, et leurs directions respectives étaient tellement convaincues que, malgré l'avis contraire des autorités italiennes, les avantages et les facilités demandées leur revenaient de droit, pourquoi n'ont–elles pas agi formellement dans ce sens devant les autorités judiciaires compétentes? Les avantages et les facilités sont octroyés — ou ne le sont pas — d'après la loi et non pas selon le bon plaisir ou la bienveillance des autorités gouvernementales: le refus ou le non–octroi de ces avantages peuvent être dénoncés devant les autorités judiciaires.

L'absence de ce recours en justice, comme le disait hier le professeur Gaja, relève aussi du non–épuisement des recours internes qui entraîne l'irrecevabilité de la prétention actuelle.

2.3. – *L'absence de fondement de la prétention.*

Même dans la meilleure des hypothèses, la prétention serait de toute manière sans fondement car, étant donné le genre de production réalisée par l'ELSI, celle–ci ne pouvait jouir à aucun titre des avantages et des facilités demandés.

Comme le ministre de l'Industrie l'avait dit, la condition préalable pour l'application de la loi des 30 p. cent et de celle sur la réduction des tarifs de transport était qu'il s'agisse de produits finis, c'est–à–dire de produits qui n'aient pas besoin d'activités supplémentaires de montage ou d'assemblage. Je devrais maintenant me livrer à une analyse des articles de loi d'où découle cette conséquence, mais puisque la Partie demanderesse n'a pas insisté sur ce point, avec la permission de la Cour, je me passerai de cet examen analytique qui figurera d'ailleurs sous forme de note dans les comptes–rendus (1).

Il suffira ici de souligner que, puisque l'ELSI ne vendait pas de produits finis, la législation invoquée ne lui était pas applicable.

Le gouvernement italien n'a donc causé aucun préjudice à l'ELSI: c'est plutôt l'ELSI qui exigeait du gouvernment italien l'octroi d'avangages relevant de l'assistance.

Et d'ailleurs, la direction était pleinement consciente de cela, à tel point que dans le fameux Projet de redressement du mois de mai 1967 (cfr. Mémoire, Annexe 22), les avantages et les facilités devant faire l'objet de la demande concernaient non pas l'ancienne gamme de produits mais, alternativement, soit des « produits nouveaux » auxquels les dispositions de faveur auraient été légitimement applicables (cfr. Mémoire, Annexe 22, p. 39), soit une «interprétation favorable de la loi» (cfr. Mémoire, Annexe 22, p. 41) — ce qui équivalait à une demande inqualifiable de favoritisme. Autrement dit, la direction de Raytheon–ELSI savait parfaitement que l'ELSI, vu la situation décrite plus haut, n'avait droit à aucun des avantages prévus pour le Sud de l'Italie.

A ce point là, laissez–moi dire, Monsieur le Président et Messieurs les juges de la Cour, qu'il est vraiment étonnant que, dans cette phase orale, la Partie demanderesse non seulement insiste encore sur la question des facilités, mais, bien plus, transforme cette sorte de rêve les yeux ouverts, en une réalité financière. En fait, nous avons entendu M. Lawrence estimer à 300 millions de lires la valeur des facilités qu'ELSI aurait dû obtenir et, surtout, nous l'avons entendu inclure cette somme dans la valeur comptable de la société. La chose est tellement énorme que je vous demande la permission de citer la page du compte–rendu; c'est le compte rendu du du 16 février 1989 (C 3/CR 89/4, texte anglais, p. 340). Bien, Monsieur le Président, je crois qu'évaluer un billet de la loterie nationale à la valeur du premier prix aurait plus de logique. Nous savons maintenant quel compte tenir d'une valeur comptable estimée avec la rigueur ... scientifique que nous avons pu apprécier.

3. – *La non–intervention de la force publique.*

Le demandeur prétend que les travailleurs ont occupé l'usine *après la réquisition*, avec le consentement tacite des autorités locales — qui ne se seraient nullement efforcées de prévenir ou de faire cesser cette occupation, ou encore de protéger de toute manière les biens de l'entreprise (cfr. Mémoire, pp. 53–55).

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(1) La partie adverse se plaint, en effet, de la non–application à son égard de l'article premier de la loi N. 835 du 6 octobre 1950, qui sanctionnait l'obligation pour les administrations de l'Etat de réserver aux établissements industriels situés dans le Sud de l'Italie les « fournitures » de matériel prévues par le décret–loi N. 40 du 18 février 1947. En particulier, aux termes de l'article 16 de la loi N. 717 du 26 juin 1965, en vigueur à l'époque où les faits se sont produits, les administrations de l'Etat auraient du réserver 30 p. cent de leurs « fournitures » aux entreprises en activité dans le Sud de l'Italie.

Dans le système juridique italien, le contrat de fourniture est un contrat par lequel une partie (dans la présente affaire, l'administration publique) achète d'une manière continue des biens et des services à une autre partie pour sa propre utilité et (dans le cas de l'administration publique) pour s'acquitter de ses devoirs de fonction. Ceci signifie que le matériel en question pouvait être acheté dans la mesure où il était utilisable dans l'immédiat sans recourir à des activités supplémentaires de montage ou de transformation. Cette caractéristique n'existait évidemment pas en l'espèce, vu que le matériel produit par l'ELSI, constitué de simples composants et non pas de produits finis, s'avérait dépourvu de toute utilité immédiate pour l'administration.

En ce qui concerne toujours les facilités prévues par notre système juridique pour les entreprises en activité dans le Sud de l'Italie, la partie adverse a dénoncé aussi la non–application à la société ELSI d'autres normes qui

Ceci constituerait un manquement à la protection que les autorités italiennes auraient dû fournir « après la date de la réquisition et tout au moins jusqu'à l'introduction de l'instance en faillite » (cfr. Mémoire, p. 54, n. 10).

Ni le Mémoire, ni la Réplique, ne mentionnent expressément les normes de droit interne prétendument enfreintes par les autorités italiennes et rien n'a été ajouté à ce sujet dans les plaidoiries.

Toutefois, la citation de certains articles du Code pénal italien (cfr. Mémoire, Annexe 95), articles qui étaient déjà cités dans le «Claim» de 1974 qui au contraire s'attardait sur ce point (*Unnumbered documents* soumis par l'Italie, Vol. I, p. 98–99; Vol. II, p. 253 *et seq.*), laisse entendre que, d'après le demandeur, les autorités italiennes n'auraient pas empêché la perpétration ou la continuation de faits illicites et n'auraient pas poursuivi les coupables. Les faits illicites en question seraient ceux prévus par toute une série d'articles du Code pénal italien, à savoir les articles 509, 633, 634, 614. Je ne vais pas ennuyer la Cour en les lisant ni tout entiers ni seulement leurs titres mais je résumerai en disant que s'il s'agit d'une série de délits que M. Gardner a qualifiée dans sa plaidoirie d'une façon univoque, en utilisant le terme anglais de « *trespass* ».

La défense du gouvernment italien entend démontrer que les allégations de la Partie adverse sont erronées en fait et dépourvues de fondement sous l'angle du droit interne.

3.1. *Date initiale et nature de l'occupation par les travailleurs.*

Contrairement à ce qu'il est dit par la Partie demanderesse qui se fonde sur l'affidavit de M. Merluzzo (cfr. Mémoire, Annexe 21), dont la véracité doit être contestée, *l'occupation par les travailleurs a commencé avant la réquisition, et précisément le* 13 *mars* 1968. Cette circonstance a été établie irrévocablement par le jugement du tribunal de Palerme N. 670 du 1 avril 1973, confirmé en appel et en cassation. Ce jugement affirme que ladite circonstance est prouvée « par la documentation produite par l'administration défenderesse et dont la correspondance avec la réalité historique n'a pas été contestée par le demandeur» (cfr. Mémoire, Annexe 80, p. 7–8; Annexes 81–82).

Il est donc presque superflu de confronter la valeur respective de deux preuves si différentes: d'une part, la décision d'un juge indépendant et impartial, prise sur les lieux, peu de temps après les faits, sur la base de preuves certaines (décision d'ailleurs confirmée par de nombreux autres documents, tels que les affidavits de Bevilacqua et de Ravalli). D'autre part, il s'agit de l'affidavit d'un ancien employé de Raytheon–ELSI, fait vingt ans après les faits sur la base de souvenirs personnels qui n'étaient plus tellement frais, dont on a toute raison de croire qu'ils sont partiaux.

Il y a lieu de préciser en outre que l'occupation était symbolique, parce qu'elle a été menée dans un esprit de collaboration et qu'elle n'a nullement entravé ni la production réduite de l'époque, qui a été maintenue, ni la procédure de faillite. Cela aussi est prouvé par:

a) la décision du tribunal déjà mentionnée qui a exclu qu'aucun préjudice n'ait été causé par les travailleurs (cfr. Mémoire, Annexe 80, p. 11);

b) les affidavits de MM. Bevilacqua et Maggio (Duplique, Annexes 2–3) qui non seulement confirment que l'occupation a commencé bien avant la réquisition, mais indiquent aussi qu'elle

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prévoient des réductions spéciales sur les tarifs de transport du matériel utilisé ou produit par l'entreprise en question.

Toutefois, ces normes n'étaient pas non plus applicables au cas d'espèce, pour les mêmes raisons déjà exposées.

L'article 15 de la loi N. 717 du 26 juin 1965 et les décrets ministériels d'application, tous deux adoptés en date du 29 mars 1967, prévoyaient l'octroi de facilités s'il s'agissait:

a) de matières premières ou produits semi–ouvrés destinés à être utilisés pour la production;

b) de matériaux de construction, outillage ou tout matériel nécessaire pour la reconstruction, la transformation, l'extension et la modernisation d'établissements industriels;

c) du transport des produits finis en dehors des territoires du Sud de l'Italie.

L'ELSI invoquait plus précisément l'octroi des facilités visées au point *c*) parce que, comme il est également affirmé dans le Mémoire, l'encombrement et le poids des produits rendaient les tarifs de transport très élevés.

Toutefois, comme il résulte du libellé de la norme, son application était subordonnée à une seule conmentaidition décisive: à savoir que les produits devaient être finis, sans qu'il y ait lieu de recourir à des activités supplémentaires de montage ou d'assemblage; ce qui n'était pas le cas pour l'ELSI.

était « ordonnée » et « menée dans un esprit de collaboration », comme le démontre également le fait qu'une partie de l'activité a été poursuivie « régulièrement aux termes des contrats en cours » (je cite textuellement le deuxième affidavit ci–dessus).

Mais il y a quelque chose de plus qui prouve ce que je viens de dire et c'est une source qui nous vient directement de l'ELSI. La défense du Gouvernement italien s'est souvent ou presque toujours référée aux pièces produites par la Partie adverse pour démontrer ses affirmations: dans ce cas également, fidèle à sa ligne de conduite, elle souhaite évoquer l'une de ces pièces.

Il s'agit en l'espèce du recours hiérarchique formé par l'ELSI contre l'ordonnance de réquisition, donc d'un document signé par le responsable de l'ELSI et par son avocat d'où il résulte que l'occupation de l'usine fut antérieure à la réquisition et que, de toute manière, elle fut symbolique, pacifique et menée dans un esprit de collaboration.

Je ne veux pas ennuyer la Cour avec de longues citations textuelles et je me bornerai donc à lire deux ou trois phrases de ces documents en renvoyant, pour ce qui est du passage entier, aux procès–verbaux dans lesquels tout le contenu du texte écrit figure sous forme de note. Voilà donc ce qu'écrivait ELSI dans son recours hiérarchique:

> « la vérité est que ... le jour même où les licenciements ont été notifiés, une délégation du personnel s'est rendue à l'usine pour conférer avec certains dirigeants et est ensuite restée toute la journée dans l'enceinte de l'établissement. Les jours suivants, un petit groupe de travailleurs a erré dans l'enceinte de l'usine sans toutefois provoquer aucun incident » (2).

Ce sont les déclarations d'ELSI *ex ore tuo*: *te judico*. Je dirai que cette description idyllique du climat qui régnait à l'ELSI fait plutôt penser au salon de la marquise de Sévigné qu'à une lutte syndicale dans une entreprise industrielle, et je me demande quel besoin y aurait–il eu d'invoquer l'intervention de la force publique. Mais revenons–en aux faits.

3.2. *Devoirs des officiers et des agents de police.*

Il faut préciser qu'il est évident qu'aucun élément d'un fait illicite poursuivable d'office ne pouvait être relevé dans ces conditions–là. Aucune plainte d'ailleurs n'avait été déposée par l'ELSI et jamais l'ELSI n'a demandé l'intervention de la force publique.

Pour prouver ma thèse avec la précision voulue, aucun des articles du Code pénal cités par l'adversaire n'est applicable, et je vais devoir examiner l'un après l'autre tous les faits illicites mentionnés. Dans cette optique, je dois prier la Cour de ne tenir compte, à titre de référence, que des textes de loi italien ne joints au « *Claim* » (*Unnumbered documents* soumis par l'Italie, Vol. II, p. 253 *et seq.*), parce que les textes de la loi pénale italienne joints au Mémoire sont imprécis, quelques uns par défaut car, il y a des alinéas qui ont été coupés, et d'autres par excès, parce que qu'il y a des commentaires ou des notes qui ont été rajoutés au texte comme s'ils faisaient partie de l'article du Code pénal. En cas d'examen, il faudra donc se référer aux textes de la loi pénale italienne qui sont en annexe au « *Claim* » et non à ceux au Mémoire annexes.

Je crains toutefois qu'une telle analyse de chaque disposition de loi ne s'avère ennuyeuse et puisque, par ailleurs, mes adversaires n'ont pas insisté sur ce point dans leurs plaidoiries, je

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(2) Le passage dans son intégralité est le suivant:

« L'ordonnance du maire, afin de justifier la mesure grave prise à l'égard du requérant, affirme que la fermeture de l'usine et l'envoi des lettres de licenciement ont provoqué la "réaction des travailleurs et des organisations syndicales, qui s'est traduite par des grèves sectorielles et générales ".

Cette affirmation ne correspond pas entièrement à la vérité. Il n'y a pas eu de grèves sectorielles ou générales, ni de violences contre les personnes ou les choses, ni une occupation de l'usine par suite des licenciements.

La vérité est que le 30 mars 1968, c'est–à–dire le jour même où les licenciements ont été notifiés, une délégation du personnel s'est rendue à l'usine pour conférer avec certains dirigeants et est ensuite restée toute la journée dans l'enceinte de l'établissement.

Les jours suivants, un petit groupe de travailleurs a erré dans l'enceinte de l'usine sans toutefois provoquer aucun accident.

Il est donc tout à fait évident que les épisodes susmentionnés ne constituent pas l'état de nécessité grave requis par la loi en tant que condition et titre nécessaires pour prendre une ordonnance de réquisition ». (Cfr. Mémoire, Annexe 36, p. 11–12).

me bornerai, avec l'autorisation de la Cour, à renvoyer, pour ladite analyse, au texte écrit des plaidoiries déposées au Greffe, où l'analyse de tous les articles du Code pénal italien est conduite dans une note. Oralement, je voudrais résumer le problème en disant qu'aucune des hypothèses délictuelles évoquées n'est réalisée dans le cas d'espèce, à défaut d'éléments matériels ou d'éléments psychologiques, ou encore parce que l'hypothèse concerne des faits illicites poursuivables sur plainte (c'est cela le point le plus important) tel par exemple la violation de domicile qui correspond plus précisément, je crois, au « *trespass* » de la *Common Law*. Et aucune plaine n'a été déposée par l'ELSI à ce sujet ([3]).

En définitive, et pour conclure sur ce point, l'occupation de l'usine par les travailleurs a été:

a) pacifique;

b) symbolique (un petit groupe);

c) acceptée ou du moins tolérée par l'ELSI qui n'a jamais demandé l'intervention de la force publique et n'a nullement porté plainte à ce sujet;

d) menée dans un esprit de collaboration;

e) elle n'a jamais causé aucun préjudice, aucun dommage à l'entreprise.

En ce qui concerne ladite occupation, aucun manquement au devoir de protection ne peut donc être imputé aux autorités italiennes.

4. *L'ordonnance de réquisition.*

Comme il est bien connu de cette Cour, la défense du gouvernment italien a réservé une place importante à ce sujet dans les défenses écrites et n'a nullement l'intention d'ennuyer Monsieur le Président et Messieurs les juges en répétant ce qui a été déjà exposé.

Le but poursuivi consiste à donner un apercu aussi vaste et aussi précis que possible de la pratique suivie pendant la période concernée par les autorités italiennes dans des affaires du genre de celle qui est actuellement examinée par la Cour. Ceci pour démontrer que, bien que l'ordonnance de réquisition ait été illégale, et a donc été annulée, elle n'était cependant ni arbitraire, ni discriminatoire, ni propre à causer aucun préjudice à l'ELSI et à ses actionnaires.

L'année 1968 a représenté, comme on le sait, le point culminant d'une période d'agitation longue et profonde, une période vécue par toutes les sociétés occidentales. Cette agitation a

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([3]) « Article 508 – *Invasion et occupation arbitraires d'exploitations agricoles ou industrielles. Sabotage.* – Quiconque envahit ou occupe, dans le seul but d'empêcher ou de troubler l'exécution régulière des travaux, l'exploitation agricole ou industrielle d'autrui (c.p. 614, 633, 634), ou bien dispose de l'équipement, des stocks, des appareils ou de l'outillage d'autrui destinés à la production agricole ou industrielle, est puni d'une réclusion jusqu'à trois ans et d'une amende minimum de deux cent mille lires (1).

Quiconque endommage les bâtiments affectés à l'exploitation agricole ou industrielle, ou tout autre bien parmi ceux indiqués dans la disposition précédente, est passible d'une réclusion de six mois à quatre ans et d'une amende minimum d'un million de lires (2), lorsque le fait ne constitue pas un délit plus grave (c.p. 510–512, 635) (3) ».

Cette norme ne peut évidemment pas être appliquée ici car elle prévoit un dol spécifique — à savoir « le seul but d'empêcher ou de troubler l'exécution régulière des travaux qui n'existe pas dans le cas d'espèce. De plus, l'intention des occupants était au contraire de maintenir l'usine en activité et de pursuivre ainsi le travail.

« Article 633 – *Invasion de terrains ou de bâtiments.* – Quiconque envahit (c.p. 637) arbitrairement les terrains ou les bâtiments d'autrui, tant publics que privés, afin de les occuper ou d'en tirer un profit quelconque, est puni, par plainte de la personne lésée (c.p. 120, 639 bis), d'une réclusion jusqu'à deux ans ou d'une amende de deux cent mille lires à deux millions (1) (2).

Les peines sont appliquées conjointement et l'on procède d'office, si le fait est commis par plus de cinq personnes, dont une manifestement armée, ou bien par plus de dix personnes, même sans armes (c.p. 112 (1) n. 1; 585 (2 et 3), 634, 649) ».

Cette norme aussi est inapplicable dans notre cas car l'adverbe « arbitrairement » indique une hypothèse particulière d'illicéité, en ce sens que l'auteur doit être conscient du caractère antijuridique de son action. Ce qui est exclu par définition pour quelqu'un qui souhaite garder son emploi.

Il aurait fallu de toute manière que la personne lésée porte plainte parce que l'occupation n'était certainement pas armée et que la description de la situation faite per l'ELSI elle-même, qui parle d'un « petit groupe », laisse supposer que le nombre d'occupants était bien inférieur à dix.

« Article 634 – *Trouble avec violence de la possession de biens immobiliers* » – Quiconque, en dehors des cas indiqués dans l'article précédent trouble par des violences contre des personnes (c.p. 581 [2] our par des menaces

commencé quelques années auparavant et s'est terminée quelques années après. Et nous ne nous en souvenons que trop bien, car il s'agissait d'une situation de type pré–révolutionnaire, diffuse dans le temps et dans l'espace.

Il s'est sans doute agi là d'une grande crise de transformation entre deux époques: la crise du passage de la société industrielle à la société postindustrielle, de l'Etat du bien–être à l'Etat post–moderne.

Et une des valeurs modèles de cette para–révolution, du moins en Italie, a été le maintien des niveaux d'emploi et la sauvegarde des postes de travail: c'était là une prémisse que les autorités ne pouvaient pas ignorer lorsqu'elles devaient prendre des mesures.

La révolution qui avait déterminé le passage de l'Etat absolu à l'Etat libéral avait mis l'accent sur la valeur statique de la propriété, alors que la révolution sociale, qui a substitué le « *Welfare State* » à l'Etat libéral, avait mis l'accent sur sa valeur dynamique, dans le cadre de la gestion de l'entreprise. Cette dernière para–révolution a mis au premier plan la valeur institutionnelle de l'entreprise, considérée ou non, ou non seulement, comme un ensemble productif, mais comme une communauté de travail, en privilégiant l'aspect travailliste par rapport à l'aspect commercial et à l'aspect privé qui prévalaient respectivement auparavant.

Ce n'est donc pas un hasard si, pendant ces années, l'usage de l'instrument de la réquisition contre la fermeture d'établissements industriels et le licenciement des ouvriers, en visant à conserver les niveaux d'emploi et à sauvegarder l'ordre public économique, a été l'ordonnance de réquisition. L'ordonnance de réquisition a donc éveillé l'intérêt de tous les maires italiens.

Et ce n'est pas non plus un hasard si la doctrine la plus attentive a admis l'existence du pouvoir de réquisition et si la jurisprudence l'a reconnu au maire en cas d'urgence exceptionnelle.

Il importe peu, aux fins de la présente affaire, que la jurisprudence ait conclu à ce sujet que la mesure de la réquisition n'était pas apte, concrètement, à conserver les postes de travail. Ce que le gouvernement italien souhaitait démontrer par une analyse critique de tous les précédents jurisprudentiels conduite dans la défense écrite c'était que, à l'époque, n'importe quel maire italien, quelle que fût l'usine menacée de fermeture et quels que fussent ses propriétaires, nationaux ou étrangers, aurait agi exactement comme l'a fait le maire de Palerme le 1 avril 1968.

Comme il a été démontré, de Florence à Pise, de Chieti à Gênes, à Sondrio, à Brindisi, à Cinisello Balsamo, à Casalmaggiore, à Rieti, tout le long de la botte, les maires italiens, au cours de la décennie 1965–1975, réquisitionnaient tous les établissements menacés de fermeture indépendamment de l'industrie concernée (mécanique, textile, papier, sucre) et indépendamment du propriétaire, individu ou société anonyme, italien ou étranger.

Dans ces conditions, on ne saurait vraiment qualifier l'ordonnance de réquisition de « discriminatoire ». Ni d'ailleu rs d'« arbitraire ».

Sans envahir pour autant les domaines qui sont du ressort des autres membres du collège, je voudrais exposer brièvement deux considérations qui excluent ladite qualification d'« arbitraire ».

(c.p. 612) la possession pacifique de biens immobiliers par autrui (c.p. 812 [1 et 2]), est puni d'une réclusion jusqu'à deux ans et d'une amende de deux cent mille à six cent mille lires (1) (2).

Le fait est considéré comme étant accompli avec violence ou avec des menaces lorsqu'il est commis par plus de dix personnes (c.p. 112 [1] n. 1) ».

L'existence d'un tel délit est exclue par les résultats des décisions du tribunal et de la cour d'appel de Palerme dans lesquelles il est affirmé qu'il n'y a eu ni violence, ni menace (ce dont l'ELSI convient d'ailleurs, comme on l'a vu, dans son recours au préfet).

« Article 614 – *Violation de domicile* – Quiconque s'introduit dans l'habitation d'autrui ou dans tout autre lieu de domicile privé, ou dans leurs dépendances, contre la volonté expresse ou tacite de celui qui est en droit de l'évincer, ou bien qui s'y introduit clandestinement ou par ruse, est puni d'une réclusion jusqu'à trois ans (c.p. 615 [1].

Cette même peine est prévue pour quiconque reste dans les lieux susdits contre la volonté expresse de celui qui est en droit de l'évincer, ou bien y reste clandestinement ou par ruse (2). Ce délit est punissable par plainte de la personne lésée (c.p. 120).

La peine va d'un à cinq ans (3), et l'on procède d'office si le fait est commis avec violence sur des choses (c.p. 392 [2]) ou contre des personnes (c.p. 581 [2]), ou bien si le coupable est manifestement armé ».

Ce délit n'entre pas non plus en ligne de compte car on ne peut déduire aucune volonté expresse ou tacite de l'ELSI contre l'occupation. Au contraire, l'absence de réaction fait penser à un consentement éventuel de sa part.

Quoi qu'il en soit, vu que la circonstance aggravante visée au dernier alinéa ne saurait être prise en considération dans ce cas, il s'agitencore une fois d'un délit poursuivable sur plainte et, comme on le sait, aucune plainte n'a été déposée à ce sujet.

La première a trait à une expérience américaine, celle de la *Pewee Coal Company* (Duplique, p. 177 *et seq.*), citée aussi dans la plaidoirie orale de M. Gardner, et qui prouve que, en cas d'urgence sociale, la réquisition temporaire d'installations industrielles constitue une sorte de réaction physiologique de notre type de société organisée pour protéger, comme l'a précisé la Cour suprême des Etats-Unis, la sécurité et le bien-être publics. Il peut s'avérer que la décision soit annulée par la suite mais le fait est que ce type d'ordonnance est pris dans ces circonstances.

Le comportement du maire de Palerme n'a donc pas représenté un abus déraisonnable, comme le prétend la Partie adverse; il a par contre été parfaitement conforme à la pratique courante de n'importe quel pays occidental industriel en temps de crise.

La deuxième considération se réfère aux raisons qui ont amené le préfet à annuler l'ordonnance du maire et, d'une manière plus générale, aux principes sanctionnés par la jurisprudence administrative italienne en la matière.

En dépit du fait que, dans le recours de l'ELSI, on contestait sous de nombreux aspects l'existence même du pouvoir du maire de prendre l'ordonnance de réquisition attaquée, le préfet *en a reconnu l'existence* (et toute la jurisprudence se range dans cette direction. Le maire a un pouvoir, en cas exceptionnels, d'adopter l'ordonnance de réquisition aux termes de l'article 7 de la loi du 23 mars 1865, annexe E et de l'article 69 du Règlement des collectivités locales en Sicile (voir à ce sujet les décisions citées dans le Contre-mémoire et la Duplique; on peut ajouter la décision du Conseil de justice administrative de la région de Sicile, N. 155 du 27 juin 1978 publiée dans *Il Consiglio di Sato*, 1978, I, 1289).

Le préfet a toutefois nié que ce pouvoir ait été exercé correctement car il a dit que le but poursuivi — c'est-à-dire la gestion de l'entreprise — n'avait pas été atteint. Là est le coeur de la décision d'annulation du préfet.

Le préfet de Palerme, en accueillant le recours hiérarchique de l'ELSI, a donc affirmé, par un pronostic fait *a posteriori*, l'existence de l'usage incorrect d'un pouvoir qui était en tant que tel reconnu.

Il semble donc évident que cela exclut tout caractère arbitraire de l'ordonnance car on ne peut parler d'« arbitraire » que lorsqu'un acte administratif constitue un abus, parce qu'il a été pris en l'absence absolue d'un pouvoir, et non pas lorsqu'un pouvoir, dont personne ne met en doute l'existence, a été simplement détourné.

Il est enfin impossible de reconnaitre l'existence d'un lien de causalité entre la réquisition et la faillite.

Ce point a été traité hier par M. Libonati; il sera traité, après moi, par M. Bonell et il est donc superflu que je m'y attarde. Permettez-moi seulement de rappeler que le problème de l'existence d'un lien de causalité entre la réquisition et la faillite a été posé au juge italien par le syndic de faillite de l'ELSI qui a demandé, comme on le sait, la condamnation du ministère de l'Intérieur à la réparation des préjudices causés par l'ordonnance de réquisition de l'usine.

Le Tribunal de Palerme, dans la décision que l'on a déjà citée, a précisé:

> « *Il découle des conditions décrites ci-dessus que le rattachement de la faillite de la société à la survenance de la réquisition est dépourvu de fondement, comme l'a soutenu à juste titre l'administration défenderesse, vu que la situation économique de Raytheon-ELSI était déjà gravement compromise depuis des années par déclaration expresse de ses dirigeants* ».

Et la Cour d'appel, pour sa part, a déclaré que:

> « *La circostance certaine de l'insolvabilité de la societé, a une époque immédiatement anterieure à l'intervention du maire, suffit à exclure tout lien de causalité entre l'ordonnance de réquisition et la faillite de la société, dont ledit état d'insolvabilité est une cause déterminante et suffisante* » (*Art. 5 de la loi en matière de faillite*).

Les deux décisions ont été, comme vous le savez, confirmées par la Cour suprême de cassation (Cfr. Mémoire, Annexe 82).

Or, la défense du gouvernment italien estime que la décision des juges du fond de Palerme, soumise à l'examen de cette illustre Cour — bien que rendue à la demande du syndic de faillite et non pas de Raytheon — revêt une valeur incontestable pour deux raisons.

La première est que le juge national du fond a pour tâche en premier lieu *d'évaluer les faits sur la base des preuves*. Et ceci *sur les lieux et dans un délai relativement bref* après les événements en discussion. Il se trouve donc dans les meilleures conditions pour une reconstitution fidèle des faits, vu qu'il est l'autorité la plus compétente d'un point de vue professionnel et qu'il dispose de tout le matériel probatoire nécessaire. Il s'ensuit que la reconstitution des faits effectués par le juge national du fond peut difficilement être contestée après une période aussi longue, sur la base de simples conjectures et sur la base de souvenirs des protagonistes des faits en question — qui sont loin d'être impartiaux.

La deuxième raison est qu'il faut exclure tout soupçon de partialité du juge italien, même au niveau subconscient, et qui aurait eu un effet défavorable pour les actionnaires étrangers. Cela parce que, dans le procès devant les juges de Palerme, les parties plaidantes étaient, d'une part, le ministère italien de l'Intérieur et, de l'autre, non pas les sociétés américaines mais la *faillite de l'ELSI*, c'est-à-dire la faillite d'une société italienne, une société donc ayant des créanciers essentiellement italiens (n'oublions pas qu'en Italie, comme M. Bonell va l'illustrer par la suite, la mise en faillite vise surtout à protéger les créanciers).

Quiconque a un minimum de connaissances de la pratique judiciaire italienne sait que la magistrature ne fait preuve d'aucune indulgence à l'égard du pouvoir exécutif: elle connaît des affaires de ce dernier avec une rigueur inflexible, alors qu'elle témoigne d'une certaine ouverture — pour des raisons évidentes d'équité — à l'égard des faillites pour lesquelles la victoire, dans un cas important, équivaut souvent à une possibilité de récupération, surtout pour la masse des petits créanciers chirographaires qui sont des personnes normalement économiquement faibles, donc sans défense, que le juge désire défendre *ex officio*.

C'était exactement le cas de l'affaire ELSI, où le jeu des instances en équité aurait pu éventuellement faire pencher la balance, pour les juges de Palerme, du côté du failli et de ses petits créanciers italiens et non pas du côté du ministère de l'Intérieur à l'égard duquel les juges ne nourrissaient — et ne nourrissent — aucun sentiment particulier de sympathie.

5. *La décision « tardive » du préfet.*

A l'époque des faits, l'ordonnancement juridique italien prévoyait, en tant que première voie de recours offerte à l'administré contre les actes administratifs, le recours hiérarchique à l'autorité supérieure. Cette voie de recours avait un caractère nécessaire car ce n'était qu'après l'épuisement de la voie hiérarchique que l'intéressé était autorisé à s'adresser au juge administratif.

Une norme considérée d'ordre général, à savoir l'article 5 du *Recueil des lois municipales et provinciales* (documents joints au Contre-mémoire, N. 20), prévoyait que, si le recours n'était pas décidé dans un délai de cent vingt jours suivant la date de sa présentation, le réclamant pouvait solliciter cette décision par une instance notifiée à l'autorité supérieure requise. Soixante jours après cette notification, le recours devait être considéré comme étant définitivement rejeté.

La norme était libellée de toute évidence pour permettre au citoyen d'exercer les autres voies de recours, à savoir le recours au juge administratif, même en cas d'inertie de l'autorité hiérarchiquement supérieure. Mais cette norme avait aussi une signification implicite, mais tout aussi claire, à savoir l'évaluation d'un *spatium deliberandi* de cent vingt jours accordé à l'autorité supérieure en tant que « temps normal de réponse » au recours hiérarchique.

La déclaration du ministre de l'Intérieur que la défense du gouvernement italien a produite (documents joints au Contre-mémoire, N. 30), explique en outre que, dans la pratique courante, ce « temps de réponse » au recours hiérarchique était en moyenne d'un an. Peut-être cela ne répond-il pas au critère de justice idéale dans le meilleur des mondes possibles dont rêvait Candide, mais c'était la réalité de l'époque, et il n'y a donc eu aucun retard important, d'un point de vue objectif et général, dans la décision du préfet qui a été prise, comme on le sait, seize mois après.

Je n'entends certes pas démentir par là l'avocat de l'ELSI, M^e^ Bisconti, qui affirme dans son affidavit que le temps de réponse pour les recours hiérarchiques particulièrement urgents etait de l'ordre d'un mois, voire même dans certains cas d'un jour. Je ne veux pas non plus mettre en doute les dires de M. Matheson qui, dans sa plaidoirie, a traité ce sujet, en parlant d'un « temps de réponse » de trois, quatre, ou cinq jours. Mais bien sûr! Il est évident que de telles

décisions, immédiates ont été parfois prises! Mais quand, Monsieur le Président, Messieurs de la Cour? Ces décisions immédiates ont été prises *seulement lorsque l'urgence particulière de la question avait été signalée et motivée d'une manière adéquate.*

La pratique, il est bien évident, est la suivante: puisque la loi accorde un délai de cent vingt jours à l'autorité supérieure pour statuer sur le recours, le bureau de l'autorité qui reçoit le recours procède à une première instruction sommaire pour voir s'il y a une instance d'urgence. S'il n'y a pas cette instance d'urgence ou si la décision n'est pas sollicitée par d'autres voies, le bureau qui prépare le recours se borne à fixer une échéance ultérieure pour l'étude et le traitement et passe à un autre document qui est peut-être plus urgent.

Or il y a lieu d'observer à ce sujet que le recours hiérarchique de l'ELSI, extrêmement long, extrêmement complexe, qui comprend jusqu'à seize pages d'arguments juridiques savants, eh bien, ce recours ne contient *pas une seule phrase, pas un seul mot* requérant une décision d'urgence et, encore moins, évidemment, quoi que ce soit sur les motifs de cette urgence mystérieuse que le préfet aurait dû deviner.

Le Directeur général de la société, M. Guidi, qui a présenté le recours assisté par l'avocat de la société, Me Bisconti, a donc rédigé un long document, subdivisé en cinq moyens de recours, mais il n'a pas jugé bon de dire un seul mot pour indiquer que la société qu'il représentait avait ce besoin pressant d'une décision immédiate.

Il ne résulte d'ailleurs pas — et la Partie adverse ne l'a jamais affirmé — que cette urgence ait été exposée au préfet de Palerme par une lettre, un télégramme, un coup de téléphone. Voyons! Ce « *management* » qui parlait tous les jours avec les ministres et les présidents de régions n'avait sûrement pas de difficulté à signaler au préfet de Palerme l'urgence du recours. Alors, je crois que nous devrions dire avec les Romains *vigilantibus jura succurunt, non vigilantibus jura non succurrunt.* Pour obtenir quelque chose il faut tout d'abord de demander.

Mais qui plus est, l'ordonnance de réquisition date, Monsieur le Président, du 1 avril 1968, alors que le recours hiérarchique date du 19 avril 1968!

Comment peut-on prétendre à une décision immédiate alors qu'on a soi-même attendu 18 jours pour présenter le recours? Et que l'on ne parle pas d'autres mesures immédiates adoptées par l'ELSI car, avant le recours, l'ELSI s'était bornée à envoyer un télégramme de protestation, le 9 avril 1968, télégramme qui ne voulait absolument rien dire, et à présenter au maire, le 11 avril 1968, une demande de révocation de l'ordonnance. Ce ne sont pas des « mesures » adoptées, mais des initiatives, totalement inutiles du point de vue juridique, et bonnes seulement à gagner du temps.

Mais les surprises, quand on lit la « *time-table* » de ces événements, continuent. La présentation de la requête de mise en faillite de l'ELSI date du 26 avril 1968: elle ne suit donc le recours hiérarchique que d'une semaine!

Ceci signifie que le préfet de Palerme a sans doute pris connaissance de la requête de mise en faillite (qui, dans la situation, est devenue évidemment d'emblée un fait notoire) avant même que du recours hiérarchique car, faute de toute indication soulignant son urgence, il est probable (ou presque sûr, dirais-je) que son service du contentieux n'avait pas encore analysé en détail le recours en question.

Et c'est à ce moment-là que le préfet de Palerme a mûri, à juste titre, la conviction que l'ELSI n'était absolument pas intéressée à la décision du recours et il ne l'a donc examiné que lorsque, une année après, le 9 juillet 1969, le syndic de faillite a engagé la procédure prévue par l'article 5 du *Recueil des lois municipales et provinciales* en vue d'obtenir une décision susceptible d'être utilisée par la suite dans le procès en dommages-intérêts devant le tribunal de Palerme.

A la suite de cette mise en demeure, et dans les délais prévus par la loi, soit quarante-trois jours après, le préfet a statué sur le recours de la manière que nous connaissons. Permettez-moi de vous lire un passage de l'affidavit de M. Ravalli (documents joints à la Réplique, N. 9) qui était à l'époque le préfet de Palerme. Il parle de l'ordonnance de réquisition et il dit:

> « En général, les dispositions de ce genre sont attaquées immédiatement par l'entreprise titulaire du complexe réquisitionné en présentant un recours hiérarchique au préfet. Ce que, à ma grande surprise, les administrateurs de Raytheon-ELSI n'ont fait que 19 jours après.

De plus, à ma connaissance, l'activité de production de l'usine avait déjà cessé depuis longtemps et le problème qui tracassait les administrateurs était plutôt d'obtenir de l'Etat des aides suffisantes pour surmonter la grave crise économique dans laquelle l'entreprise se trouvait depuis longtemps. Dans ce but, la société Raytheon–Elsi avait, même après l'ordonnance de réquisition, pris des contacts avec les autorités tant locales (Région et municipalité) que centrales.

En me basant sur ce qui a été dit plus haut, j'ai eu le sentiment que le recours contre la réquisition, de même que la requête de mise en faillite présentée immédiatement après au Tribunal de Palerme, représentaient plutôt des manoeuvres tactiques visant à influencer les autorités réticentes à accueillir les demandes d'aides sus–mentionées.

Ceci est confirmé par le fait que ni la société, ni le syndic de faillite, après la déclaration de faillite, n'ont jugé bon, aux fins de l'annulation de l'ordonnace du maire, d'introduire la procédure de sommation visée à l'article 5 du Recueil de lois du 3 mars 1934 avant le 9 juillet 1969; de sorte que la décision d'illégalité n'a pu être adoptée que le 22 août 1969, à savoir bien des mois après que la réquisition eut cessé de produre ses effets ».

En conclusion, permettez–moi de dire que, si les administrateurs de l'ELSI avaient voulu éviter à tout prix une décision immédiate du préfet, ils n'auraient pas agi autrement. Ils ont présenté un recours tardivement (après dix–huit jours); ils n'ont signalé aucune urgence au préfet, ni dans le corps du recours, ni d'aucune autre manière et, immédiatement après avoir présenté le recours, ils ont présenté une requête de mise en faillite.

La vérité est que même une décision très rapide du préfet n'aurait pas évité la faillite de l'ELSI, surtout en considération de ce que la requête présentée à ce sujet avait révélé au tribunal un état d'insolvabilité extrêmement grave. Ceci de toute manière ne pouvait donner lieu qu'à une déclaration de faillite, comme le mettront en évidence par la suite mes éminents collègues de la défense, vu la nature « officieuse » de la procédure en question.

Quel retard peut–on donc reprocher au préfet de Palerme? Peut–on soutenir que, si la décision avait été prise entre le 20 et le 25 avril (elle ne pouvait pas être prise avant, elle aurait été inutile après), l'ELSI n'aurait pas présenté sa requête de mise en faillite?

Cette thèse semble risible parce qu'il est évident qu'une situation désespérée de déconfiture, telle que celle où se trouvait l'ELSI, ne pouvait être résolue simplement en obtenant la libre disponibilité d'un établissement non actif et de moindre valeur et aussi parce que la requête de mise en faillite était un acte qui aurait dû être pris depuis des mois, comme l'a dit M. Libonati, et comme le dira M. Bonell; enfin parce que la faillite elle–même aurait pu être déclarée (et aurait dû être déclarée) d'office.

Admettons toutefois, hypothèse absurde, qu'il y ait eu une relation entre le moment dela décision du préfet et la faillite. Je voudrais alors qu'on m'explique pour quelle raison le préfet aurait dû statuer tambour battant sur un recours dont le délai de décision prévu par la loi est de cent–vingt jours et dont non seulement *aucun des intéressés ne lui avait signalé l'urgence, mais encore dont le retard avec lequel ils l'avaient présenté révélait clairement un bien faible intêrêt de leur part.* Cela aurait été de la part du préfet vraiment un excès de zèle que M. de Talleyrand n'aurait pas appouvé! Il est donc évident que, dans une telle situation, on ne saurait accuser le préfet d'avoir pris une décision tardive et le gouvernement italien d'avoir dénié la justice aux intéressés.

Une dernière considération, Monsieur le Président, Messieurs de la Cour, si vous me le permettez.

6. *Autre considération sur l'épuisement des recours internes.*

Je voudrais quelque peu aborder le sujet de l'épuisement des recours internes. Ce sujet a déjà été traité par M. Gaja, surtout en ce qui concerne les normes du Traité: il serait donc présomptueux de ma part d'ajouter quoi que ce soit sur ce point.

Permettez–moi seulement de faire une brève allusion aux voies de recours pouvant être exercées aux termes des normes générales de droit interne italien applicables aux cas d'espèce

selon le nouvel exposé des faits: ce nouvel exposé si différent de celui du « *Claim* » initial qu'on a déjà vu.

Comme je l'ai précisé, dans le « *Claim* » initial, la dénonciation des comportements des autorités italiennes était faite dans un contexte purement neutre, sans aucune allégation d'un dessein unique — imputable aux autorités italiennes elles-mêmes.

Dans ce cadre, le problème de l'épuisement des recours internes aux termes du droit italien général pouvait être résumé comme suit:

> « l'actionnaire a-t-il le droit de demander des dommages-intérêts à l'autorité publique qui a réquisitionné les biens de la société en causant despré judices directs à la société, et des préjudices indirects à l'actionnaire en question » ?

Voilà quelle était la question en droit général selon le cadre proposé par le « *Claim* » de 1974.

Et en ces termes-là, la question a été posée par Raytheon aux experts juridiques qu'elle a consultés. Ces experts, comme on le sait, ont exclu dans leurs avis l'hypothèse que les actionnaires — vu la nature indirecte du préjudice subi — aient le droit d'exercer une action en indemnité contre l'Etat italien aux termes des règles générales. Et nous sommes parfaitement d'accord avec ces avis, sous réserve, évidemment, des inexactitudes signalées dans les défenses écrites et, bien entendu, sans que soit touché le problème des droits qui dérivent directement du Traité et dont M. Gaja au parlé. Mais cette question et les avis que les experts consultés par Raytheon à l'époque ont donné se réfèrent à une hypothèse tout à fait différente de celle qui est aujourd'hui présentée par la Partie demanderesse.

Effectivement, comme nous l'avons vu dans le Mémoire, dans la Réplique et dans les plaidoiries, le maire de Palerme, le préfet de Palerme, ainsi que d'autres officiers publics italiens sont accusés d'avoir abusé de leurs pouvoirs pour nuire à Raytheon, en tant qu'actionnaires de l'ELSI, et pour favoriser l'IRI, en permettant à cette dernière de racheter à bas prix un joyau technologique.

D'après cet exposé différent des faits, qui demeure inchangé dans sa substance en dépit de la déclaration de M. Matheson, les actionnaires auraient subi non seulement un préjudice indirect découlant du préjudice direct causé à la société, mais aussi une atteinte immédiate, personnelle et directe à leurs droits d'actionnaires, puisqu'ils auraient été victimes en tant que tels, en tant qu'actionnaires, d'une entente entre les fonctionnaires publics (voir à ce sujet surtout la plaidoirie de M. Gardner, C/3 CR 89/3, p. 325). Ils auraient donc pu invoquer — indépendamment de leur nationalité, même s'ils étaient des italiens, et indépendamment de tout traité d'amitié — l'article 2043 du Code civil italien qui dit que « Tout fait dolosif ou fautif causant un préjudice injuste à autrui oblige celui qui l'a commis aux dommages-intérêts », et demander, en vertu de cet article, la condamnation du ministère de l'Intérieur aux dommages-intérêts (à condition évidemment de prouver leurs accusations).

Qui plus est, si les autorités italiennes avaient agi de la sorte, comme l'affirme le demandeur, les titulaires des services respectifs, même si l'entente n'était pas en elle-même un délit, même si l'entente n'était pas en elle-même une « *conspiracy* », auraient commis des faits illicites en se rendant coupables personnellement tout du moins du délit d'abus innomé de fonction, prévu par l'article 323 du code pénal italien, qui dit:

> « Tout officier public (c.p. 357) qui, en abusant des pouvoirs inhérents à sa fonction, commet, pour porter préjudice à quelqu'un ou pour lui assurer des avantages, un fait non prévu en tant que fait illicite par une disposition de loi particulière (c.p. 605-606), est puni d'une réclusion jusqu'à deux ans ou d'une amende de cent mille à deux millions de lires (c.c. 2637) » (Documents joints à la Réplique, Annexe 17).

Il ressort très clairement de ce libellé que l'hypothèse visée par la norme englobe parfaitement le comportement des autorités italiennes dénoncé par la Partie demanderesse; en outre, l'article 185 du Code pénal italien prévoit que

> « tout fait illicite ayant causé un préjudice patrimonial ou non patrimonial oblige le coupable et les personnes qui, aux termes des lois civiles, doivent répondre du fait qu'il a commis, à réparer le préjudice causé » (Documents joints à la Réplique, N. 23).

Dans la présente affaire, la personne qui aurait dû répondre du fait commis par les coupables était évidemment l'Etat (en la personne d'un de ses ministres), cela va de soi et cela découle aussi de l'article 28 de la Constitution italienne. Monsieur le Président, l'article 28 n'est pas parmi les documents qui ont été produits, je m'en tiens donc à ce que vous avez dit au commencement de la séance et m'abstiens de le citer.

En définitive et pour conclure sur ce point, Raytheon aurait pu présenter des dénonciations pénales et exercer une action civile dans la procédure pénale suivante en se constituant partie civile contre les personnes physiques accusées et contre le ministère de l'Intérieur, responsable civil dans ce même procès, ou bien se borner à exercer directement une action civile en dommages–intérêts contre le ministère de l'Intérieur, comme d'ailleurs d'autres sujets américains l'ont fait dans des circonstances analogues.

C'est le collège de défense américain qui a eu l'amabilité d'évoquer un de ces cas dans cette même phase orale et je voudrais y faire référence. Il s'agissait dans ce cas d'un ressortissant américain qui a demandé d'importans dommages–intérêts à plusieurs ministères italiens en s'adressant au Tribunal de Rome.

Ce ressortissant américain avait dénoncé un comportement arbitraire et discriminatoire de l'Etat italien contre lui et contre des sociétés de capitaux dont il était actionnaire ou l'intéressé de façon directe ou indirecte. Il avait invoqué la violation de l'article 2043 du Code civil italien et la violation du traité ACN. Voici un cas donc très proche.

Le Tribunal de Rome, tout en déboutant le demandeur sur le fond, faute de précision de la demande et faute de preuves, a admis en principe la recevabilité d'une telle demande.

Même si l'affaire est maintenant l'objet d'un recours en appel, il semble utile de le citer, car le Tribunal de Rome a affirmé d'une facon implicite mais très claire — la pièce a été produite par la Partie demanderesse — que si des faits spécifiques avaient été affirmés et prouvés, le demandeur aurait gagné le procès.

Il est donc évident que si la plainte qui nous concerne avait été portée par Raytheon à un juge italien, elle aurait été jugée recevable sur la base d'indications spécifiques de comportements illicites et fautifs de la part des autorités italiennes. Si, en plus, Raytheon avait pu prouver la vérité de ses dires, les dommages–intérêts demandés lui auraient été accordés.

Puisque Raytheon et Machlett n'ont jamais introduit cette action en dommages–intérêts, ils n'ont pas satisfait, pour ce qui concerne ce point, à la condition de l'épuisement des voies internes et il est presque superflu d'ajouter que les observations développées tout à l'heure représentent une contestation supplémentaire de l'exception d'*estoppel* formulée par la Partie adverse (Réplique, p. 139), puisque le Mémoire de 1987 représente un *quid novi* par rapport au « *Claim* » de 1974.

Une dernière considération pour répondre à une observation de M. Fazzalari selon lequel une telle action en justice aurait été impossible en raison du manque de preuve accompagnant des accusations aussi graves contre les autorités italiennes. Formuler de telles accusations, a dit M. Fazzalari, sans pouvoir les prouver — car évidemment la preuve de l'entente est impossible — aurait été dangereux pour les administrateurs d'ELSI d'un point de vue pénal (C 3/CR 89/2, p. 299).

On aurait envie de se demander, avec une pointe d'amertume, pourquoi ce que l'on ne doit pas faire devant un juge national — à savoir lancer des accusations si graves sans en avoir les preuves — devrait être permis devant la suprême instance internationale de justice.

Mais il me suffit de constater que M. Fazzalari estime impossible de prouver que le maire de Palerme, en réquisitionnant l'ELSI, a agi dans des buts différents de ceux qui ont été expliqués dans l'ordonnance et, plus généralement, que M. Fazzalari estime impossible de prouver une entente entre les autorités italiennes qui auraient permis à l'IRI de racheter à bas prix les installations d'ELSI. Impossible de la prouver, Monsieur le Président, Messieurs les juges, parce que cette entente n'a jamais existé.

7. *Conclusions.*

Comme je l'ai précisé au début de ma plaidoirie, la tâche qui m'avait été assignée au sein du collège de défense italien consistait à vous parler:

1) des avantages prévus par la législation en faveur du Sud;
2) de l'intervention de la force publique ou du manque d'intervention;
3) de la réquisition de l'usine;
4) du retard du préfet de Palerme dans la décision du recours hiérarchique.

J'espère avoir démontré que le comportement des autorités italiennes a été légitime ou, à tout le moins, là où une illégalité a été commise et reconnue par les autorités italiennes, qu'il n'a nullement contribué à causer les conséquences alléguées par la Partie demanderesse et que, en tout cas, il n'était pas propre à justifier des accusations quant à son caractère arbitraire ou discriminatoire.

Monsieur le Président, Messieurs les juges. Je vous remercie pour votre attention.

The PRESIDENT: Merci Monsieur, je crois que nous allons écouter M. Bonell après un intervalle de dix à quinze minutes.

The Court adjourned from 11.20 a.m to 11.35.

The PRESIDENT: Please be seated. I give the floor to Professor Bonell.

Mr. BONELL: Mr. President, distinguished Members of the Court.

I consider it to be a great honour to appear before you on behalf of the Italian Government. As a comparative lawyer, I normally have to deal with the differences between the various national jurisdictions. To be now in front of you, supreme international judges, whose task is to apply, among other things, principles of law generally recognized all over the world is a unique experience for me.

1. *The impact of the requisition on the prospect of ELSI's « orderly » liquidation.*

Mr. President, distinguished Members of the Court. According to the Applicant, by the end of 1967, ELSI was a respected manufacturer in the electronics field, with a modern, fully-equipped plant, a reputation for sophisticated quality products, and a significant volume of sales and export earnings.

It was only because the company failled to provide the return on Raytheon's investment that Raytheon itself at a certain point decided to liquidate the company and settle all outstanding debts from the proceeds of the sale.

Still in the opinion of the Applicant, if such an « orderly liquidation » could not be carried out, the sole reason for this was the requisition of ELSI's plant by the Mayor of Palermo. The requisition is said to have prevented Raytheon from selling the plant and forced it in less than one month to file for bankruptcy with all the consequences following on from that (see Memorial, pp. 3, 14-15); Reply, pp. 128-129 *et seq.*).

As to the presentation of ELSI as a successful manufacturer of sophisticated products, my colleague Professor Libonati has already demonstrated that in reality Raytheon's investment in the Sicilian company was a disaster right from the start and only got worse over the years.

Even the last-minute attempts by the new ELSI management to reorganize the company — last week described by both Mr. Adams and Mr. Clare as so promising — did not result in anything else than an increase in the losses to a total of 3.75 billion lire by March 1968.

For his part, Avvocato Caramazza has just now shown that the requisition was in no way arbitrary or discriminatory.

Now, it is up to me to illustrate that:

1) when deciding to close ELSI, Raytheon was no longer able to proceed with an « orderly » liquidation, since this would have required the company's ability to satisfy all its outstanding debts. To the contrary Raytheon itself foresaw the payment of no more than 30 to 50 per cent to the unsecured creditors;

2) when Raytheon decided on ELSI's « orderly » liquidation, the company was in fact already insolvent, and Raytheon was under a legal duty either to formally ask for a composition with all its creditors or to file for bankruptcy;

3) the fact that Raytheon, notwithstanding this duty, waited until after the requisition to file for bankruptcy, cannot now be used to establish any sort of causal connection between the requisition and bankruptcy.

(a) *ELSI's inability to proceed with an « orderly » liquidation due to its insolvency.*

The decision to liquidate ELSI was formally taken on 16 March 1968.

According to the Applicant, Raytheon took this decision with a view to beginning an « orderly », or as it is elsewhere referred to, « voluntary » liquidation of the company, in order to minimize its losses.

This is far from the truth.

The decision to liquidate ELSI was by no means a free choice. It was a matter of absolute necessity, as was perfectly clear to, and admitted by ELSI's management itself, at the time.

In fact, on 7 March 1968 Raytheon formally notified ELSI that despite the company's urgent need of additional capital, it was no longer willing to subscribe to any further stock which might be issued by the company or to guarantee any additional loans which might be made by others to ELSI.

This is stated in a letter from Mr. Adams, Raytheon's President, to Mr. Clare, ELSI's new President (cfr. Exhibit III–13 to the 1974 Claim), and confirmed by both of them in their oral testimonies before you last week.

ELSI, thus, knew perfectly well that it could no longer count on Raytheon for even the slightest help, and since its coffers had dried up a long time earlier, the only way to meet its obligations and immediate commitments was to start selling off its assets.

This had been bluntly anticipated, after all, by Mr. Clare himself, at the famous meeting on 20 February 1968 with the President of the Sicilian Regional Government, Mr. Carollo.

And no one other than Mr. Adams himself confirmed before us last week that in fact the time–chart drawn up on that occasion by Mr. Clare was correct, that is to say, that on 8 March the money put into ELSI was expected to run out and that as from this date the company had to be sold off.

Further conclusive evidence that the liquidation decided on by ELSI's management in March 1968 could not have been an « orderly » one, is given by the company's disastrous balance sheet at that time.

The outstanding debts were some 16 billion lire — isn't that an astonishing figure, by the way, if one considers that the company's share capital totalled a mere 4 billion lire? — of these 16 billion lire, around 4 billion were due to the preferred creditors and 11 billion to unsecured creditors.

The Applicant would like us now to believe that all these creditors could have been satisfied in full in view of the fact that the « book value » of the company's assets amounted to some 17 billion lire.

My colleague Professor Libonati has demonstrated the total unsoundness of such a proposition. You will therefore forgive me if I simply disregard it for the present purpose.

What remains is the company's own liquidation plan.

Yet, even supposing that everything had gone as foreseen in this plan, namely that the sale of the assets had raised some 10 billion lire, after deducting the preferred creditors, the remainder would only have been sufficient to pay 30 to 50 per cent of the unsecured debts!

This being so, it is patently evident that what is now presented as an « orderly » or « voluntary » liquidation, decided on in order to avoid further losses, was in reality a desperate attempt on the part of an insolvent company to avoid bankruptcy and to force the creditors into an amicable settlement.

Raytheon knew perfectly well that, in order to succeed in its plan, it had to obtain the approval of all the creditors. If only one creditor had demanded to be paid immediately and in full, bankruptcy would have been unavoidable. And this was why the liquidation plan provided for the full payment not only of the preferred creditors, but also of the mass of small creditors: the idea was — as candidly admitted by Mr. Clare in his testimony last week « to get rid of all of those [small creditors] ... and not have one of [them] coming along, [and] put us into bankruptcy ... » (cfr. C 3/CR 89/2, pp. 286).

The risk that sooner or later such a small disruptive creditor might in fact appear and destroy the illusory dream of an orderly liquidation, must have represented a sort of nightmare for Raytheon.

Despite its previous declaration that it would never pay ELSI an extra lire, it immediately arranged the transfer of 150 million lire to silence the more unruly small creditors. This we are told by Mr. Scopelliti, a senior official of the company (cfr. his Affidavit annexed to the Memorial of the Applicant).

On their part, the large creditors, made up of six banks with outstanding claims of some 9 billion lire, were asked to accept a payment of only 30 to 50 per cent.

According to the Applicant, Raytheon reasonably anticipated that the banks would settle their claims at this reduced level, as this would guarantee « prompt and substantial payment, as compared with receiving little or nothing in bankruptcy » (cfr. Memorial, p. 11; but the same view is repeated in the Reply, p. 130).

I shall discuss later whether ELSI's management was right or wrong in anticipating the banks' willingness to renounce more than half of their outstanding claims.

What I want to bring to your attention at this point, Mr. President and distinguished Members of the Court, is the following: by openly admitting that, once the decision was taken to liquidate ELSI, the banks had every reason to be satisfied with a mere 30 to 50 per cent payment, the only alternative being the company's bankruptcy with the prospect of receiving little or nothing out of it, the Applicant itself has in effect abandoned the fiction of ELSI as a going concern and had acknowledged that the company was insolvent already prior to the requisition!

(b) *ELSI's duty to file for bankruptcy long before the requisition took place.*

Maybe one of the reasons why the Applicant insists that prior to the requisition ELSI was entitled to proceed with an « orderly » liquidation lies in the fact that — unconsciously perhaps — the Applicant argues in terms of the bankruptcy law of the United States.

This is confirmed by some of the passages of the oral testimony of both Mr. Adams and Mr. Clare last week. I refer in particular to their statements (to be found in C 3/CR 89/1, p. 261 and C 3/CR 89/2, p. 279, respectively, which clearly show that Raytheon at that time considered bankruptcy, and what they called an orderly liquidation, as two functionally equivalent solutions, between which the company was entirely free to choose.

This can be understood to a certain extent if one thinks in terms of the bankruptcy law of the United States.

As is well known, the main characteristic of that law has always been that of being « debtor–oriented ». In other words, in the United States, bankruptcy is basically a means for the debtor, whether insolvent or not, to discharge his previous debts and to resume his activity on a fresh footing.

This so–called « fresh start doctrine » has been expressed in very clear terms by the United States Supreme Court in the case *Local Loan Co. v. Hunt*, where it is stated:

> « One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh ... » (292 US 234, 244).

As a consequence, a debtor may file for bankruptcy, even if he is solvent (« voluntary case »: Sec. 3.01 Bankruptcy Act), whereas in cases of insolvency the creditors may file a bankruptcy petition against the debtor (« involuntary case »: Sec. 3.03 Bankruptcy Act) but there is no obligation for the debtor to file for bankruptcy himself.

The situation is quite the reverse in Italy as it is also in many, and almost all other countries, at least those of civil law tradition, such as France, Germany, Spain, etc.

Here bankruptcy continues to be a sort of sanction which befalls the insolvent debtor. And even if the creditors have lost their original right to have him imprisoned, there remains the obligation on the debtor to file for bankruptcy himself as soon as he becomes insolvent.

Even more important: bankruptcy is seen as a means of protecting primarily the interests of the creditors by rendering innocuous those who are unable to correctly administer their assets and ensuring a prompt and equitable satisfaction from the proceeds of the sale of the debtor's assets. As a result, bankruptcy, in these countries, may be initiated on the initiative of the Court, and the non-observation of the duty of the insolvent debtor to file for his own bankruptcy may even lead to the imposition of a criminal sanction. For citation of literature on this subject, I may refer to my written text where I quote some of the most recent comparative law studies on the subject (cf. J.H. DALHUISEN, *Composition in Bankruptcy – A Comparative Study of the Laws of the EEC Countries, England and the USA, Leyden*, 1968, pp. 95 *et seq.*; D.A. ALLAN and U. DROBNIG, *Secured Credit in Commercial Insolvencies – A Comparative Analysis*, in Rabels Zeitscrift, Vol. 44 (1980), pp. 615 *et seq.*; A. FLESSNER, *Sanierung und Reorganisierung*, Tubingen, 1982, pp. 173 *et seq.*).

This being so, there can be no doubt at all that ELSI — a company which was operating in Italy according to Italian law — was under a duty to file for bankruptcy long before the requisition took place and certainly at the time when Raytheon decided to proceed with the so-called « orderly » liquidation.

As a matter of fact, the insolvency of ELSI at that time cannot be denied. In terms of Article 5, paragraph 2, of the Italian Bankruptcy Law, insolvency is manifested by defaults or any other fact which demonstrate that the debtor is no longer in a position to fulfil his obligations in a regular manner.

This was clearly the situation in which ELSI found itself. Nothing demonstrates this better than Raytheon's own admission, to be found in its 1974 Claim, where it is stated:

> « At the end of the month of March 1968, the situation relating to ELSI was as follows: ... ELSI had run out of money and had no prospect of receiving funds except from the sale of assets ... Substantial payments were due from ELSI, the maturities of which had not been extended » (cfr. pp. 35-36).

According to the Applicant, these imminent payments could easily have been met with the proceeds of the sale of ELSI's assets.

Yet as a matter of fact, a company which, in order to meet its financial obligations as they become due, is bound to start selling off its assets, is an insolvent company!

In the desperate attempt to demonstrate the contrary the Applicant relies upon the opinion of Professor Franco Bonelli. I have studied it very carefully, but with all due respect to my colleague of the University of Genoa, his conclusions are totally irrelevant.

First of all, in order to exclude the idea of ELSI's insolvency and demonstrate its ability to satisfy all its creditors, he simply bases himself on the affirmations to this effect contained in the Applicant's Memorial. He openly admits that he himself did not have the chance of checking ELSI's accounts (cfr. C 3/CR 89/2, p. 292).

Secondly, the different kinds of settlement with all or part of the creditors, indicated by him as alternatives to bankruptcy, by no means affect the duty of the insolvent debtor to file for bankruptcy. In fact, they all presuppose — how couldn't they — the willingness on the part of the creditors to voluntarily accept a pro rata payment. Without such an agreement, the debtor remains under the duty to file for bankruptcy.

There was only one possibility for ELSI to avoid the duty of filing for bankruptcy and that would have been to formally request to be admitted — it is a privilege according to Italian law —

to the procedure of judicial settlement (*concordato preventivo*) according to Articles 160 *et seq.* of the Italian Bankruptcy Act.

Now, I can imagine the reasons why ELSI did not take such an initiative either. By law, the debtor must show the court that he has been keeping his accounts in order and that he is able to satisfy all his unsecured creditors with at least 40 per cent of their claims. I am afraid that for ELSI it would have been extremely difficult to meet both requirements at the time.

Yet, this is not an excuse for Raytheon having instead adopted the charade of the so–called « orderly » liquidation, and waited for the provident order of requisition by the Mayor of Palermo before finally filing for bankruptcy.

As in many other legal systems, under Italian law, such a negligent delay on the part of an insolvent debtor may amount to the criminal offence of so–called « *bancarotta semplice* », bringing with it the sanction of up to two years imprisonment of its directors (cfr. Art. 217, N. 4, of the Italian Bankruptcy Act).

And while we are on the subject, the acceptance by ELSI of further credit from Raytheon in order to silence some of the small creditors comes very close to yet another crime, that is to say, that of the so–called abusive recourse to credit « *ricorso abusivo al credito* », for which Article 218 of the same Bankruptcy Act again provides for up to two years imprisonment. Not to mention the fact that as from January 1968 we were told that ELSI's accounts were no longer kept properly — an omission which too constitutes a criminal offence according to the Bankruptcy Act.

But just to complete the picture, even assuming for the sake of argument ELSI was operating in Delaware, the home state of Raytheon, rather than in Italy, the situation would have been very much the same.

First of all, there is no doubt that at least as from March 1968 ELSI was insolvent even in terms of the United States Bankruptcy Law. Indeed, Section 19 of the Bankruptcy Act, prior to the 1979 reform, reads as follows: « A person shall be deemed insolvent ... whenever the aggregate of his property ... shall not at a fair valuation be sufficient in amount to pay his debts ».

And we have seen that ELSI had itself, right from the beginning, announced its inability to pay the larger unsecured creditors more than 30 to 50 per cent from the proceeds of the sale of its assets.

Yet the company would also have have been insolvent under the new criterion introduced with the 1979 reform, according to which insolvency consists in the debtor generally not paying his debts as they become due (Sec. 303 [h]). In this respect it is sufficient to recall once more the crude, but accurate, analysis of the company's actual financial health made early in March by Mr. Clare.

It is true that, under United States law, ELSI would not have been obliged to file for bankruptcy, notwithstanding its insolvency.

The company would have been free to choose between a voluntary bankruptcy petition under Chapter 7 or a voluntary petition for reorganization under Chapter 11. In the first case its assets would have been liquidated immediately, while in the second case ELSI would have been able to continue its activity in the hope of convincing its creditors to accept or, failing to get their approval, to have the judge impose upon them the « plan of rehabilitation » providing for the 50 per cent payment of creditors or even less.

This at least is the theory.

In practice, it is anything but certain that United States banks, placed in the same situation as the Italian banks vis–à–vis ELSI, would have waited patiently as long as the latter did, instead of filing an involuntary bankruptcy petition as they were entitled to do.

Moreover, in a reorganization procedure, the confirmation of an advantageous plan of rehabilitation depends to a large extent on the actual capacity for recovery of the insolvent company. ELSI could hardly be said to meet that requirement. Or did not ELSI's management itself, in its own reorganization plan of 1967, conclude that without heavy financial assistance on the part of the Italian Government the company no longer had any future?

Perhaps when deciding to liquidate ELSI Raytheon's legal advisors had in mind a special device provided for by the law of the State of Delaware for insolvent corporations.

I refer to Section 291 of the General Corporation Law of that State, which gives the right not only to the creditors, but also to the individual shareholders to ask for the liquidation, as it is called, of the company in order to have their property rights adequately protected.

There is however a significant difference between such a procedure and the so-called « orderly » liquidation of ELSI as decided by Raytheon. Under Section 291 and following of the Delaware Corporation Law, the requested liquidation of the company implies the appointment by the Court of a receiver who takes over all the assets, thus depriving the company of their free disposal, while Raytheon attempted to liquidate the insolvent company without any judicial supervision!

(*c*) *No causal connection between the requisition and ELSI's bankruptcy.*

Mr. President, distinguished Members of the Court, after what has been said so far it should not take me very long to demonstrate the complete unsoundness of the proposition of the Applicant, according to which it was the requisition of ELSI's plant which forced the company to file for bankruptcy three weeks later.

First, the action of the Mayor of Palermo had no effect on the company's duty to file for bankruptcy, since the company was already insolvent.

In addition, it is untrue that the requisition, by preventing ELSI from liquidating its assets, made it impossible for the company to reach an amicable settlement with its large unsecured creditors.

There is no evidence whatsoever that, prior to the requisition, the banks were willing to accept the proposal of a 30 to 50 per cent payment. After all, where was this proposal? Did not Mr. Clare himself tell us last week that when ELSI formally took the decision to proceed with the liquidation, there was not yet any definite plan of how this should be carried out? (C 3/CR 89/2 p. 289).

Nor did the banks change their minds afterwards. On the contrary, once the order of the Mayor became known, the banks did not react at all. They never filed for ELSI's bankruptcy, as would have been their right.

It clearly follows that the requisition had no effect on the banks attitude vis-à-vis ELSI: to a certain extent it even contributed — why not — in encouraging them to wait in the hope that sooner or later the company would be saved.

Finally, there is the argument that the requisition deprived ELSI of its assets.

Mr. President, in this respect it is important, first of all, to recall that an insolvent debtor is in any case precluded from freely disposing of its assets. This is because of the absolute prohibition — provided for by the bankruptcy law of all countries and in most of them even carrying criminal sanctions — of making preferential payments to individual creditors. In other words, it was not the requisition that froze ELSI's plant: the company's assets were already frozen by its insolvency!

The Applicant has further failed to produce even the slightest evidence that there were firms in Italy, or abroad, that would have been willing to buy the whole plant or part of it, but were in fact prevented from doing so because of the supervening requisition.

Nor can one object that the time between the decision to liquidate the company and its requisition was too short to allow potential purchasers to formulate sufficiently definite offers. The company was virtually already in liquidation from the beginning of the year, its offices having been already transferred to a provisionary seat in Milan, quite far away from Palermo, and its premises occupied by the workers since the beginning of March.

If it was not possible to sell all or part of the assets at the price set in the company's « liquidation plan », this was certainly not the fault of the requisition which took place on 1 April 1968, but was entirely due to the fact that even before that date, and independently from the Mayor's intervention, nobody was willing to buy these assets at these prices from a company in such an economic and financial mess!

To sum up:

(*a*) already before the requisition, it was no longer possible for ELSI to dispose freely of its assets, both from a strictly legal and from a factual viewpoint;

(*b*) neither before nor after the requisition did ELSI's major creditors request its bankruptcy: it was Raytheon itself which, after months of play–acting, immediately after the requisition, suddenly felt obliged to file for bankruptcy.

In these circumstances, Mr. President, there can be little doubt that in reality it was not the requisition of the Mayor of Palermo which caused ELSI's bankruptcy. The requisition merely became a pretext which Raytheon has used as a scapegoat for ELSI's already existing insolvency.

II. *The bankruptcy proceedings and IRI's role in the acquisition of ELSI's plant.*

Mr. President, distinguished Members of the Court, according to the Applicant in its Memorial (p. 41):

« Having requisitioned the plant and caused ELSI's bankruptcy, the Government of Italy discouraged private bidders, boycotted the auctions itself, and worked out special arrangements for a piecemeal take–over directly with the bankruptcy authorities ».

And this with the object « to secure ELSI's facilities for IRI, on the terms and at the below–market price which IRI desired ».

With your permission, I shall try to demonstrate that once again the Applicant's allegations are totally unfounded.

As a matter of fact, they lack any specific evidence, and, what is even worse and more important, they rely wholly on two totally erroneous assumptions, namely:

1) that IRI actually had an interest in the acquisition of ELSI's plant; and

2) that the price paid by IRI at the end was materially less than that which could have been reasonably expected to be paid by any other purchaser under the same circumstances.

(a) *IRI never had any interest in acquiring ELSI and did so very reluctantly only when it became apparent that no one else was willing to buy the hopelessly obsolete and loss–making plant.*

As Mr. Clare said: « I suppose the only people who, right from the beginning were very blank–faced about it all was IRI » (C 3/CR 89/2, p. 278).

The irony of the situation is that the first one to urge IRI to intervene in ELSI was Raytheon itself. As early as Spring 1967 Raytheon, having become aware of the serious crisis affecting its Italian subsidiary, immediately came up with the idea of loading off ELSI onto IRI.

The request was rejected by IRI, for a very simple reason. According to the reorganization plan drawn up at that time by the new ELSI management, the company was expected to expand mainly in the telecommunications sector, i.e. a sector in which several IRI companies were already operating. Why then should IRI have had the slightest interest in pouring money into an insolvent company which, even in the case of recovery, would just have provided an unnecessary duplication of its production?

Last week, in reply to a similar question put to him by our colleague Mr. Highet, Mr. Adams, significantly enough, referred to the fact that « IRI was not unused to loss operations » (cfr. C 3/CR 89/2, p. 272).

Mr. Adams is right. In particular in the years immediately after the end of the war there have been instances where IRI was forced to take over the burden of unprofitable companies, in order to protect general interests such as the maintenance of the production of vital materials or the safeguarding of employment.

As a rule, however, IRI — a public enterprise with a distinct legal personality — enjoys full managerial freedom and, by law, must act in accordance with the principle of profitability. I may refer back to my written text, Mr. President, for the citation of literature on this subject: see on this point, among other, *Corte di Cassazione* 14 December 1985, N. 6328, in *Diritto fallimentare* 1986, II, p. 214; F. ROVERSI-MONACO, *Gli enti di gestione*, Milano 1967, pp. 164 *et seq.*; M.T. CIRENEI, *le imprese pubbliche*, Milano 1983, pp. 227 *et seq.*; F. GALGANO, *La società per azioni*, Padova 1988, pp. 455 *et seq.*).

The extent to which IRI in fact sticks to these principles has only just recently been clearly confirmed in the choice of a foreign partner for STET, IRI's operating company in the telecommunications sector. Indeed, if after a careful examination of several prospective partners, the United States company AT & T has been selected to the exclusion of a number of other important European groups like Siemens or Ericsson, this is because IRI-STET based their choice entirely on purely economic considerations. And this is only one example. Maybe Professor Libonati could tell us about other recent cases where IRI has behave in exactly the same manner faced with important strategic choices.

In ELSI's case, the Italian Government, for a long time did not interfere at all with IRI's decision to stand back.

The situation changed after ELSI's decision to cease its activity.

ELSI's desperate financial straits clearly indicated that only a large-scale intervention could avoid collapse with the consequent loss of more than 1,000 jobs. Since the Sicilian Region had immediately laid down as a condition that any further financial help on its part would be dependent on IRI participation in the rescue operation, the Central Government now felt obliged to do its best in order to convince IRI to step in.

Surely, if the Italian Government had really intended to have IRI buy up the ELSI plant cheaply, the easiest way to do so would have been to reject Raytheon's desperate request for funds and to leave ELSI to go into bankruptcy.

Instead the Government's behaviour was quite the opposite. It immediately declared itself ready to come to ELSI's aid and to seek a solution acceptable to all concerned.

Mr. President, isn't this a strange attitude for someone trying to take property for the benefit of IRI?

Nor could it be claimed that the first step in this direction was the requisition of the plant, which is alleged to have caused ELSI's bankruptcy and all the ensuing events.

First of all, because, as already demonstrated, it was not the requisition which caused ELSI's bankruptcy, since the company had already been insolvent for a long time.

Secondly, the requisition was obviously just an emergency measure taken for the purpose of avoiding possible disorders due to the dismissal of ELSI's employees by the company's management on the previous day. When the requisition was ordered, all the parties concerned considered it little more than a temporary measure.

Its immediate effect was just to calm the workers, since it gave them the assurance that their dismissals were no longer effective and that their wages would continue to be paid by the Region. This was important for them.

At the same time, negotiations for the public rescue of ELSI went ahead without interruption even afterwards, and ELSI itself — as we have just heard from Avvocato Caramazza — let 19 days go by before lodging an appeal against the Mayor's order.

How little the requisition worried ELSI's management at that time has now been confirmed — perhaps not intentionally but certainly very clearly — by Mr. Clare himself. After having described all the preparations for the company's liquidation made from the beginning of March onwards, he added, as if this were the most natural thing in the world:

> « Later on when the plant had been seized, I handed over to Oppenheim, who was another Raytheon Vice-President, and he was going to run ... the activity of the orderly liquidation. I was ... moving off to look at the other nine or 10 companies in Raytheon Europe, all of whom needed some attention » (C 3/CR 89/2, p. 279).

No sign, as you can see, of desperation; on the contrary, confidence that ELSI's orderly liquidation would basically go on, notwithstanding the temporary measure of requisition.

I do not want to bore you with a repetition of all the more than generous proposals for a solution put forward by the Italian authorities, both before and after the requisition.

I would just like to mention two of them, which in my view are particularly significant in showing the different attitudes of the two Parties concerned.

On 29 March 1968, i.e. after Raytheon's decision to liquidate ELSI, but still before the requisition, the Italian authorities begged Raytheon to reopen the plant and not to send the dismissal letters as announced. In return the Government would pay wages and shoulder most of the operating losses, until such time as a public company could open negotiations with ELSI for the purchase or lease of its assets. Raytheon refused (cf. minutes of a meeting of 29 March 1968 between Carbone, Clare, Oppenheim and Scopelliti, Annex 15, Exhibit G, to the Memorial).

The same proposal was renewed to Raytheon one month later — one month later — but Raytheon again refused. This time its acceptance would have entailed the immediate revocation of the requisition order — which the Mayor of Palermo had in the meantime issued — as well as the pledge of the Italian authorities that, once productive activity would have been resumed, by means of a special management company to be set up together with the Sicilian Region and IRI — all governmental proposals — once this would have happened « everybody, including the Region and IRI, shall be ready to help Raytheon and in the meantime to liquidate ELSI through a useful sale in the shortest possible time » (cf. memorandum of 20 April 1968 from the President of the Sicilian Region, Annex 38 of the Memorial; see also the minutes of the meeting in Palermo on 19–20 April 1968, Annex 37 to the Memorial).

In an attempt to justify the undue intransigence of Raytheon, the Applicant now claims that by means of this proposal, « After having requisitioned ELSI's plant ... Italian authorities pressured Raytheon to reopen ELSI at Raytheon's own ... expense » (cfr. Memorial, p. 13).

Nothing, Mr. President, is further from the truth! The establishment of the new operation company would have required not the paying–up of any new capital on the part of Raytheon, but merely Raytheon's willingness to cover 40 per cent — 40 per cent! — of the probable operating losses, while the remaining 60 per cent would be covered by the Region and IRI.

Thus, one thing is certain. The impossibility of reaching an agreement between all the interested parties was not the fault of the Italian authorities, but of Raytheon. Raytheon was perfectly aware that the Italian authorities would do everything possible to avoid ELSI's activities ceasing overnight, leaving more than 800 employees jobless. Taking advantage of this fact, it continued to act as if the ELSI disaster was none of its business, and as if it was the duty of the Italian authorities to save the company and to satisfy the creditors!

And this, Mr. President, is the company which now complains that in Italy a private investor is not permitted to run his business without constant interference on the part of the State!

The Applicant complains of an endless series of meetings between Raytheon's top management and Italian politicians, both in Palermo and in Rome, during which the latter — the Italian side — did nothing but go from sweet promises to hard–line threats.

First question: who approached whom for funds? Furthermore, how do politicians all over the world react when faced with the dilemma of either having to pump public money into a private enterprise or losing 1,000 jobs in an area of high unemployment?

Seen within this context, even the much–quoted memorandum of 20 April 1968 by the President of the Sicilian Region, Mr. Carollo, loses much of its importance. Indeed, when he stated that:

> « Nobody in Italy shall purchase, that is ... IRI shall not purchase ... the Region shall not purchase, private enterprises shall not purchase ... the Region and IRI and anybody else who has any possibility to influence the market will refuse ... to favour any sale while the plant is closed ».

he pronounced, perhaps somewhat undiplomatically, something quite obvious: namely, that as President of the Sicilian Region he could not view favourably the closure of ELSI's plant, and

Details of the prices set in the various auctions and the way in which the final figures were arrived at, can be found in our Counter-Memorial (p. 91).

What I do want to stress here and now is that the price paid by ELTEL at the bankruptcy auction was perfectly reasonable.

And it is certainly interesting to note that in its 1974 Claim Raytheon itself openly admitted that the price paid by ELTEL was only 300, or at the most 500, million lire less than what it anticipated in its own liquidation plan (cf. Claim, p. 66). A modest difference — I dare say — considering that ELTEL was purchasing at a fourth bankruptcy auction, after three auctions had been unattended!

Much less understandable — to put it lightly — is the fact that the Applicant now claims that ELTEL should have paid a much higher so-called « free market price ». By doing so, the Applicant completely ignores that (*a*) ELTEL was not purchasing a going concern on the market, but the remains of a bankrupt company at a bankruptcy auction; and (*b*) not even under these circumstances was someone else willing to buy.

And these are hardly minor points, would you not agree?

Mr. President, distinguished Members of the Court, I have thus completed my statement and I thank you very much for your attention.

The PRESIDENT: Thank you, Professor Bonell. Judge Schwebel would like to put a question to the Italian Counsel.

Judge SCHWEBEL: Thank you, Mr. President. If I understood Italy's distinguished Counsel correctly, he stated that a major purpose of the requisition was to enable Italian governmental authorities to pay the wages of ELSI's employees. I also understood Counsel subsequently to state that Italian governmental authorities, before the requisition, offered to pay the wages of ELSI's employees if ELSI were to keep the factory open. Can these statements be reconciled and, if so, how? If Italian law requires requisition as a condition of governmental payment of wages, what are the precise provisions of the relevant law?

The PRESIDENT: I do not expect to receive the reply today. I think that, as it is practically 1 o'clock, you may reply to Judge Schwebel's question tomorrow morning. Or do you want to reply now?

Mr. BONELL: Mr. President, that is entirely up to you.

The PRESIDENT: If you want to reply now, you may do so.

Mr. BONELL: One has to make one step backwards and think of what happened in July 1967. At that point ELSI's management, in accordance with what had been worked out in the so-called reorganization plan in order to reduce the expenses for employees, announced its intention to dismiss some 200 employees. The reaction on the side of the trade unions was a fairly strong one and, being faced with a strike, the Company accepted to enter into negotiations with the trade unions and representatives of the Sicilian Region, in order to try and find a generally acceptable solution. The solution — as we can read in the 1974 Claim of Raytheon — was more or less along the following lines. Some 160, or 168 if I am not mistaken, out of these 200 employees, though not actually dismissed, were asked not to work any longer for the time being, but with their salaries being paid by the Sicilian Region. This was with a view to retraining them, as it is stated, in order to allow them either to be reassumed by the Company itself with different tasks or to find a job elsewhere. This turned out to be impossible so that, at the end of March 1968, again a strike broke out and led to the difficult situation at the plant, before the requisition took place.

The requisition — I dare say — was not at that time, nor has it ever been, according to Italian law, a formal condition for the Italian State to pay the wages to the workers. On the contrary, later on — if I am not mistaken it was just around 1968 or 1970, but I do apologize for not having a clear recollection of all this — the Italian Parliament adopted a special act providing for what is called « *Cassa integrazione guadagni* », a special fund intended to compensate for the loss of earnings — sometimes close to the total amount of the salaries — by those workers who were put into that special régime by their employers, because they were felt to be redundant.

But at the time of the ELSI case, this system was not yet working, so that the Sicilian Region — for obvious reasons I dare say — felt obliged to step in and to enact a special law, copies of which are annexed to our Counter-Memorial, providing the payment of the full salaries. This is what actually happened and these salaries were paid until 15 September, or October as I have now been told, 1968. I apologize for not having these figures precisely before me. I was referring to the Government's proposal — and as a matter of fact one has to go back in time, because the Sicilian law had not yet been passed by the Sicilian Regional Parliament — to the time at which it had just been announced that the Region would among other things provide for the payment of the salaries. But I think perhaps the most important point is that *de facto* the requisition, of course put an end to the employment contract by the company with the dismissal letter, although they should have notified this dismissal in good time, according to the current trade union agreement. They have not done this. But from the point of view of the Company the termination of the employment contracts was effective at this point together with the requisition, but this is just a *de facto* coincidence. On the one hand this prevented that the plant as such could immediately be sold off and on the other hand, it permitted the Mayor of Palermo to call the workers back and to urge the Regional Government to present a bill in order to have the workers paid. This is, as far as I can remember now, the procedure followed on that occasion and, as I said before, it then went on the basis of a special Regional Act until the fall of 1968.

The PRESIDENT: Thank you very much. Do any of the judges want to put a question? Thank you very much, Professor. We will continue tomorrow at 10 o'clock.

The Court rose at 1 p.m.

C 3/CR 89/7
Wednesday 22 February 1989, at 10 a. m.

Mr. CAPOTORTI, Mr. MONACO, Mr. FERRARI BRAVO

The PRESIDENT: Please be seated. I understand that Professor Ferrari Bravo wants to make a short statement.

M. FERRARI BRAVO: Merci Monsieur le Président. Nous voulons seulement compléter la réponse donnée hier à la question posée par M. Schwebel, réponse donnée par M. Bonell. Nous avons transmis au Greffe et, je crois comprendre, aussi à la Partie américaine, deux pages qui ne sont rien d'autre que la récapitulation de cette réponse avec la mention de documents pertinents: ces documents étant tous déjà produits, il n'y a aucun document nouveau (voir annexe). C'est tout ce que je voulais dire. Merci.

The PRESIDENT: Merci Monsieur Ferrari Bravo. Nous avons reçu il y a quelques minutes la réponse qui a été préparée par la délégation de l'Italie; le Greffe transmettra ce que vous appelez un « supplement » à la délégation américaine. Je crois que c'est à M. Capotorti de prendre la parole. Je donne la parole à M. Capotorti.

Mr. CAPOTORTI: Monsieur le Président, Messieurs les juges. Qu'il me soit permis de commencer par des mots tout à fait semblables à ceux que mes collègues ont employés avant moi. En effet, je désire à mon tour souligner quel prix j'attache au fait d'intervenir dans ces débats. C'est la première fois que je plaide devant votre Cour et j'en suis extrêmement honoré.

Les collègues qui ont eu, avant moi, l'honneur d'exposer à cette Cour les raisons de l'Italie dans l'affaire relative à la société Elettronica Sicula (ELSI), ont traité essentiellement deux points. Tout d'abord, M. Gaja a donné les raisons pour lesquelles le recours doit être considéré irrecevable ensuite, MM. Libonati, Caramazza et Bonell, ont analysé la manière dont les faits se sont réellement déroulés, surtout dans la période cruciale des années 1967, 1968, 1969. Ma tâche consiste maintenant à aborder le troisième point de la défense italienne, à savoir la discussion du fondement juridique des prétentions que les Etats–Unis font valoir contre l'Italie.

Il s'agit, comme la Cour le sait, de prétentions fondées sur sept dispositions des accords d'établissement en vigueur entre les deux pays, à savoir le Traité d'amitié, de commerce et de navigation du 2 février 1948 et l'Accord supplémentaire du 26 septembre 1951. Il s'agit, plus précisément, quant au premier Traité, des articles III, paragraphes 1 et 2, V, paragraphes 2 et 3 et VII, paragraphe 1, ainsi que du paragraphe 1 du protocole. Pour ce qui est de l'Accord supplémentaire, il s'agit uniquement des règles contenues dans son article premier.

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Toutefois, avant d'interpréter ces dispositions conventionnelles, il convient de résoudre une question de méthode: celle des critères d'interprétation à adopter. Dans la présente affaire, la Partie adverse a déclaré qu'elle partage notre conviction quant à l'applicabilité des critères établis par la Convention de Vienne sur le droit des traités du 23 mai 1969, en sa troisième partie, troisième section. En effet, en dépit du principe de non–rétroactivité établi à l'article 4 de la Convention, la jurisprudence internationale, sur la base d'une norme coutumière internationale généralement reconnue, a amplement admis que les règles d'interprétation accueillies par ladite Convention correspondent aux principes de droit international en vigueur.

Il y a lieu de citer textuellement, une nouvelle fois, la règle générale d'interprétation établie par l'article 31 de la Convention de Vienne. Elle dispose, au paragraphe 1, que: « Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but ». Il est en outre important de rappeler, dans cette affaire, la disposition de l'article 33, paragraphe 1:

> « Lorsqu'un traité a été authentifié en deux ou plusieurs langues, son texte fait foi dans chacune de ces langues, à moins que le traité ne dispose, ou que les parties ne conviennent, qu'en cas de divergence un texte déterminé l'emportera ».

Le paragraphe 3 de ce même article précise que « Les termes d'un traité sont présumés avoir le même sens dans les divers textes authentiques », mais le paragraphe 4 ajoute que:

> « Sauf le cas où un texte déterminé l'emporte conformément au paragraphe 1, lorsque la comparaison des textes authentiques fait apparaître une différence de sens que l'application des articles 31 et 32 ne permet pas d'éliminer, on adoptera le sens qui, compte tenu de l'objet et du but du traité, concilie le mieux ces textes ».

L'article 31, paragraphe 1, précité confirme donc le principe bien connu d'après lequel un traité doit être interprété de bonne foi, et attribue une valeur déterminante à deux aspects de chaque traité: en premier lieu, le sens ordinaire des termes dans leur contexte, en deuxième lieu, l'objet et le but du traité. Ceci équivaut à dire que la méthode *textuelle* et la méthode *fonctionnelle* sont préférées à toute autre méthode lorsqu'il s'agit d'interpréter un traité. D'autres méthodes possibles — telles que celle axée sur la recherche de l'intention des parties, qui ressort notamment des travaux préparatoires, et celle qui attache une grande valeur à l'évaluation des circonstances dans lesquelles chaque traité a été conclu — sont destinées à jouer un rôle secondaire. A cet égard, il y a lieu de rappeler que le délégué des Etats-Unis, au cours de la conférence de Vienne sur le droit des traités, et précisément à la séance plénière du 19 avril 1968, avait fortement critiqué le caractère secondaire attribué par le projet de convention aux deux moyens mentionnés par l'article 32 du texte actuel. En effet, cet article qualifie les travaux préparatoires, ainsi que les circonstances dans lesquelles un traité a été stipulé, de « moyens complémentaires d'interprétation ». Toutefois, la majorité des délégations a partagé et soutenu l'orientation choisie par la Commission du droit international, lors de la rédaction de son projet de base, à savoir que la volonté des Etats contractants doit être reconstituée *à partir du texte d'un traité* et que toute recherche sur le processus d'élaboration du traité même, ou sur la situation historique qui a entraîné sa stipulation, a une valeur complémentaire et peut même devenir superflue.

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C'est sur la base de ces considérations que nous avons déclaré, dans les défenses écrites italiennes, que nous ne pouvions pas partager la thèse énoncée par nos adversaires quant à la prétendue « intention fondamentale » des parties contractantes du Traité de 1948; cette intention aurait été de stimuler la création d'un cadre favorable aux investissements. Mercredi dernier, M. Gardner a repris cette thèse; il a parlé de la présence de nombreuses règles spécifiques et interdépendantes visant la protection des investissements étrangers dans le Traité de 1948, règles qui reflèteraient l'intention fondamentale des Parties d'établir un cadre susceptible d'encourager un climat favorable aux investissements.

Nous avons néanmoins deux objections à opposer à ce propos. La première est que l'interprète doit se fonder sur les termes du traité, sans y superposer une prétendue « intention des parties ». La deuxième est que lorsque l'on considère l'objet et le but du Traité de 1948, tels qu'ils résultent de son contexte, il est impossible d'ignorer la *multiplicité* et la *variété* des objectifs poursuivis. La protection des investissements peut être considérée tout au plus comme l'un de ces objectifs, et *non pas comme le principal.*

En réalité, le préambule du Traité affirme que l'Italie et les Etats-Unis désiraient promouvoir des relations plus étroites entre leurs territoires respectifs, au moyen de dispositions correspondant aux aspirations spirituelles, culturelles, économiques et commerciales de leurs peuples.

Aucune mention n'est faite de la sauvegarde des investissements; c'est ce qui distingue ce préambule de ceux des traités analogues conclus entre 1951 et 1962 entre les Etats–Unis d'une part et certains pays de l'Europe occidentale de l'autre (nous faisons allusion à la Grèce, au Danemark, à l'Allemagne, aux Pays–Bas, à la Belgique et au Luxembourg). Là vous trouvez partout cette mention de la protection des investissements dans le préambule. Le fait est que, dans le texte du Traité de 1948 entre les Etats–Unis et l'Italie, les problèmes relatifs à l'établissement sont abordés selon une approche traditionnelle. Il s'ensuit qu'aux ressortissants des deux parties et aux sociétés ayant la nationalité de l'une de ces parties est garantie une série d'avantages relatifs à la possibilité de s'établir sur le territoire de l'autre partie pour y exercer des activités de nature commerciale, industrielle, professionnelle, culturelle, scientifique, religieuse ou philanthropique. Ceci signifie que l'objet et le but du Traité de 1948, de même que le contenu de son libellé, sont bien plus vastes que ceux d'un traité visant uniquement la protection des investissements et sont sans doute beaucoup plus vastes aussi que l'objet et le but de l'Accord complémentaire de 1951 entre ces mêmes parties.

Le demandeur a toujours invoqué d'une manière globale certains articles du Traité de 1948 et le premier article de l'Accord complémentaire de 1951, *comme si toutes ces dispositions faisaient partie d'un seul texte*. On ne saurait toutefois négliger la différence de portée qui existe entre ces deux documents et surtout on ne doit pas oublier que les parties contractantes ont jugé nécessaire de stipuler un deuxième accord trois ans après le premier, parce que les investissements n'étaient pas suffisamment protégés par le premier traité. On a donc bien là la preuve que l'objectif principal du Traité de 1948 n'était pas la protection des investissements. D'ailleurs, le préambule de l'Accord supplémentaire déclare explicitement que les principes énoncés en 1948 devaient être *élargis*. Le demandeur a manifesté à plusieurs reprises une tendance à interpréter les dispositions contenues dans le Traité de 1948 à la lumière des critères pouvant être déduits de l'Accord de 1951, lequel est indiqué comme le supplément du premier. Nous estimons que cette méthode est erronée parce qu'elle porte à interpréter les dispositions du Traité par rapport au but d'un accord successif, alors que celui–ci a entendu ajouter de nouvelles règles et non pas modifier les dispositions de l'accord précédent dans leur ensemble. On peut dire aussi que ladite méthode unifie artificiellement deux accords distincts et qu'elle conduit le demandeur à déformer les résultats qu'on obtient en interprétant le contexte du Traité de 1948 dans son unité et dans sa globalité.

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Cette dernière observation prend toute sa valeur si l'on tient compte d'une négligence extrêmement significative qui ressort des défenses écrites du demandeur. Nous savons que le présent recours a pour objet le traitement qu'ont reçu en Italie deux sociétés américaines qui étaient devenues actionnaires d'une société italienne et avaient fini par prendre le contrôle de cette dernière. Il est donc indispensable d'attribuer sa juste valeur à la disposition du Traité de 1948 dans laquelle sont indiqués les critères d'appartenance des sociétés et des associations à chaque partie contractante. Il s'agit plus précisément de l'article II, paragraphe 2, qui, vous le savez, établit que les sociétés et les associations constituées ou organisées aux termes des lois et des règlements en vigueur dans les territoires de chaque haute partie contractante seront considérées comme étant des sociétés ou des associations *de ladite haute partie contractante*. Cependant, alors que le demandeur prend acte que l'investissement dont il est question a été effectué par les sociétés américaines Raytheon et Machlett par l'achat d'actions de la société ELSI, il laisse dans l'ombre le fait que cette société appartient à l'Italie. Le demandeur a en fait préféré raisonner le plus souvent comme si l'ELSI était une société américaine, comme si la présence d'intérêts américains dominants dans la gestion de cette société entraînait son appartenance juridique aux Etats–Unis. En réalité, il aurait dû reconnaître que l'ELSI, aux termes du Traité, était une société italienne, malgré que tous ses actionnaires aient été des ressortissants américains.

Il n'y a pas de doute qu'en vertu des dispositions du Traité, notamment de l'article II, paragraphe 2, la nationalité d'une société ou d'une association constituée aux termes des lois en vigueur dans le territoire d'une partie contractante peut être différente de celle des associés.

Et c'est bien à ce propos que nous avons cité le précédent représenté par l'arrêt rendu en 1982 par la Cour suprême des Etats-Unis dans l'affaire *Sumitomo c. Avigliano*. Dans cette affaire, on mettait en question la nationalité de la société Sumitomo, constituée selon la loi de l'Etat de New York, mais contrôlée par des actionnaires japonais. La Cour suprême s'est rapportée à l'article XXII, paragraphe 3 du Traité d'amitié, de commerce et de navigation entre les Etats-Unis et le Japon, et en a déduit que Sumitomo, constituée selon la loi de l'Etat de New York, était une société américaine et non japonaise. C'est tout à fait le point qui nous intéresse.

Dans l'affaire qui est actuellement soumise à cette Cour, il n'y a pas de doute que l'ELSI — constituée en Italie conformément aux lois italiennes quelques années avant que les sociétés Raytheon et Machlett ne décident d'y participer — avait la nationalité italienne à l'époque des événements dont il s'agit. Il faut bien mettre au clair ce point, afin de préciser la *véritable question soulevée par la présente affaire*. Elle se pose précisément en ces termes: vu que les sociétés Raytheon et Machlett ont fini par devenir les seuls actionnaires de l'ELSI, dans quelles limites et contre quels comportements de l'Etat italien avaient-elles titre à être protégées par les Etats-Unis en vertu des accords de 1948 et de 1951?

Il est notoire que, quand les actionnaires étrangers d'une société, et non pas la société elle-même, sont expressément protégés à l'échelon international, il s'agit de cas entraînant l'exigence de « lever le voile social » (*lifting the corporate veil*). Cependant, cette manière de procéder est tout à fait exceptionnelle: elle doit être justifiée par des circonstances spéciales, comme cette Cour l'a précisé dans sa décision sur la fameuse affaire de la *Barcelona Traction* (*CIJ*, *Recueil* 1970, *arrêt*, p. 39, par. 58). Malgré les objections exprimées par M. Gardner à cet égard, il convient de mettre en évidence que cet arrêt a eu le mérite de faire ressortir clairement la distinction entre les droits d'une société commerciale et ceux de ses actionnaires. Rappelons que la Cour a souligné l'importance de cette distinction même sur le plan du droit international, en reconnaissant que ce droit se réfère aux règles pertinentes de droit interne «chaque fois que se posent des questions juridiques relatives aux droits des Etats qui concernent le traitement des sociétés et des actionnaires» (*CIJ*, *Recueil* 1970, *arrêt*, p. 34, par. 38). La Cour a ajouté: « même si la société n'est autre chose qu'un moyen pour les actionnaires de poursuivre leurs propres fins économiques, elle n'en possède pas moins, tant qu'elle subsiste, une existence indépendante» (*CIJ*, *Recueil* 1970, *arrêt*, p. 36, par. 45).

Deux conséquences découlent de ces enseignements de la Cour, et il faut en tenir rigoureusement compte dans la présente affaire. D'une part, la possibilité que les actionnaires soient protégés indépendamment de la société à laquelle ils appartiennent suppose que les dispositions d'un traité sur lequel ils fondent leurs réclamations le permettent d'une manière explicite et claire. D'autre part, les comportements de l'Etat local, contre lesquels les actionnaires demandent une protection, doivent posséder la caractéristique d'avoir été « dirigés contre les droits propres des actionnaires en tant que tels » (*Barcelona Traction*, *CIJ*, *Recueil* 1970, *arrêt*, p. 36, art. 47). Ce n'est qu'à ces deux conditions que les actionnaires de l'ELSI — c'est-à-dire les sociétés Raytheon et Machlett — auraient pu bénéficier de la protection de leur Etat national contre l'Italie en invoquant les traités d'établissement en vigueur entre ces deux pays. Par contre, là où les Traités de 1948 et de 1951 n'attribuent pas d'une façon expresse et sans ambiguité des droits subjectifs aux actionnaires américains d'une société italienne — ou bien aux sociétés filiales, de nationalité italienne — le bénéfice de la protection des Etats-Unis vis-à-vis de l'Italie ne saurait pas être accordé.

Cela limite évidemment — ou conduit à n'admettre que dans des limites assez restreintes — la possibilité pour un actionnaire de tirer des droits subjectifs du Traité de 1948 ou de l'Accord supplémentaire de 1951. D'après M. Gardner, cette interprétation serait absurde (C 3/CR 89/3, p. 328). Tout au contraire, elle est la seule interprétation acceptable. La plupart des dispositions du Traité et de l'Accord supplémentaire ne font pas de distinction entre le cas d'une participation majoritaire et celui de la participation d'une minorité. Si une protection spéciale devait être donnée à une société italienne en raison de la présence, parmi ses actionnaires, de ressortissants des Etats-Unis, n'importe quelle société italienne deviendrait l'objet de ladite protection et cela parfois sans que les autorités italiennes le sachent. Il suffit de considérer à cet égard la

rapidité de la circulation des actions. On peut dire que la plupart des sociétés italiennes jouirait d'une telle protection sur la base des accords avec les Etats–Unis. Voilà ce qui est absurde.

La solution proposée par le demandeur est d'autant plus inacceptable qu'il n'y a pas de règles de droit italien qui imposent aux investisseurs étrangers la constitution de sociétés affiliées locales. Elles sont établies en raison de l'intérêt économique et fiscal des investisseurs et par leur libre choix.

M. Gardner nous a dit que « *Foreign investment in locally iucorporated subsidiaries was protected in 1948 and it is protected today* » (C 3/CR 89/3, p. 328). En principe, on ne saurait contester cette affirmation. Mais on ne pourrait pas en tirer une règle générale visant la protection des sociétés italiennes en Italie par le truchement de la protection prétendument accordée, même à cet égard, aux ressortissants des Etats–Unis qui en seraient les actionnaires.

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Il nous semble opportun à présent d'analyser une par une les prétentions avancées par le demandeur contre l'Etat italien, qui est accusé de ne pas s'être acquitté de certaines obligations établies par le Traité de 1948 et par l'Accord complémentaire de 1951. Même si ces prétentions ont parfois pour objet la prétendue violation simultanée de plusieurs dispositions, nous estimons que notre analyse doit être effectuée au regard de chaque disposition; et ceci surtout parce que la manière dont chaque article a été conçu et rédigé a une importance décisive lorsqu'il s'agit de l'interpréter en vue d'évaluer s'il donne lieu éventuellement à des droits subjectifs des actionnaires. Il est superflu de répéter de quoi il est question ici. C'est en fait du droit des actionnaires, ainsi que des sociétés locales affiliées, d'être protégés par les accords précités. Et à M. Gardner, qui nous a reproché d'avoir constamment méconnu le droit des sociétés affiliées italiennes d'être protégées par le Traité (C 3/CR 89/3, p. 316), nous répondons que notre manière de penser consiste plutôt à analyser la situation article par article; la protection des sociétés affiliées italiennes est prévue par certains articles mais non par d'autres.

Le demandeur reproche tout d'abord au défendeur d'avoir enfreint l'article III, paragraphes 1 et 2, du Traité de 1948, par une ingérence dans la direction et le contrôle de l'ELSI. Ceci se serait produit à cause de:

a) l'ordonnance de réquisition;

b) le retard mis par le préfet de Palerme à se prononcer sur le recours formé contre la réquisition;

c) l'occupation de la fabrique de l'ELSI de la part des travailleurs;

d) l'orientation donnée à la procédure de faillite, qui aurait avantagé l'Etat italien, ou plutôt l'ELTEL.

Les points importants de l'article précité figurent à la phrase finale du paragraphe 1 et au paragraphe 2 tout entier. Je ne veux pas vous ennuyer en citant ce texte assez long et compliqué, mais la Cour le connaît; bien entendu, elle a sous les yeux les articles des deux traités.

En substance, par l'effet de l'article III, les sociétés italiennes dont font partie des sociétés américaines (ou qui sont contrôlées par elles) ont la *faculté* de remplir les fonctions en vue desquelles elles ont été constituées ou organisées conformément à la loi italienne, en jouissant du traitement de la nation la plus favorisée, ainsi que la *faculté* d'exercer en Italie leurs activités commerciales, industrielles, philanthropiques, religieuses, etc., en jouissant du traitement national. Quant aux sociétés américaines, elles ont la *faculté* d'organiser, de contrôler et de diriger des sociétés italiennes en Italie, conformément à la loi italienne.

Selon le libellé des deux dispositions, la violation de l'article III du Traité de 1948 supposerait que l'Etat italien ait empêché la société ELSI d'exercer ses fonctions conformément aux lois italiennes, c'est–à–dire d'exercer ses activités commerciales et industrielles en se conformant à ces lois et, ce faisant, qu'il n'ait pas respecté les standards de traitement prévus. La violation de l'article III supposerait, d'autre part, que l'Italie ait imposé des restrictions aux activités normalement liées à l'organisation, à l'institution, au contrôle et à la direction des sociétés aux-

quelles participent des actionnaires américains. Mais l'Etat italien n'a commis aucune violation de ce genre et, ce dont la partie adverse l'accuse (à tort, en tout cas), c'est de s'être ingéré dans la direction et dans le contrôle de la société ELSI à un moment postérieur à l'époque où cette société avait été organisée (et en effet notre adversaire ne reproche pas à l'Italie d'avoir entravé l'organisation de l'ELSI).

Une telle accusation suppose que la faculté de diriger et de contrôler une société soit détachée de la faculté de l'organiser et soit entendue comme l'équivalent d'une garantie que la société puisse continuer de gérer ses affaires sans être aucunement perturbée.

Nous sommes tout à fait contraires à cette interprétation. A notre avis, l'article III n'accorde pas une liberté totale de diriger ou de contrôler des sociétés telles que l'ELSI dans leur vie quotidienne; il ne prévoit pas une garantie absolue contre toute ingérence des autorités. M. Gardner a vu dans l'article III la source d'une obligation de l'Italie de protéger les sociétés des Etats-Unis de toute interférence dans leur direction et dans leur contrôle. Nous repoussons ce point de vue, qui ne correspond pas au texte de l'article III. L'ELSI a certainement joui de la faculté d'exercer les fonctions en vue desquelles elle avait été constituée, ainsi que de celle d'exercer ses activités sur le territoire italien. A leur tour, les actionnaires américains de l'ELSI ont certainement joui de la faculté de l'organiser, de la contrôler et de la diriger. L'exercice de cette faculté n'a pas été empêché par la réquisition *temporaire de l'usine*. Bref, le libellé de l'article III n'étaye pas la première contestation élevée par le demandeur.

Pour s'en convaincre, il suffit de comparer cet article avec l'article I de l'Accord supplémentaire de 1951; seule cette dernière disposition interdit d'une façon expresse d'empêcher le contrôle effectif et l'administration des entreprises que les ressortissants de chaque partie contractante ont eu l'autorisation d'acquérir, lorsque cet empêchement est le résultat de mesures arbitraires ou discriminatoires. Cet aspect sera traité plus loin; pour l'instant, nous nous bornons à signaler la tentative de la part du demandeur de confondre l'article III du Traité avec l'article I de l'Accord supplémentaire, en dépit de la différence textuelle entre ces règles, et de la circonstance qu'elles figurent dans le cadre de deux contextes différents.

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Il y a d'autres aspects de l'article III sur lesquels nous souhaitons attirer l'attention de cette Cour. Nous avons dit plus haut que le paragraphe 2 impose le traitement national en faveur des sociétés italiennes contrôlées par des sociétés américaines, et que le traitement national est l'un des deux principes sur lesquels se fonde le Traité de 1948, comme il ressort de son préambule (l'autre principe étant celui du traitement du pays le plus favorisé). Un traitement équivalent à celui qui est accordé aux ressortissants comprend évidemment le respect des obligations imposées à ces derniers. D'autre part, tant le paragraphe 1 que le paragraphe 2, là où ils assurent aux sociétés contrôlées par des ressortissants ou des sociétés de l'autre partie contractante la faculté d'exercer leurs fonctions et leurs activités sur le territoire où elles ont été constituées, ajoutent la condition « conformément aux lois et règlements en vigueur » (en vigueur, bien entendu, dans ce territoire). Il nous semble que cette formule confirme et renforce le principe de l'assujettissement des sociétés précitées à la loi locale, dont découlent non seulement des droits, mais aussi des devoirs.

Nous souhaitons nous attarder brièvement sur ce point. La circonstance principale sur laquelle le demandeur fonde ses contestations consiste dans l'ordonnance de réquisition prise par le maire de Palerme le 1er avril 1968. Cette ordonnance, de laquelle M. Caramazza a parlé hier, a été prise en effet aux termes de la loi N. 2248 du 20 mars 1865, annexe E, article 7. Le maire qui a décrété la réquisition était dûment habilité à prendre une telle mesure puisque cette loi autorise les autorités administratives à disposer de la propriété privée en cas de grave nécessité publique et d'urgence. La motivation de l'ordonnance de réquisition a exposé les raisons pour lesquelles cette mesure avait été prise, à savoir: la réaction de l'opinion publique à la décision de l'ELSI de mettre fin à ses activités et de licencier presque un millier de salariés; les grèves décidées par les syndicats; le préjudice pour l'économie sicilienne; l'intérêt montré par la presse; le risque de troubler l'ordre public. En conclusion, et vu que les facultés reconnues

à l'ELSI par l'article III, paragraphes 1 et 2, étaient soumises à la condition de la conformité aux lois et règlements en vigueur en Italie, ceci aurait suffi à exclure que la société puisse être exonérée de l'application de mesures impératives — telles que la réquisition — autorisées en règle générale par la loi locale.

La Partie adverse commence par déformer la portée de l'ordonnance de réquisition, en affirmant qu'elle avait une finalité bien différente de son but déclaré; la finalité de faire obstacle à la liquidation volontaire de l'ELSI. Quant à l'effet de la réquisition dans le temps, la Partie adverse se fonde sur la déclaration de M. Carollo, le Président de la Région sicilienne, pour accréditer la thèse qu'il s'agissait d'une réquisition sans limite de temps. Elle oublie de considérer que l'ordonnance avait fixé une limite de six mois, susceptible d'être prolongée au besoin et qu'*il n'y a eu en réalité aucune prolongation.* En outre, la Partie adverse objecte que la réquisition a été ensuite déclarée illégale et annulée par le préfet de Palerme et que cette décision serait de nature à exclure la conformité de cette mesure à la loi italienne.

Il y a lieu de faire trois observations à ce sujet. En premier lieu, le préfet de Palerme lui-même, dans la décision précitée sur le recours de l'ELSI, a déclaré que la compétence du maire de disposer de la propriété privée en vertu de la loi N. 2248 du 20 mars 1865 (annexe E, art. 7), ne pouvait pas être mise en doute. En deuxième lieu, il est évident que, jusqu'au moment où est survenue la décision d'annulation du préfet, l'ordonnance de réquisition devait être considérée conforme à la loi. Enfin, l'article III du Traité se borne à garantir aux sociétés en question deux facultés d'agir, à condition qu'elles respectent les obligations imposées par la loi italienne (dont l'obligation générale de se soumettre à d'éventuelles ordonnances de réquisition). Cet article confirme ainsi que lesdites sociétés sont assujetties à la loi en vigueur dans le territoire italien; il ne traite pas le problème de la validité ou non des actes pris par les autorités administratives locales.

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En quoi consiste alors la prétendue violation, de la part de l'Etat italien, de l'article III, paragraphes 1 et 2, du Traité de 1948? Nous pensons avoir démontré que ces dispositions n'entraînent nullement l'obligation pour les autorités italiennes de s'abstenir de toute ingérence dans le contrôle et la gestion de l'ELSI: *leur contenu est différent.* Permettez-moi de rappeler à ce propos que les dispositions dont on peut déduire une protection indirecte des actionnaires, vu leur nature exceptionnelle, doivent être *interprétées au sens strict.* D'autre part, vu que la réquisition a eu pour effet de rendre l'usine et les équipements de l'ELSI indisponibles pendant six mois, il semble évident qu'elle *n'a pas mis fin aux facultés garanties* par l'article III du Traité.

Quant au problème de la mise en faillite, permettez-moi d'insister sur un point qui est d'une grande importance. Le demandeur a présenté de nombreux effets de la mise en faillite comme étant des effets de la réquisition; il a ainsi décrit certains événements qui se sont produits par suite de la procédure de faillite (engagée à sa demande et rendue inévitable par la crise financière de l'ELSI), comme étant imputables à l'Etat italien. La méthode suivie par la Partie adverse ressort de sa description de la manière dont l'Italie a prétendument enfreint l'article III du Traité de 1948: cette violation aurait consisté, nous l'avons dit maintes fois, dans l'ingérence de l'Etat italien dans la direction et le contrôle de l'ELSI. En réalité, c'est la faillite en soi qui a privé l'ELSI définitivement de la direction et du contrôle de ses installations en les transférant au syndic.

Pour conclure le chapitre relatif à l'article III, nous réfutons la thèse du demandeur selon laquelle cette disposition comporterait un standard minimum de protection des investissements, selon le droit international général. Nous sommes convaincus que le droit international général n'assure aucune protection supplémentaire aux investisseurs par rapport à celle qui est accordée par le droit conventionnal national; de fait, l'article III précité ne prévoit aucune protection supplémentaire de ce genre. A notre avis, la réglementation prévue par les accords d'établissement est entièrement indépendante de la réglementation coutumière sur le traitement des investisseurs étrangers.

Une deuxième contestation que notre adversaire a formulée contre l'Italie se fonde sur l'article V, paragraphe 2, du Traité de 1948; ce paragraphe est complété par la disposition du point 1 du protocole.

La Cour en connaît le texte; qu'il me soit donc permis de ne pas le citer. Néanmoins, il y a lieu de faire observer qu'à l'expression du texte italien du protocole *si estenderanno ai diritti che* (seront étendues aux droit que) correspond, dans le texte anglais du protocole, la phrase:

> « *shall extend to interests held directly or indirectly by nationals, corporations and associations of either Contracting Party in property which is taken within the territories of the other High Contracting Party* ».

En se basant sur l'ensemble de ces dispositions, la Partie adverse soutient que les autorités italiennes ont exproprié les biens de l'ELSI sans payer une indemnité, en violant l'article V, paragraphe 2, du Traité, et le point 1 du protocole qui le complète.

A notre avis, le problème principal dont on doit discuter à ce propos est le suivant: est-il possible ou impossible d'inclure dans la notion d'expropriation la réquisition des biens de l'ELSI telle qu'elle a été décrétée par le maire de Palerme? Cette question est liée à celle de l'interprétation de l'article V, paragraphe 2, du Traité, et due point 1 du protocole, vu notamment que le texte italien ne correspond pas ici au texte anglais. Il conviendra aussi d'analyser par la suite la question de l'indemnité versée par l'Italie pour la réquisition subie par la société ELSI.

A titre préliminaire, et compte tenu de l'opinion exprimée mercredi dernier par M. Gardner, il nous paraît très important de souligner un point: la défense italienne est fermement convaincue qu'elle a *le droit de se fonder sur le texte italien* des dispositions précitées.

N'oublions pas qu'à l'article XXVII du Traité d'amitié, de commerce et de navigation entre l'Italie et le Etats-Unis, il a été précisé que le traité a été fait en double exemplaire, dans les langues italienne et anglaise, les deux étant également authentiques. La même formule apparaît sous l'article IX du Traité supplémentaire de 1951. D'autre part, au début de cette plaidoirie, nous avons cité l'article 33 de la Convention de Vienne en matière d'interprétation des traités authentifiées dans deux langues. On se souviendra que le principe devant être appliqué est que le traité « fait foi dans chacune de ces langues » (art. 33, par. 1). Toutefois:

> « lorsque la comparaison des textes authentiques fait apparaître une différence de sens que l'application des articles 31 et 32 ne permet pas d'éliminer, on adoptera le sens qui, compte tenu de l'objet et du but du traité, concilie le mieux ces textes ».

M. Gardner nous a expliqué, mercredi dernier, que certaines dispositions du Traité de 1948 avaient été rédigées et négociées en anglais et traduites en italien par la suite (C 3/CR 89/3, p. 317). Il a estimé donc que ces circonstances autorisent l'interprète à considérer le texte anglais comme prédominant et décisif en cas de doute. Cette thèse n'est pas seulement surprenante, elle est étonnante, venant d'un juriste de l'envergure de M. Gardner. Je viens de citer l'article 33 de la Convention de Vienne. Mais j'ajoute que, dès l'époque de l'affaire des *Concessions Mavrommatis en Palestine* — c'est-à-dire, dès le 30 août 1924 — la Cour permanente de Justice internationale avait mis au clair qu'en présence de deux textes d'égale autorité, mais l'un semblant avoir une portée plus étendue que l'autre, la Cour même a le devoir d'adopter l'interprétation plus restrictive, qui peut se concilier avec l'un et l'autre des textes en question; en effet, dans cette mesure, l'interprétation la plus restreinte correspond sans aucun doute à l'intention commune des parties.

Cherchons maintenant à résoudre le problème principal du cas d'espèce. Il nous semble évident que l'ordonnance du maire de Palerme, si elle est interprétée de bonne foi, s'avère être une mesure ayant un effet différent des effets de l'expropriation. Cette ordonnance décrétait « la réquisition avec effet immédiat et pour une durée de six mois, prolongeable au besoin » de l'usine et des équipements de l'ELSI. Or l'effet d'une réquisition temporaire consiste dans l'attribution à l'autorité de l'usage des biens réquisitionnés, pour une période déterminée, et non pas dans le transfert à cette même autorité de la propriété de ces biens.

D'autre part, nous avons déjà eu l'occasion de faire observer que la disposition sur laquelle se fonde l'ordonnance de réquisition est l'article 7 de la loi N. 2248 du 20 mars 1865 dont l annex

autorise les autorités administratives à disposer sans délai de la propriété privée en cas de grave nécessité publique; par contre, la loi qui autorise l'expropriation à des fins d'utilité publique est, en Italie, la loi N. 2359 du 25 juin 1865: c'est donc une autre loi. Le libellé de l'ordonnance du maire de Palerme précitée ne peut être interprété qu'à la lumière du système des sources du droit italien. Or, le principe selon lequel le respect ou la violation des règles de droit international ne saurait pas être influencé par l'état du droit interne de l'Etat obligé — un principe que M. Gardner a eu l'amabilité de nous rappeler (C 3/CR 89/3, p. 322) — n'a rien à faire avec cette question d'interprétation du texte d'un acte interne de l'Etat italien. La conclusion est donc univoque: dans l'affaire en cause, il n'y a pas eu une expropriation des biens de la société ELSI.

J'ajoute que, même si notre raisonnement se fondait sur la notion de « *taking of property* » qui figure dans le texte anglais à la place du terme « *espropriazione* », une réquisition temporaire ne saurait être identifiée purement et simplement avec le « *taking of property* »; il faut tout au moins *qualifier cette notion.* D'après Rosalyn Higgins, qui s'est occupée spécifiquement de ce sujet dans un cours qui s'était tenu en 1982 à l'Académie de droit international de La Haye, les formes de contrôle temporaire exercées par les autorités sur la propriété privée relèvent de la notion de « *indirect taking* » (dépossession indirecte), alors qu'un véritable « *taking* » implique un degré d'ingérence dans la propriété qui exclut fondamentalement son retour au propriétaire.

M. Caramazza nous a rappelé hier que la pratique américaine connaît bien le phénomène de la prise de contrôle d'établissements industriels. Il ne nous intéresse pas de comparer les précédents de cette pratique avec l'affaire en cause; il nous suffit de souligner que l'hypothèse de la prise de contrôle d'établissements industriels pour des causes de nécessité publique n'est pas du tout inconnue aux Etats–Unis.

De toute manière, la Cour me permettra de faire observer que les références au thème du « *taking of property* » ne signifient pas que la défense italienne ait accepté, ou jugé normal, de se baser sur le texte anglais du Traité de 1948. Il est hors de doute pour nous qu'il faut tenir compte du texte anglais comme du texte italien. Face à une possibilité de divergence entre les deux textes, la seule solution que nous pouvons suggérer est celle qui est indiquée à l'article 33, paragraphe 4 précité, de la Convention de Vienne, à savoir, l'adoption d'un sens susceptible de concilier les deux textes. Or, il nous semble qu'une comparaison entre le terme « *espropriazione* » et l'expression « *taking of property* », qui figurent respectivement dans les deux versions de l'article V, paragraphe 2, du Traité, doit aboutir à la conclusion que le noyau commun aux deux terminologies est le concept de privation définitive des biens. Point n'est besoin d'ajouter qu'une solution de ce genre confirmerait la non–applicabilité de la disposition précitée à la réquisition temporaire dont il est ici question.

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Nous avons jusqu'ici laissé de côté la question décisive de l'existence ou non de droits *des actionnaires* en cas d'expropriation des biens de l'ELSI. La protection assurée par l'article V, paragraphe 2, du Traité se borne en soi à couvrir les biens des sociétés de chaque partie contractante sur le territoire de l'autre. En principe, les biens de l'ELSI, compte tenu de la nationalité italienne de cette société, ne jouissent pas de la protection du Traité à l'égard de mesures décidées par les autorités italiennes. C'est pourquoi l'allégation selon laquelle la disposition précitée aurait eu pour effet de protéger les droits des actionnaires américains ne peut être étayéque par le point 1 du protocole annexé au Traité. Nous avons déjà vu que ce point étend l'applie cation des dispositions du paragraphe 2 de l'article V, qui prévoient le paiement d'une indeminité:

> « aux droits que des ressortissants ou des sociétés et associations de l'une des Hautes Parties contractantes possèdent directement ou indirectement sur des biens qui sont expropriés à l'intérieur des territoires de l'autre Haute Partie contractante ».

Dans le texte anglais du protocole, les dispositions de l'article V, paragraphe 2, s'étendent « *to interests held directly or inderectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party* ».

C'est à ce propos que se pose de nouveau le problème du défaut de concordance entre les deux versions du Traité: dans l'une, il est fait mention des droits (« *diritti* »), dans l'autre des « *interests* »; dans l'une, des biens qui sont expropriés, dans l'autre de la « *property which is taken* ». Point n'est besoin de répéter toutes les observations qui ont déjà été amplement développées sur la comparaison entre la notion d'expropriation et celle de « *taking of property* ». Il reste à approfondir le problème de la différence de sens entre les droits et les intérêts.

Le demandeur tend à considérer ces deux termes comme des synonymes; il semble donc disposé à parler de *indirect rights* » (le texte dit « *interests* ») des actionnaires sur les biens de l'ELSI. Mais le fait est surtout que les actionnaires ne sont titulaires de droits qu'à l'égard de la société et n'ont aucun droit sur les biens de la société. Ceci est certain en droit italien, mais également en droit international, dans la mesure où celui-ci accueille les notions fondamentales du droit interne en matière de sociétés. Nous avons déjà dit que la valeur internationale de la distinction entre les droits d'une société et ceux de ses actionnaires est confirmée par l'arrêt de cette Cour dans l'affaire *Barcelona Traction*, (*CIJ*, *Recueil 1970*, p. 34, par. 41). On ne peut donc pas parler de droits indirects des actionnaires sur les biens de la société à laquelle ils appartiennent.

De plus, il faut relever qu'un autre problème se pose sur le plan de l'interprétation. Le point 1 du protocole prévoit l'extension des « dispositions du paragraphe 2 de l'article V qui prévoient le paiement d'une indeminité ». Mais de quelles dispositions s'agit-il exactement? Le demandeur semble être convaincu qu'elles comprennent toutes les règles portant sur des conditions relatives à l'expropriation des biens. Nous avons toutefois de bonnes raisons de refuser une interprétation aussi large. En réalité, l'article V, paragraphe 2, prévoit en premier lieu l'obligation de paiement d'une indeminité pour les biens expropriés, mais il prévoit aussi, en deuxième lieu, en faveur de « ceux qui recevront un telle idemnité », la faculté de retirer cette indemnité sans ingérences, en obtenant des devises étrangères dans la monnaie de l'autre partie contractante. Evidemment, ce sont des dispositions concernant le paiement d'une indeminité, et elles sont étendues en vertu du point 1 du protocole.

Il ressort donc de la lecture intégrale de l'article V, paragraphe 2, ainsi que du protocole, qu'en définitive celui-ci ne peut être interprété comme la source de prétendus droits indirects des actionnaires sur les biens de la société à laquelle ils appartiennent. Le protocole étend en fait le régime privilégié des indemnités à tous les sujets — ressortissants, sociétés et associations de chaque partie contractante — qui possèdent même indirectement *des droits* sur les biens expropriés à l'intérieur du territoire de l'autre partie contractante. Ces sujets peuvent comprendre les titulaires de droits réels partiels, tels que l'usufruit, ou bien les créanciers munis de garanties telles que l'hypothèque. Si l'on voulait inclure dans cette même catégorie les actionnaires des sociétés, il faudrait peut-être prévoir les droits que ces actionnaires sont en mesure d'avancer après la liquidation de la société en question. On ne peut cependant pas estimer qu'en vertu du protocole, les droits attribués par l'article V, paragraphe 2, aux sociétés américaines éventuellement expropriées en Italie puissent être étendus aux actionnaires américains des sociétés italiennes soumises à leur contrôle. En d'autres termes, le point 1 du protocole n'est pas l'une des règles destinées à lever, à titre exceptionnel, le voile social de l'ELSI.

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Ce n'est qu'à titre incident que nous traiterons brièvement du problème des conditions établies par l'article V, paragraphe 2, du Traité pour que les biens des ressortissants et des sociétés et associations d'une partie contractante puissent être expropriés à l'intérieur du territoire de l'autre partie. Nous pensons, en effet, avoir démontré que:

a) il n'y a pas eu d'expropriation, mais une réquisition temporaire;

b) les biens réquisitionnés appartenaient à la société italienne ELSI et ne pouvaient donc pas être « protégés » dans le cadre d'une réclamation des Etats-Unis contre l'Etat italien;

c) les sociétés Raytheon et Machlett n'ont jamais été les titulaires indirectes d'un droit de propriété sur les biens de l'ELSI.

Ceci étant, et en admettant donc, à titre de simple hypothèse, que l'article V, paragraphe 2, puisse être applicable à l'affaire en cause, nous désirons préciser tout d'abord que la condition de la procédure conforme au droit (*due process of law*) a été respectée dans la réquisition des biens de l'ELSI.

En réalité, l'ordonnance de réquisition du maire de Palerme faisait mention des normes juridiques sur lesquelles elle était fondée et justifiait la prise de cette mesure dans une motivation détaillée. Les mesures postérieures à la réquisition — notamment la nomination des personnes auxquelles l'usine a été confiée — étaient également conformes au droit. Cette conformité a été reconnue à l'occasion du recours formé contre l'ordonnance précitée par la société réquisitionnée devant le préfet de Palerme.

Quant à la condition du paiement rapide d'une indemnité réelle et équitable, il y a lieu de relever que, si elle n'a pas été entièrement remplie, c'est en raison des événements qui se sont produits après la réquisition. On sait que l'ordonnance du maire de Palerme avait reconnu que l'ELSI avait droit à une indemnité. Toutefois, avant que ne soit déterminé le montant de cette indemnité, l'ELSI a fait recours au préfet de Palerme en alléguant l'illégitimité de l'ordonnance en question. L'acceptation dudit recours aurait nècessairement eu pour effet de transformer le droit à l'indemnité en droit à la réparation du préjudice causé par la réquisition: c'est pourquoi la question de l'indemnité est restée en suspens jusqu'à la décision du préfet. Après cette décision, le syndic de la faillite de l'ELSI a cité le ministère de l'Intérieur devant le Tribunal de Palerme en demandant des dommages-intérêts pour les préjudices subis par l'ELSI.

Un procès a donc été engagé et son déroulement a connu des hauts et des bas. Enfin, par un arrêt de la Cour de cassation du 26 avril 1976, la demande en réparation pour les préjudices causés à l'ELSI par l'occupation de son usine a été accueillie et le syndic de faillite a perçu la somme liquidée en sa faveur.

En conclusion, si les circonstances ont empêché que le paiement de l'indemnité soit « rapide », on ne peut nier qu'il a été « réel et équitable ». En effet, le montant de l'indemnité a été déterminé par la Cour suprême après un jugement en troisième instance, ce qui a d'ailleurs permis au syndic d'exposer amplement les raisons de l'ELSI, et aux juges de trois cours de les apprécier. Quant à la détermination du montant de l'indemnité, le fait qu'elle ait été calculée sur la base de la rentabilité des biens pour la période de six mois coïncide avec le critère de calcul adopté aux Etats-Unis dans l'affaire *Pewee Coal Company*, jugée par la Cour suprême le 30 avril 1951.

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Une autre disposition du Traité de 1948 que le demandeur accuse l'Italie d'avoir enfreint est l'article V, paragraphe 3. Cette disposition garantit aux ressortissants et aux sociétés de chacune des Hautes Parties contractantes, sur les territoires de l'autre, pourvu qu'elles se conforment aux lois et règlements en vigueur, la protection et la sécurité relativement aux questions mentionnées aux paragraphes 1 et 2 du même article, dans une mesure égale à la protection et à la sécurité données aux ressortissants et aux sociétés de n'importe quel pays tiers. Le paragraphe 1, auquel on renvoie, traite des personnes accusées de faits illicites ou détenues et dispose l'assimilation des personnes aux sociétés en ce qui concerne les biens, donc seulement la protection des biens. Le paragraphe 2 (qui a déjà été analysé) traite de l'expropriation des biens des ressortissants, ainsi que des sociétés de chaque partie et du paiement des indemnités correspondantes. La dernière phrase du paragraphe 3 de l'article V dispose enfin que, dans toutes les questions concernant le passage des entreprises de la propriété privée à la propriété publique, ainsi que le passage de telles entreprises sous le contrôle public, les entreprises dans lesquelles les nationaux, les personnes juridiques ou les associations de chaque partie ont un intérêt remarquable jouiront, dans les territoires de l'autre partie, d'un traitement fondé sur le standard national et sur le standard de la nation la plus favorisée.

Les faits qui, de l'avis de notre adversaire, attestent la violation de l'article V, paragraphe 3, furent l'occupation de l'usine de l'ELSI par les travailleurs et le retard mis par le préfet à se prononcer sur le recours formé par l'ELSI contre l'ordonnance de réquisition. De plus, selon les Etats-Unis, l'ordonnance en question serait contraire à l'obligation de l'Italie d'assurer la

protection et la sécurité des biens des sociétés Raytheon et Machlett. En outre, M. Gardner, dans son intervention de mercredi dernier, a considéré que la notion d'entreprise dans laquelle des sociétés américaines ont un intérêt remarquable couvre la situation d'une entreprise (telle que l'ELSI) dans laquelle les Américains ont une participation plus que majoritaire, totalitaire.

Or, l'objection principale à l'argument soutenu sur ce point par la Partie adverse est simple: l'article V, paragraphe 3, à l'exception de sa phase conclusive, vise les sociétés et associations américaines en Italie, et non pas les sociétés et associations italiennes en Italie. Même en admettant, comme simple hypothèse, que la protection et la sécurité de l'ELSI ont été compromises par les autorités italiennes, la disposition précitée serait inapplicable, vu qu'il s'agit de la protection et de la sécurité d'une société italienne contre des autorités également italiennes.

Pour surmonter cette difficulté, le demandeur a affirmé, dans sa Réplique, que « l'ELSI elle-même représentait les biens de Raytheon et Machlett en Italie ». A notre avis, on ne peut nullement partager l'idée qu'une société soit l'objet d'un droit de propriété des actionnaires: la seule manière juridiquement correcte de décrire le rapport existant entre une société par actions et ses actionnaires consiste à reconnaître que ces derniers ont un droit de participation dans la première, en tant que propriétaires d'un certain nombre d'actions. Quant à la phrase finale du paragraphe 3 de l'article V, il suffit de relever que M. Gardner n'a pas soutenu la coïncidence de l'hypothèse prévue par la règle avec le cas d'espèce; en effet, le passage d'une entreprise dans le domaine de la propriété publique et sous le contrôle public ne se réalise qu'à la suite d'une véritable nationalisation. En tout cas, notre adversaire n'a pas affirmé que l'ELSI ait été exclue du bénéfice du traitement de la nation la plus favorisée. Quant au traitement national, elle en devait jouir sans doute, en tant que société italienne.

Permettez-moi enfin de faire deux observations sur certains faits que la Partie adverse affirme être incompatibles avec l'article V, paragraphe 3. En ce qui concerne l'occupation de l'usine de l'ELSI par les travailleurs, mes collègues, — et en particulier M. Caramazza, — ont déjà rappelé qu'elle a eu lieu avant et non pas après la réquisition: ce furent donc les administrateurs de l'ELSI, nommés par le vote de Raytheon et Machlett à l'assemblée des actionnaires de la société, qui ont choisi la ligne de conduite tolérante actuellement critiquée par le demandeur, et c'est du fait de leur décision qu'il n'a pas été demandé à la police d'intervenir. Quant au retard mis par le préfet à se prononcer sur le recours de l'ELSI, nous ne voyons pas comment et avec quelle logique il puisse être rattaché au prétendu manquement de l'Italie à l'obligation d'assurer la protection et la sécurité des sociétés Raytheon et Machlett. Est-ce que la garantie d'une justice rapide rentre dans les notions de protection et de sécurité? De toute manière, il suffit de répéter qu'à notre avis, l'occupation de l'usine, le retard mis par le préfet à se prononcer sur le recours et l'ordonnance de réquisition elle-même ne concernent que la société ELSI, indépendamment de ses actionnaires américains, auxquels l'article V, paragraphe 3, ne confère pas de droits dans le cas dont il s'agit.

* * *

Passons maintenant à l'autre critique avancée par les Etats-Unis contre l'Italie, à savoir que celle-ci aurait enfreint l'article VII, paragraphe 1, en s'ingérant dans la gestion et le contrôle de l'ELSI. Avec la permission de la Cour, je négligerai encore une fois de citer le texte de la disposition invoquée, l'article VII, paragraphe 1, parce que la Cour le connaît. Toutefois, je me permets de noter que, dans le texte anglais, l'article VII, paragraphe 1, figure l'expression « *or interests therein* » au lieu des termes « *altri diritti reali* » (d'autres droits réels), et ceci a donné lieu à certaines élucubrations de notre adversaire qui semble toujours convaincu que le texte anglais est le seul libellé valable de ce Traité.

Dans l'affaire en cause, les droit réels que Raytheon et Machlett avaient acquis en Italie en tant que sociétés américaines, et dont ils pouvaient disposer, se limitaient au droit de propriété sur les actions de la société et sur de l'argent liquide. Il ne résulte pas que l'exercice de ce droit subjectif ait jamais été entravé par les autorités italiennes. Cependant, lorsque le demandeur se plaint de l'ingérence de ces autorités dans la gestion et dans le contrôle de la société ELSI, il est évident qu'il pense que la gestion et le contrôle de l'ELSI étaient entre les mains des sociétés

investisseuses et que l'ELSI lui apparterait, de sorte que ces sociétés auraient titre à être protégées aux termes de l'article VII, paragraphe 1.

On revient par là à l'idée que j'ai déjà analysée et rejetée, qu'une société (une société italienne dans le cas d'espèce) puisse être considérée comme étant la propriété de ses actionnaires.

Le demandeur ajoute à cette conception — qui, je le répète est juridiquement erronée — un autre argument qu'il prétend fonder sur le texte anglais de l'article VII, paragraphe 1, et plus précisément sur l'expresion « *immovable property or interests therein* ». La faculté d'acquérir des « *interests in immovable property* » comprendrait, selon l'interprétation donnée par notre adversaire, le droit d'acquérir indirectement la propriété de biens immobiliers; et la société américaine Raytheon serait, avec Machlett, le titulaire de ce droit, je répète, d'acquérir indirectement la propriété des biens de l'ELSI, ou pour être précis, des biens immobiliers de l'ELSI, société affiliée.

La Cour me permettra de faire remarquer qu'un échafaudage d'arguments si compliqués nous paraît franchement inacceptable. La notion de « propriété indirecte » est tout à fait étrangère au droit italien; en tout cas, elle ne peut servir à décrire la position des actionnaires de sociétés étrangères par rapport aux biens immobiliers d'une société italienne qui est soumise à leur contrôle. Il semblerait que le demandeur veut employer à ses fins la différence entre la personnalité des sociétés investisseuses et celle des sociétés contrôlées. Il y a lieu de faire observer en outre que le texte italien du Traité — là où il est fait mention de « la faculté d'acquérir, de posséder ou de disposer de biens immobiliers ou *d'autres droits réels* sur les territoires de l'autre Haute Partie contractante » — est beaucoup plus clair, bien délimité et rigoureux que le texte anglais. Pour concilier les deux textes, on doit donc interpréter le texte anglais en tenant compte de la catégorie des droits réels autres que le droit de propriété sur des biens immobiliers. Ceci amène à ne prendre en considération que les soi-disants droits réels mineurs, tel que l'usufruit ou l'hypothèque.

En définitive, l'article VII, paragraphe 1, du Traité de 1948 n'étaye nullement les allégations des Etats-Unis dans la présente affaire. En partant du fait que, si l'on interprète l'article VII dans son ensemble, les paragraphes 1 et 2 apparaissent destinés à assurer la reconnaissance des droits réels et successoraux sur les biens immobiliers — alors que les paragraphes 3 et 4 de ce même article traitent de ces mêmes droits sur les biens mobiliers — il est évident que les bénéficiaires ne peuvent être que les personnes physiques et les sociétés ayant la nationalité de l'une ou de l'autre partie contractante et qui se trouvent sur le territoire de l'autre partie. On doit donc considérer que la situation des actionnaires de ces sociétés échappe entièrement au champ d'application de la disposition précitée.

* * *

Monsieur le Président, je constate qu'il est maintenant 11 h 15 et il me reste encore sept ou huit pages à lire. Préférez-vous que je le fasse maintenant... ?

THE PRESIDENT: Vous pouvez terminer.

MR. CAPOTORTI: Nous avons parlé jusqu'ici des prétendues violations par l'Italie des obligations découlant du Traité de 1948. Il nous reste maintenant à analyser deux autres contestations avancées par le demandeur contre l'Italie sur la base d'une clause de l'Accord supplémentaire de 1951.

La clause en question est l'article I, qui se subdivise en deux points *a*) et *b*). Leur texte est compris dans notre documentation ainsi que dans celle alléguée par notre adversaire. Je remarque que parmi les sociétés de chaque contractant sont comprises bien évidemment les sociétés américaines Raytheon et Machlett, qui étaient protégées contre les mesures éventuellement prises à leur égard — je souligne, *à leur égard* — par les autorités italiennes, à condition qu'il s'agisse de mesures arbitraires ou discriminatoires ayant pour effet, aux termes du point *a*), de les empêcher de diriger et de gérer effectivement l'ELSI (une entreprise que les deux sociétés avaient été autorisées à acquérir). Notre adversaire soutient que la réquisition décrétée par le maire de Palerme était une mesure qui avait les caractéristiques indiquées ci-dessus, et qu'lle était done arbitraire et discriminatoire. De notre côté, M. Caramazza a expliqué hier pourquoi la réquisition

n'était ni arbitraire ni discriminatoire. Pour évaluer l'allégation du requérant il faut donc analyser trois questions relatives à ladite réquisition: a-t-elle été arbitraire ou discriminatoire ? A-t-elle visé les sociétés Raytheon et Machlett ? Les a-t-elle empêchées de diriger et de gérer l'ELSI ? Nous avons déjà répondu et nous continuons à répondre négativement à ces questions; de toute manière nous faisons observer qu'une seule réponse négative suffirait pour rejeter les allégations du demandeur à ce sujet. Pour ne pas répéter trop longuement les considérations déjà exposées dans notre défense écrite, j'essaierai de résumer les raisons de ces réponses négatives.

En ce qui concerne le prétendu caractère « arbitraire » de la réquisition, commençons par dire que, d'après le demandeur, ce caractère est démontré par le seul fait que le préfet de Palerme a déclaré l'ordonnance du maire illégale parce qu'elle ne correspondait pas à l'objectif déclaré (qui consistait à assurer aux memberes du personnel de l'ELSI la protection de leur emploi). Nous estimons par contre qu'un acte ne peut absolument pas être qualifié d'arbitraire uniquement parce qu'il n'est pas entièrement conforme aux conditions établies par le droit interne d'un Etat. A notre avis, un acte illégal du point de vue d'un système juridique interne peut ne pas être arbitraire, et ce surtout si l'optique est différente, s'agissant d'évaluer l'acte en question du point de vue du droit international. Dans la présente affaire, nous savons que le maire de Palerme a réquisitionné l'usine et l'outillage de l'ELSI en exerçant un pouvoir qui lui était reconnu par la loi italienne, et qu'il a motivé sa décision d'une manière détaillée; il ne s'agissait donc pas d'une mesure déraisonnable, capricieuse et dépourvue de toute justification.

Si telles avaient été les caractéristiques de cette mesure — je le répète: si elle avait été déraisonnable, capricieuse et dépourvue de toute justification — on aurait pu la qualifier d'arbitraire; ces qualifications sont en effet liées à la notion d'arbitraire. Le responsable d'un acte arbitraire enfreint toutes les règles en commettant un acte qui n'est pas inclus dans les catégories prévues par le droit, un acte conçu uniquement comme un instrument pour porter préjudice à sa victime et pour l'opprimer. Une autorité agit d'une manière arbitraire lorsqu'elle se place en dehors de toute règle juridique; lorsqu'elle n'a aucun pouvoir qu'elle puisse légalement prétendre exercer. Au contraire, l'inobservation partielle des règles auxquelles est soumise une catégorie d'actes déterminée donne lieu à un acte illicite, mais non pas arbitraire. J'ajoute enfin que la prétendue nature arbitraire de l'acte en question est contredite dans le cas d'espèce par le simple fait qu'il était accompagné par la garantie judiciaire du droit italien consistant dans le droit de faire recours au préfet. Ce recours a été présenté; il a donné lieu à l'annulation de l'acte. Dans ces conditions, le destinataire effectif de la réquisition, c'est-à-dire l'ELSI, a disposé avec succès d'un moyen susceptible de remédier à ce que l'acte avait originairement d'illégal.

En ce qui concerne la prétendue nature « discriminatoire » de la réquisition, il convient de rappeler tout d'abord que le sens acquis par le terme « discrimination » dans l'usage du droit international se fonde sur la notion d'une distinction injuste et préjudiciable basée sur des circonstances déterminées et faite au détriment d'une certaine catégorie pour en favoriser d'autres. Dans le contexte des traités d'amitié, de commerce et de navigation, qui se fondent le plus souvent sur le principe du traitement national, une discrimination basée sur la nationalité représente sans aucun doute un comportement que l'on doit combattre. Dans l'affaire en cause, l'ordonnance de réquisition aurait été discriminatoire si elle avait été prise à l'égard d'une société contrôlée par des investisseurs américains en raison de la nationalité américaine des sociétés investisseuses. Or, ceci doit être tout à fait exclu; dans les défenses écrites présentées par l'Italie, il y a maints exemples de réquisitions justifiées par des problèmes de protection de l'emploi, à l'égard d'entreprises italiennes contrôlées par des capitaux italiens.

Une autre façon d'interpréter l'expression « mesures discriminatoires » peut être fondée sur la phrase finale de l'article premier de l'Accord de 1951. On y confirme l'engagement à ne pas agir d'une manière discriminatoire à l'égard des ressortissants et des sociétés et associations d'autres parties, mais on ajoute: enfin qu'elles puissent obtenir, à des conditions normales, les capitaux, les procédés de fabrication et les techniques nécessaires pour leur développement économique. Il est tout à fait évident, d'après ce langage, qu'il y aurait une mesure discriminatoire concernant les conditions faites aux entrepreneurs qui ont besoin de capitaux, de procédés de fabrication ou de techniques pour leur développement si ces conditions étaient anormales. Bref, au traitement normal, donc au traitement appliqué généralement aux entreprises engagées dans

un processus de développement, on oppose un traitement anormal et donc discriminatoire. Ici même, l'idée de fond consiste à garantir l'égalité de traitement, sur un plan « normal ».

Le demandeur a affirmé l'existence d'une discrimination dans ce qu'il estime être l'objectif final de l'ordonnance du maire de Palerme: réduire la valeur de l'usine de l'ELSI et favoriser ainsi l'entreprise qui a finalement acquis cette usine, à savoir une entreprise contrôlée par l'IRI. Cette allégation, en substance, se rattache à la thèse fameuse du complot fomenté par les autorités italiennes, le complot mis en oeuvre par le maire de Palerme, le préfet de cette ville, les personnes chargées de diriger la procédure de faillite, à savoir le syndic et le juge commissaire, dont la décision a donné lieu à la vente de l'usine, et les responsables de l'IRI, bien entendu. Ce complot aurait entraîné l'adoption d'une ordonnance de réquisition discriminatoire du fait qu'elle avantageait injustement l'IRI. Nous avons déjà fait observer que cette thèse du complot n'est que le fruit de l'imagination. De plus, elle ne serait valable que si les actes des organes qui ont dirigé la procédure de faillite et ceux d'une société contrôlée par l'IRI pouvaient être considérés comme des actes de l'Etat italien, ce qui n'est absolument pas le cas.

A ce propos, permettez–moi de relever que le demandeur n'a jamais expliqué, et encore moins prouvé, sur la base de quelles normes du droit international les actes des organes chargés de diriger la procédure de faillite et ceux d'une société contrôlée par l'IRI pourraient être imputés à l'Etat italien. La question relève de la responsabilité pour des prétendus actes illicites de cet Etat. En effet, la condition que l'acte puisse être attribué à l'Etat (« *is attributable to that State* ») figure dans le document élaboré en 1961 par la Harvard Law School relativement au projet de convention en matière de responsabilité internationale des Etats pour les préjudices causés projet à des étrangers, comme étant l'une des conditions essentielles de la responsabilité (voir art. 1, par. 1, du projet). Il convient de citer en outre les articles du projet d'articles en matière de responsabilité des Etats, dont la première partie a été adoptée en première lecture par la Commission du droit international en 1980. L'article 11 de ce texte exclut que l'on puisse considérer comme un acte de l'Etat le comportement d'une personne ou de personnes qui n'agissent pas pour le compte de l'Etat. A son tour, l'article 7, par, 2, admet que l'on puisse considérer comme un acte de l'Etat le comportement de l'organe d'une institution ne faisant pas partie de la structure de l'Etat, à condition que cet organe soit autorisé par le droit interne à exercer les pouvoirs d'une autorité publique, dans la mesure où il agit dans le cadre de l'exercice de ces pouvoirs, relativement à l'affaire en cause. Ceci étant, nous nous demandons comment il est possible d'attribuer à l'Etat italien le comportement de l'ELTEL, qui a acquis l'usine de l'ELSI à la suite d'une vente aux enchères annoncée par le syndic de la faillite.

D'autre part, nous nous demandons aussi comment on a pu affirmer, sans le prouver, l'existence d'un lien de causalité entre le décret de réquisition temporaire, la vente de l'usine de l'ELSI (dans le contexte de la faillite demandée par ses administrateurs) et le préjudice que les Etats–Unis prétendent avoir subi. Un autre point fondamental de la théorie de la responsabilité internationale de l'Etat est que le préjudice doit être une conséquence directe du fait illicite. Dans l'affaire en cause, ceci aurait dû être prouvé par le demandeur, mais cette preuve n'a jamais été rapportée.

En ce qui concerne le sujet passif de la réquisition, il y a lieu de relever que ce rôle a été joué par l'ELSI, et non pas par les sociétés Raytheon et Machlett. Autrement dit, aux termes de l'article premier de l'Accord de 1951, ce sont « les sociétés et associations » de chaque partie qui peuvent prétendre à la protection contre la mesure arbitraire et discriminatoire prise à leur égard à l'intérieur des territoires de l'autre partie. Par contre, dans la présente affaire, l'ordonnance de réquisition, que l'adversaire dit être arbitraire et discriminatoire a été prise à l'égard de la société ELSI. Mais l'ELSI était une société italienne, en principe, et non américaine.

Enfin, en ce qui concerne l'allégation selon laquelle l'Italie aurait empêché les sociétés Raytheon et Machlett de diriger et de gérer effectivement l'ELSI, il y a lieu de faire observer que le décret de réquisition dont il s'agit n'a produit son effet, pendant six mois, que sur l'usine et l'outillage de l'ELSI.

En conclusion, nous estimons avoir démontré qu'aucune des conditions dont dépend l'applicabilité de l'article premier de l'Accord supplémentaire n'a été remplie dans la présente affaire. Ceci étant, cette disposition ne saurait être invoquée avec succès par les Etats–Unis.

La conclusion susmentionée vaut également pour la disposition du point *b*) de l'article premier précité. Nous avons déjà eu l'occasion de dire que cette disposition interdit de porter atteinte à « d'autres droits en intérêts » des ressortissants et des sociétés de chaque partie contractante, dans les entreprises qu'ils ont acquises et dans les investissements qu'ils ont effectuées sous différentes formes. Toutefois, cette interdiction ne vaut que dans la mesure où le préjudice est causé par des mesures arbitraires ou discriminatoires. Etant donné que nous avons démontré que la réquisition dont il s'agit ne constitue pas une mesure arbitraire ou discriminatoire, il s'ensuit que même le point *b*) de l'article premier est inapplicable.

Le demandeur a affirmé que tous les droits et intérêts lésés par la mise en faillite relèvent de la disposition précitée. A ce propos, permettez-moi de répéter une fois encore — en espérant que le dicton *repetia iuvant* est vrai — que le prétendu lien de causalité entre la réquisition et la faillite n'a jamais été prouvé par la Partie adverse et qu'en fait il n'existe pas. Nous savons que la faillite a été déterminée par l'état d'insolvabilité de l'ELSI bien avant la réquisition. M. Bonell a parlé longuement sur ce point hier. Quant à l'interdiction de porter atteinte aux droits et interêts des sociétés Raytheon et Machlett, il suffit d'ajouter que la procédure de faillite, dont les deux sociétés ont demandé l'ouverture, ne représente certes pas une mesure à laquelle elles ont été soumises sur l'initiative des autorités italiennes. Le fait que notre adversaire ait fortement essayé de « démoniser » ces autorités ne devrait pas avoir pour conséquence de mettre à leur charge toutes les conséquences des erreurs de Raytheon.

J'en ai terminé, Monsieur le Président. Je vous remercie de votre attention.

THE PRESIDENT: Merci Monsieur Capotorti. Nous allons nous interrompre dix minutes.

The Court adjourned from 11.35 a. m. to 11.45 a. m.

THE PRESIDENT: Asseyez-vous s'il vous plaît. Je donne la parole à M. Monaco.

MR. MONACO:

1. – *Prémisse.*

Monsieur le Président et Messieurs les juges. C'est un grand honneur pour moi de plaider encore une fois devant cette Cour qui est la plus éminente juridiction internationale.

Je voudrais tout d'abord déclarer que je serai particulièrement bref, étant donné que mes collègues de la défense italienne ont déjà démontré, maintes fois et sous différents aspects, le manque de fondement des demandes avancées par le gouvernment des Etats-Unis.

Selon moi, ce qui reste à exposer, et peut-être à clarifier, est donc tout ce qui pourrait se rattacher au lien, d'ailleurs inexistant, entre les faits qui ont été déjà exposés d'une façon très détaillée, et les demandes en réparation.

2. – *Le caractére subsidiaire des demandes en réparation.*

La délégation du gouvernement italien ne saurait discuter la question de la réparation qu'à titre tout à fait subsidiaire.

En effet, ce n'est que si une violation du traité est établie que la question de la réparation se pose. Or l'Italie nie avec force l'existence de tout fait illicite qui puisse lui être attribué.

De plus, les conclusions de la Partie demanderesse supposent l'existence d'une série d'actes illicites, ce qu'on ne saurait admettre même à titre de pure hypothèse.

Enfin, la Partie demanderesse refuse d'envisager, même à titre subsidiaire, l'hypothèse que seuls certains actes seraient illicites; elle fonde plutôt sa demande en réparation sur l'ensemble de prétendus faits illicites.

L'un de ces soi-disants faits illicites dont les conséquences dommageables nécessiteraient une réparation en vertu du droit international serait, par exemple, la réquisition de l'usine. Il

est évident que l'effet dommageable supposé produit par ce seul fait, se différencie quantitativement et qualitativement des conséquences dommageables qui résulteraient de toute la série d'actes dont il est question dans les mémoires et plaidoiries du gouvernement demandeur.

Le refus de la Partie demanderesse de prendre en considération, à titre subsidiaire, l'hypothèse que seuls certains faits — et non pas l'ensemble de faits qu'elle allègue — auraient provoqué des conséquences dommageables met la Partie défenderesse dans une position difficile pour discuter de ladite hypothèse.

Dans ces circonstances, une telle discussion ne manquerait pas de susciter l'impression que la thèse principale de la Partie défenderesse n'est pas tout à fait fondée et affaiblirait en conséquence sa position, alors même qu'elle demeure ferme à nier la réalité de tout acte illicite que la partie demanderesse veut lui attribuer.

Je me bornerai donc à quelques remarques d'ordre général sur la nécessité de prouver l'existence d'un lien étroit entre un prétendu fait illicite et ses éventuelles conséquences dommageables aux fins de l'obtention d'une réparation en droit international.

3. – *Le manque de preuve du lien de causalité entre le dommage allégué et le prétendu fait illicite de l'Etat.*

C'est en effet un principe incontestable du droit international que, pour que l'Etat lésé ait droit à la réparation, il ne suffit pas qu'il existe un préjudice susceptible d'indemnisation et qui se rattache de quelque manière à un acte illicite de l'Etat; il est en outre essentiel de démontrer l'existence d'*une relation de cause à effet suffisamment étroite* entre le prétendu acte qui constitue l'origine de l'obligation d'indemniser et le préjudice lui-même.

La jurisprudence internationale exclut nettement l'obligation de verser une indemnité pour un préjudice qui n'a pas été « éprouvé avoir été une conséquence réelle et inévitable » (affaire *Yuille et Shortridge*, dans LAPRADELLE et POLITIS, *Recueils des arbitrages internationaux*, vol. II, Paris, 1932, p. 78) de l'acte illicite, ou quand ce dernier « *was not in legal contemplation the proximate cause of such a damage* » (affaire *Cabos Lopez*, *Recueil des sentences arbitrales*, Vol. IV, p. 20). Afin d'apprécier d'une manière plus précise les demandes des Etats-Unis et les caractères propres de la présente affaire, il est utile de rappeler certains des motifs sur lesquels des tribunaux internationaux se sont appuyés pour décider qu'il n'y avait pas de lien de causalité suffisant entre le dommage allégué et le fait illicite (ou prétendument illicite) d'un Etat.

L'un de ces motifs consiste à dire que l'acte imputé à l'Etat, même s'il a contribué à créer une situation favorable à la survenance d'un fait illicite, ne peut en être considéré comme la cause directe, parce que le fait dommageable en question se serait produit de toute manière par l'effet d'autres circonstances qui ne peuvent pas être imputées à l'Etat.

Dans l'affaire *Remy-Martin* (*Recueil des tribunaux arbitraux mixtes*, Vol. IV, p. 415), par exemple, le tribunal arbitral mixte franco-allemand a refusé d'accorder des dommages-intérêts pour le manque à gagner d'une distillerie française résultant de l'interruption de ses activités à la suite de sa saisie par les autorités allemandes pendant la guerre, parce que, même sans l'acte illégal de la mise sous séquestre, la distillerie, de toute manière, n'aurait pu fonctionner à la suite de l'impossibilité de se procurer, en temps de guerre, les raisins français nécessaires à la fabrication de ses produits. Plus significative encore est l'affaire *Guillemot-Jacquemin* (*Recueil des sentences arbitrales*, Vol. XIII, p. 70), dans laquelle une ressortissante française a intenté une action en restitution de deux appartements à Rome qu'elle avait loués à une société publique italienne et qui avaient été saisis pendant la guerre. La commission de conciliation franco-italienne a conclu que, puisque les loyers avaient été fixés à un taux légal à cette époque, même:

> « sans le séquestre et sans les mesures prises par le séquestrateur, Mme Guillemot-Jacquemin [se serait trouvée], vis-à-vis de ses deux locataires, exactement dans la même situation que celle dont elle se [plaignait]... Tout lien de causalité faisait donc défaut entre les restrictions que le Gouvernement français voulait voir lever et les mesures prises par le Gouvernement italien à l'égard des deux appartements en tant que biens ennemis ».

Dans certains cas, la raison pour laquelle le lien de causalité entre le fait illicite de l'Etat et le préjudice causé à un particulier a été considéré comme trop ténu — ce qui excluait l'obligation d'indemniser — a été que le comportement de la victime elle-même (ou une situation créée par elle) l'avait exposée aux effets de l'acte illicite, lequel n'aurait entraîné aucun préjudice sans ce comportement ou cette situation.

A cet égard, on peut citer l'affaire *Dame Simone Reverand* (*Recueil des sentences arbitrales*, Vol. XIII, p. 276) relative à une maison qui avait été vendue aux enchères en Italie pendant la guerre, consécutivement à une série de mesures prétendument illégales prises au détriment de la propriétaire, qui était une ressortissante française, mesures qui l'avaient empêché de transférer en Italie les fonds nécessaires pour payer les intérêts échus d'une hypothèque sur cette maison. Puisque:

> « la situation pécuniaire de Mme Reverand était, avant le 10 juin 1940, obérée à tel point que depuis mai 1939 elle n'avait pu acquitter les arrérages de sa dette hypothécaire »,

la commission de conciliation franco-italienne conclut que « l'on ne peut soutenir dans ces conditions que c'est du fait de la guerre que l'intéressée s'est trouvée hors d'état de payer les arrérages en question ».

Dans d'autres affaires, le refus d'accorder une indemnité a été déterminé non seulement par « le lien trop lointain qui rattache la perte au fait générateur », mais aussi « par le caractère *trop aléatoire* du bénéfice espéré (LAPRADELLE et POLITIS, *op. cit.*, p. 284). Cette situation s'est produite en particulier dans des affaires où le préjudice pour lequel une indemnité était demandée dépendait d'une perte de revenus qui présentait un caractère tout à fait aléatoire.

En d'autres termes, sous réserve de toutes les différences résultant des aspects divers des affaires dont il s'agit, les sentences arbitrales internationales confirment qu'en statuant sur l'obligation de réparer et sur le montant de l'indemnité due, il faut tenir compte non seulement du lien entre chaque fait illicite imputé à l'Etat et chaque préjudice qui fait l'objet d'une demande en réparation, mais aussi de l'incidence que des circonstances ou des actes non imputables à l'Etat défendeur ont pu avoir sur la survenance du préjudice.

4. – *L'éventuelle réalisation de la valeur de l'ELSI par la liquidation supposée.*

Nous avons amplement démontré que la preuve du lien de causalité allégué par le demandeur n'a nullement été apportée. De plus, il faut rappeler que, en raison de l'incidence possible de cet aspect sur l'évaluation éventuelle du préjudice, ce prétendu lien de causalité semble se fonder surtout sur la simple hypothèse selon laquelle Raytheon aurait pu obtenir un résultat financier tout à fait différent s'il y avait eu une liquidation régulière. Le gouvernement des Etats-Unis persiste à affirmer que les créanciers de l'ELSI auraient été remboursés intégralement si cette procédure avait été possible et que Raytheon aurait évité les répercussions découlant de la situation ruineuse de l'ELSI. Selon le demandeur, tout cela aurait été possible parce que « *had the Respondent not interfered with the liquidation, Raytheon and Machlett would have recovered the market value of ELSI as a going concern in 1968* » (Rèplique, p. 156).

Cet argument semble dépourvu de tout fondement, comme l'ont déjà montré très amplement mes collègues MM. Bonell et Caramazza, d'autant plus qu'il suppose que la totalité de la valeur comptable de l'ELSI aurait été réalisée dans la procédure de liquidation, sa valeur comptable étant considérée comme la plus proche de sa valeur d'entreprise en activité (Réplique, p. 158). Cela est difficile à admettre aux fins de l'évaluation du préjudice qui aurait été causé à Raytheon, car en vertu du principe admis par la jurisprudence de droit international, c'est au demandeur qu'il incombe de prouver que « soit en consultant le cours ordinaire des choses, soit en s'attachant aux affaires de la partie lésée ou aux dispositions prises par elle, il est *probable* — *non pas seulement possible* — que celle-ci aurait réalisé tel ou tel profit si le fait illicite ne s'était pas produit » (affaire *Fabiani*, Pasicrisie Internationale, Berne, 1902, p. 365).

Cependant, l'éventualité de la réalisation de la valeur comptable totale de l'ELSI par la liquidation n'a pu qu'apparaître tout à fait improbable à l'époque, voire impossible du point de

vue de Raytheon elle–même, car la propre direction de l'ELSI avait envisagé une valeur de liquidation rapide très inférieure à la valeur comptable et elle avait cherché, avec insistance mais sans succès, à parvenir à un accord avec les principaux créanciers de l'ELSI sur la base d'un remboursement de 50 p. cent seulement des sommes qui leur étaient dues.

Comme nous l'avons déjà démontré, la vérité est que le scénario de la réalisation de l'ELSI comme une « entreprise en activité » (*going concern*) ne correspond nullement à la réalité. A cet égard, on peut remarquer avec intérêt qu'alors que le Mémoire considérait cette solution comme le scénario le plus optimiste, la Réplique la qualifie de seule possibilité. La preuve que cela ne correspond pas à la réalité, contrairement aux allégations du demandeur, réside dans le fait que, dans sa Réclamation de 1974, Raytheon retenait une estimation de l'ELSI très inférieure, c'est–à–dire reposant sur la valeur de « réalisation rapide » (*quick–sale value*). Sans parler du fait qu'une évaluation basée sur la « réalisation rapide » est tout à fait hypothétique et ne reflète pas la valeur réelle des biens, le recours à une telle estimation, dans la Réclamation de 1974, exclut donc qu'il puisse s'agir d'un « *worst case scenario... for purposes of internal corporate planning by ELSI-s shareholders* » (Réplique, p. 159), comme le soutient le gouvernement des Etats–Unis. Il faut aussi exclure qu'une telle évaluation, que le gouvernement des Etats–Unis présentait comme « la plus défavorable des hypothèses » (*worst case scenario*), ait été utilisée lors de la Réclamation de 1974 seulement pour entamer les négociations « *in the spirit of compromise* » (Réplique, p. 159). Un tel esprit ne transparaît pas dans la réclamation dont il s'agit. Il y a lieu d'ajouter que deux évaluations différentes, l'une fait par le syndic de la faillite et l'autre par l'ELTEL (celle–ci devant être considérée comme tout aussi objective que celle de Raytheon), aboutissent à des chiffres nettement inférieurs.

Le demandeur dit que la base d'évaluation utilisèe fut la « *going concern basis* » et nous savons qu'ils utilisent la « *book value basis* » comme équivalence.

Mais ELSI n'était pas un « *going concern* ». Ainsi, les évaluations du demandeur n'ont aucune signification. L'alternative à la « *going concern basis* » est la « *break up value basis* », utilisée nécessairement lorsque les éléments de l'actif sont vendus séparément.

Personne n'a rien dit à ce sujet, mais il est sûr que le produit d'une aliénation séparée aurait été bien inférieur au chiffre présenté par le demandeur.

Une « *break up value* » est bien la base qui a ètè utiliseè dans la faillite.

Ce n'est certes pas à la partie défendresse — qui nie l'existence de tout fait illicite et rejette par conséquent toute obligation de payer une indemnité pour le prétendu préjudice — qu'il incombe de proposer une autre méthode d'évaluation. Comme nous l'avons déjà indiqué dans le Contre–mémoire (p. 77), l'Italie formule ses observations à titre tout à fait subsidiaire, à seule fin de contrer les « *dubious contentions of law and the distortions of facts* » contenues dans les allégations du demandeur.

Monsieur le Président, Messieurs les Juges, vous allez entendre certains éclaircissements, j'espère, de la délégation italienne à l'égard de la question dont j'ai parlé tout à l'heure. Et j'en viens d'une façon très rapide aux deux derniers points de mon exposé. L'un se réfère au recouvrement des frais de justice et de procédure et l'autre est relatif à la question des intérêts.

5. – *Le prétendu recouvrement des frais de justice et de procédure.*

Premièrement outre les observations présentées dans le Contre–mémoire italien (p. 116), quelques autres remarques peuvent être formulées au sujet des frais de justice et de procédure supportès par Raytheon. Malgré les affirmations du gouverement des Etats–Unis, les frais de justice et de procédure exposés par la société à l'occasion des procès intentés contre elle en Italie par les banques créancières de l'ELSI ne peuvent être considérés, de toute manière, comm e une conséquence directe des agissements de la Partie défenderesse (Réplique, p. 156). Ils résultaient de l'insolvabilité de l'ELSI, dont seule cette dernière était responsable, avant même les circonstances contestées. Abstraction faite de toute évaluation sur les agissements du défendeur, ceux–ci ne peuvent avoir été, au maximum, que la cause indirecte d'une circonstance résultant

exclusivement d'une situation propre à l'ELSI et créée par cette dernière. Ceci nous permet d'affirmer que ces dépenses, telles que la juridiction italienne les a fixées, doivent être considérées comme définitives et ne peuvent plus faire l'objet de recours de la part du demandeur.

Il y a lieu de souligner en outre que, contrairement aux allégations du demandeur, il est rare que les tribunaux internationaux établissent le montant du remboursement des frais de justice et de procédure exposés par le sujet lésé dans l'exacte mesure indiquée par celui-ci. En règle générale, ils établissent ce montant en se basant sur le bon sens, selon une pratique proche de celle des tribunaux nationaux. Rappelons, à titre d'exemple, que l'*Iran–US Claims Tribunal* n'a pas liquidé les frais de justice dans tous les cas et même, lorsqu'il l'a fait, le montant a été inférieur à celui exposé par le demandeur. Cette conclusion résulte par exemple du cas *Sylvania Technical Systems v. Iran*, décision N. 64 du 27 juin 1985: ce jugement est intéressant parce qu'il contient de nombreuses considérations à ce sujet. Et de même on peut se référer à un autre cas l'*Oil Field of Texas v. Iran and National Iranian Oil Co.*, décision N. 43 du 8 octobre 1986. Ceci est d'autant plus manifeste si l'on considère que, contrairement au cas présent, les frais de justice et de procédure le plus souvent remboursés sont ceux relatifs aux procès dans lesquels le particulier, lésé de manière illicite par l'Etat, a tenté sans succès d'obtenir la réparation du préjudice auprès des tribunaux de l'Etat en question. A ce propos, il serait intéressant de relire le texte de l'article 36 de la *Convention on the Law of State Responsability for Injuries to Aliens (revised Harvard Draft Convention)*, préparée comme nous le savons par MM. Sohn et Baxter, que le demandeur lui-même a inséré dans la n. 63, p. 157 de Sa Réplique:

> « a claimant shall be reimbursed for those exepenses incurred by him in the local and international prosecution of his claim *which are reasonable in amount and the incurrence of which was necessary to obtain reparation on the international plane* ».

Il faut enfin souligner que les frais de justice ont été attribuées par les tribunaux italiens à Raytheon dans les procédures elles-mêmes; cela est important. Les décisions ont donc établi des frais légaux de caractère normal, qui comprenaient aussi les honoraires d'avocat calculés sur la base des tarifs en vigueur. Par conséquent, tout autre frais de justice éventuellement supporté par Raytheon ne peut apparaître admissible dans les circonstances indiquées.

6. – *La question des intérêts.*

Ce n'est évidemment qu'à titre encore plus subsidiaire que des remarques supplémentaires s'imposent sur la question des intérêts. L'importance que lui accorde la partie demanderesse, surtout s'agissant d'intérêts composés, confère à la réclamation une dimension que l'on peut considèrer ccmme astronomique en l'état des choses.

La thèse de la partie demanderesse peut être comme suit: des intérêts sont dus à partir de la date où le fait dommageable s'est produit; bien plus, il faudrait aussi prendre en compte, comme nous l'avons déjà dit, les intérêts composés.

Il faut aussi rappeler ceci: tout en défendant la thèse que des intérêts composés sont dus, M. Ramish a eu l'amabilité de dire:

> « *The United States recognizes that arbitral tribunals historically have not shown much inclination to award compound interest. Indeed, the Iran-US Claims Tribunal has not awarded compound interest* » (*C 3/CR 89/4 p. 348*).

Il est dès lors surprenant que M. Ramish se soit au contraire acharné à démontrer qu'en droit international contemporain, il y a une obligation de payer des intérêts en tout état de cause, et à les faire courir à partir du jour où le prétendu fait dommageable se serait produit.

Pour étayer cette argumentation dans ses deux aspects, M. Ramish traite d'une façon quelque peu cavalière des précédents judiciaires et arbitraux.

Il cite par exemple l'affaire célèbre du *Vapeur Wimbledon* (*CPJI, série A N. 1*, p. 54) — c'est la première décision de la Cour permanente de justice internationale — sous le chapitre *The Award of Interest at Commercially Reasonable Rate, from the Date of Injury to the Date of*

Payment. A cet égard, M. Ramish dit: « *The Court must, as in the ' Wimbledon ' case, take account of ' the present financial situation of the world ' including contemporary rates of interest* (SS ' *Wimbledon* ', *supra*, p. 32) ». Mais voici la citation complète de la même phrase de l'arrêt que je me permets de soumettre à l'attention de la Cour:

> « Quant aux taux des intérêts, la Cour trouve acceptable dans la situation financière actuelle du monde, en tenant compte des conditions admises pour les emprunts publics, les 6 p. cent demandés; ces intérêts, cependant, doivent courir non pas à compter du jour de l'arrivée du *Wimbledon* à l'entrée du Canal de Kiel, suivant la réclamation des demandeurs, mais bien de la date du présent arrêt, c'est-à-dire du moment où le montant de la somme due a été fixé et l'obligation de payer établie ». (*CPJI, série A N.* 1, p. 32).

M. Ramish cite également (C 3/CR 89/4, p. 327) la phrase suivante d'une décision de la troisième chambre du Tribunal des réclamations Iran-Etats-Unis dans l'affaire *Mc Collough* (*Iran-US Claims Tribunal Report*, Vol. 11, p. 29):

> « *The first principle is that under normal circumstances* [*and especially in commercial cases*] *interest is allocated on the amounts awarded as damages in order to compensate for the delay with which the payment to the succesful party is made* ».

On pourrait enfin, sans vouloir insister, rappeler que M. Ramish a enlevé les mots « *and especially in commercial cases* » et mis à la place des petits points.

Dans la plaidoirie de M. Ramish (C 3/CR 89/4, p. 348), la citation de la sentence du même tribunal en l'affaire *The Islamic Republic of Iran* est tout à fait incomplète parce que le tribunal ne visait que la question du pouvoir de prendre une décision sur les intérêts. Le tribunal a, d'autre part, refusé d'indiquer une règle générale à propos des intérêts et a conclu de la manière suivante:

> « *The determination of the applicable principles of law in any given case, and consequently the question of whether an award of interest is appropriate, must rest witht he Chamber concerned, and the Tribunal therefore concludes that the alternative request for the establishment of general rules governing the award of interest by the individual Chambers must be denied* » (*Mealey's Litigation Reports, Iranian Claims, Vol. 2, N. 17, p. 9*).

7. – *L'appréciation de la réparation sur le plan international.*

Monsieur le Président, Messieurs les juges, il ne convient pas, à mon avis, de poursuivre cette analyse de petites astuces, mais plutôt de revenir aux principes de droit international en matière de réparation qui ont été développés par la doctrine et par votre jurisprudence.

La Partie demanderesse en réalité traite la présente affaire comme une simple affaire commerciale, telle qu'elle pourrait être soumise à un tribunal arbitral entre particuliers ou entre Etats et particuliers. Il faut plutôt, à mon avis, placer la question des intérêts, comme celle des conséquences dommageables, dans le contexte qui lui est propre: celui d'une affaire portée devant la Cour. Dans ce cadre-ci, la réparation ne saurait être sans rapport avec la gravité de la violation de l'obligation internationale. De plus, la réparation doit être appréciée en raison des circonstances et donc tenir compte du comportement de la Partie défenderesse, ainsi que de la Partie demanderesse et, dans les cas de protection diplomatique (ce n'est pas le cas ici), également de celui du ressortissant pour lequel cette dernière prend fait et cause en l'espèce.

C'est une matière fort délicate, dans laquelle la jurisprudence de la Cour s'est encore peu aventurée et il serait probablement trop présomptueux, — tout à fait présomptueux de ma part, — de faire quelques suggestions à la Cour quant aux principes à dégager. Je préfère m'en abstenir, d'autant que je partage pleinement la thèse, défendue par mon gouvernment, qu'aucune violation n'ayant été commise, il n'y a pas lieu à une quelconque réparation.

Je suis ainsi, Monsieur le Président, Messieurs les juges, arrivé à la fin de mon exposé et je vous remercie beaucoup de l'attention que vous m'avez prêtée.

Le PRESIDENT: Je vous remercie, Monsieur Monaco. I give the floor to Mr. Highet.

Mr. FERRARI BRAVO: I am sorry, Mr. President, I think there is a small misunderstanding. I announced that, before Mr. Highet, our adviser on accountancy, Mr. Hayward, would take the floor, with your permission.

The PRESIDENT: I call upon Mr. Hayward. I invite you to make the declaration provided in the Rules of Court.

Mr. HAYWARD: I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth and that my statement will be in accordance with my sincere belief.

The PRESIDENT: Thank you very much. You may now proceed.

Mr. HAYWARD: Mr. President and distinguished Members of the Court. It is an unexpected honour for me, firstly, to have been named as an adviser to the Italian delegation and, secondly, to have been given the opportunity to address this Court.

Mr. President, I should be pleased if you would allow me to set forth my qualifications.

I am a practising member of the Institute of Chartered Accountants in England and Wales and also a member of the Paris Region of the French *Ordre des experts comptables et des comptables agrèès*. I have also received an authority to practise in the Netherlands from the Ministry of Economic Affairs.

I am a partner in the Dutch firm of public accountants, *KPMG Klynveld Kraayenhof & Co.*, itself a member of the international partnership of *Klynveld Peat Marwick Goerdeler*.

I have spent the last 25 years both in practice and in business on the continent of Europe, in Belgium, Switzerland, France and now the Netherlands. I have also, for a period of some four years, managed, as *Directeur gènèral adjoint*, a group of publishing companies based in Switzerland. One of my responsibilities at that time comprised the acquisition and disposal by sale or by closure of a number of group companies in Europe and in North America.

As the Italian Agent indicated on Monday, I shall be addressing the Court on matters arising from the production, last Friday, of the audited financial statements of ELSI as at and for the year ended 30 September 1967. I shall also comment on the valuation presented to this Court by Mr. Lawrence on 16 February.

In this short address I do not intend to make use of the overhead projector but I shall place before the Court five exhibits marked A through E and to which I shall frequently refer. These exhibits, Mr. President, are in the blue folder that you have in front of you. The Court will note, and the index so indicates, that all but one of these exhibits are no more than copies of selected information previously placed before this Court by the Applicant.

Exhibit A, which I would ask the Court to refer to now, is a copy of the chart appearing on the Memorial (p. 60) and which Mr. Ramish set out on a transparency last Thursday. As the Court will recall, Mr. Ramish stated: « Column 1 charts the basis for the United States claim for reparation in this case. It starts from the conservative premise that ELSI's physical and intangible assets were worth at least book value » (C 3/CR 89/4, p. 332).

But, Mr. President, the 17,053.5 million lire shown by Mr. Ramish (that is in the top left-hand column of the exhibit) cannot represent book value of ELSI at 31 March 1968 (this number has been drawn from Schedule B1 of Mr. Arthur Schene's Affidavit appearing as Annex 13 to the Memorial and is to be found before you as Exhibit B). The « total assets » of 17,053.5 million lire was unadjusted for provisions and write-downs arising from the independent audit of ELSI as of the 30 September 1967 balance sheet date.

As you can see from the second from the far right column of Exhibit B, the total assets of ELSI at 30 September 1967 were shown in the Affidavit as amounting to 17,956.3 million lire. In passing, I should also like to refer you to the intangible asset line captioned « Deferred Charges » just above the total assets line and amounting to 1,653 million lire in both the final two columns. I shall be returning to this number later.

Now, I request you to look at Exhibit C, the next exhibit, which is a copy of the assets side of the ELSI balance sheet as at 30 September 1967 audited by Coopers & Lybrand. The balance

sheet has three columns in the lire presentation and the first column, entitled « Book Figures », indeed agrees with the 17,956.3 million lire reflected in Schedule B1 to the Annex 13, which I earlier presented to you as Exhibit B.

However, the audited balance sheet on Exhibit C refers to « Company's Adjustments » totalling 3,062.4 million lire resulting from an additional write-down to the value attributed to inventories of 1,309.4 million lire, a write-down of 100 million lire to the value attributed to investments and the complete write-off of the intangible assets of 1,653 million lire as being of no value.

I must stress that these adjustments were made and agreed by Company management following, no doubt, lengthy discussions with the auditors. Indeed, the Coopers & Lybrand audit report confirms that the adjustments were made by the Company in preparing the balance sheet. The auditors also state that such adjustments have not, at the date of their report, been recorded in the books for, essentially, tax reasons.

The true adjusted book values after audit are thus 14,893.9 million lire and not 17,956.3 million lire as shown in Annex 13 — a reduction of 3,062.4 million lire.

Accordingly, the book values used by Mr. Ramish for the purpose of the Applicant's claim should, in my opinion, also be reduced at 31 March 1968 by at least 3,062.4 million lire.

But this is not all. Coopers & Lybrand have qualified their audit report in respect of an overstatement in the reported inventory values of 453.3 million lire and revenue expenditure incorrectly included in fixed assets and thus overstating this caption by 463.6 million lire.

These misstatements total 916.9 million lire and must be read in conjunction with two further matters over which the auditors have expressed doubts. Firstly, no evidence was presented to them justifying favourable price adjustments, included as an asset of the Company, on the supply of klystrons for 251.6 million lire and, secondly, they were unable to determine whether amounts appearing as fixed assets are fully represented by specific items of physical property.

As the audit report was dated 22 March 1968 I believe it is appropriate to consider these adjustments as also applying to the 31 March 1968 book values.

In conclusion, therefore, the book value amount used by Mr. Ramish and drawn from Mr. Schene's Affidavit, appears to be incorrect and should be reduced by 4,230.9 million lire to arrive at 12,822.9 million lire as explained in Exhibit D.

As the Court has heard earlier this week, Mr. President, the Respondent rejects the Applicant's view that book value, even when properly reflected at the corrected value of 12,822.6 million lire, at 31 March 1968, is a fair proxy for the value of ELSI as an ongoing enterprise. As the Court has heard, the ongoing enterprise or going concern nature of ELSI was substantially compromised well before 31 March 1968. Note 10 to the audited financial statements, before you as Exhibit E, indicates that there is a shareholders deficit at 30 September 1967 of 881.3 million lire. Should this become « officially » the case (in inverted commas in the text), that is to say, should the adjustments made in arriving at this total of accumulated losses be entered into the Company's books of account, then the Directors would have been obliged to convene a stockholders meeting forthwith to take measures either to recover its losses by providing new capital or to place the Company in liquidation.

Mr. President and distinguished Members of the Court, I point out that this note was written by the Company and is attached to its own accounts presented for audit.

If I may depart from my prepared brief for a moment, I think we need to go back to 1967 to consider the situation in 1967. Many companies in Italy, France, and Spain at that time had two books of accounts. One was the official books of account for fiscal monetary exchange reasons, and the other was the proprietor's set of accounts which reflected the true economic substance of an enterprise. It is my view that the audited balance sheet which was presented to Raytheon is the equivalent of the proprietor's set of accounts in this context, and does truly represent the substance of the economic enterprise.

The Company was not a going concern at 30 September 1967 and, accordingly, an orderly liquidation with disposal of the Company's business and assets as a going concern was an impossibility. No additional capital funds were available to it on the admission of Raytheon. The Company was on the verge of insolvency well before the requisition of the plant on 1 April 1968.

It is in this light, I believe, that the Court must consider Mr. Lawrence's testimony of 16 February 1989. Mr. Lawrence has testified that:

> « It is my opinion that there was a good prospect that a purchaser of any or all of those [ELSI] businesses would have been prepared to pay a substantial premium over the value of the tangible assets for the benefit of this goodwill, particularly if there was competition between more than one prospective purchaser to acquire the business » (C 3/CR 89/4, p. 341).

Mr. Lawrence has based his valuation on the potential sale as a going concern, a sale between a willing buyer and a willing seller and indeed a sale in a market of depth whereby more than one prospective buyer is to be found. I would note that the concept of going concern has been consistently maintained by the Applicant and is referred to in of the United States Memorial (p. 10).

Now it is for this reason that Mr. Lawrence has seen fit to give a value of 3,500 million lire to intangible assets when his own firm agreed with Company management that no value, other than for fiscal reasons, could be attached to the intangible assets appearing in the records of ELSI at 30 September 1967.

Further, a value of 300 million lire has also been attributed to *Mezzogiorno* grants for which, as explained by Mr. Caramazza in his submission of yesterday, no justification has been given.

Mr. President, in my opinion, the valuation of Mr. Lawrence, based upon the premise of ELSI as a going concern, is unrealistic and is not supported by the underlying economic position of the Company, either at 30 September 1967 or at 31 March 1968.

Mr. President and distinguished Members of the Court, I have now come to the end of my address. Thank you.

The PRESIDENT: Thank you. Do the American delegation wish to examine the expert now?

Mr. FERRARI BRAVO: Mr. President, I regret to take the floor. Of course Mr. Hayward will be at the disposal of the Court and of the American delegation for all questions they may wish to put but, in fact, Mr. Hayward did not speak as an expert in the sense given to this word by the Rules of Procedure of this Court. Certainly it was my fault if there was some misunderstanding, but Mr. Hayward has been listed not as an expert but as an adviser, and Italy asked for permission for him to address the Court in the same capacity as Professor Bonelli and Professor Fazzalari did last week. They were also listed as advisers on behalf of the American delegation. So, for our part, the Italian delegation will not cross-examine Mr. Hayward, but I repeat that Mr. Hayward is ready to answer any questions.

The PRESIDENT: I accept the statement of Professor Ferrari Bravo, but Mr. Hayward himself took the declaration as an expert. Therefore I think that, in this case, it would have helped for you to submit your objection before he took the declaration.

Mr. FERRARI BRAVO: I did not want to interrupt you.

The PRESIDENT: But you have the right to do so. I myself understood that under Article 64 of the Rules of Court Mr. Hayward had been declared an expert of the Italian delegation; he therefore can be submitted to cross-examination by the American delegation, now, if they wish to. Mr. Matheson.

Mr. MATHESON: Mr. President, I have no desire to press the point with the Respondent's delegation. We will be prepared to comment upon the expert presentation when we make our rebuttals, and we may at that time have further questions but, for the time being, I am not going to press whatever procedural rights I might have. Thank you.

The PRESIDENT: So that we can have an orderly discussion on this subject, I think it is better for you to put questions tomorrow. Otherwise you will have to keep the expert from the Italian delegation here next week, when the expert from the American delegation will not be here. Therefore, I am going to give you the opportunity tomorrow morning to put questions to the expert from the Italian delegation. Do any of the Judges want to put a question? Judge Schwebel?

Judge SCHWEBEL: If I understood the expert correctly, he was submitting that the Applicant's argument was based on the concept of going concern value and, in his opinion, ELSI was not a going concern — or if it was going it was going down and not up, in essence.

I haven't, of course, just now had a chance to review the submissions of the Applicant in this regard, but as I recall the testimony and the written pleadings, my impression is that the Applicant was arguing that this is a case, unlike the generality of cases, where a « going concern » value was not the basis of damages sought, but rather « book value » was, precisely because the firm was not making a profit and had no prospects, apparently, of making a profit. Damages were therefore claimed on the basis of the sale value of the company in terms of its assets sold as a unit or by various lines. Now, is my understanding of what the Applicant argued consistent with your remarks of a few moments ago on « going concern » value, or not?

Mr. HAYWARD: Let me say first of all that the Applicant — I am speaking from memory as I do not have the papers here with me — but in Mr. Ramish's address he mentioned that the book value was a proxy for a going concern, that there was no means in which a going concern value at this stage could be attributed to a Company of 1967. But the book value was to be sold in business lines or as a business. The intangible assets, which is goodwill, attach to a business, they do not attach to assets; so if any value is given to intangible assets, then the business must have been sold as a business.

Now, in the book values of the Applicant there remains 1,659 million of intangible assets in the balance sheet, which the auditors actually wrote off at 30 September 1967. So, intangible assets, the sign of a going concern valuation basis, are retained in the Applicant's book value basis.

The PRESIDENT: I would like to put a question to you, Mr. Hayward, please.

Mr. HAYWARD: Yes, Mr. President.

The PRESIDENT: During your statement, if I understood you correctly, you said that on 31 March 1968 the Company was on the verge of insolvency. Now I was a very good student of mathematics when I was in the secondary school, but then I followed law; therefore, I have forgotten all about mathematics. For me, what insolvency means is that you have the assets and you have the debts, and the debts are more than the assets?

Mr. HAYWARD: Indeed, Mr. President.

The PRESIDENT: I suppose that this is an accountant's idea — for you I think this is a crucial question — on 31 March 1968 the debts of ELSI were above the assets of ELSI?

Mr. HAYWARD: Yes, Mr. President.

The PRESIDENT: Could you explain this in more detail, please.

Mr. HAYWARD: Indeed, with pleasure. The audited accounts of ELSI, on which Coopers & Lybrand issued their opinion on 22 March 1968, relate to the year ended 30 September 1967. Those audited accounts show a shareholders' deficit — speaking from memory — of 881 million lire, that is to say, that at 30 September 1967 the debts exceeded the assets of the Company from the audited balance sheet. Now, we know that in the six months following 30 September the Company made another 1,000 million loss. I am not saying that their debts went up by 1,000 million, because it may be that other money came in, but nonetheless the Company had not improved at March 1968 over September 1967. But the audited accounts produced a situation revealing a shareholders' deficit — the debts exceeded the assets.

The PRESIDENT: Thank you very much. Any other questions? Yes, Judge Schwebel.

Judge SCHWEBEL: In pursuance of what the President just said, are you then amending your statement that ELSI was on the verge of bankruptcy to say that it was bankrupt, or do you maintain your statement that it was on the verge of bankruptcy?

Mr. HAYWARD: I have not used the term « bankruptcy », I have used the term « insolvency »; I prefer that term. I think my statement was « on the verge of insolvency well before 31 March »

— I was talking in terms of the period before 31 March. Yes, I believe that the Company, at 31 March, was on the verge of insolvency.

The PRESIDENT: But I think that the point is this: was it insolvent, or not? Because it is one position to be on the verge of insolvency, and another to be insolvent.

Mr. HAYWARD: Insolvency is a situation — in French it is « *cessation de paiements* » — where the company cannot pay its liabilities as they fall due. Now, it can be that a supplier does not press for payment, enabling the company to pay off other suppliers earlier and, therefore, the insolvency situation, while technically the company is insolvent, may be prolonged because of the business life of the company. *Un ètat de cessation de paiements* can exist, but until one has gone to the court and actually declared that the company is insolvent, the company can still continue business — which I think was the case of ELSI.

The PRESIDENT: Any other questions? Judge Schwebel? Thank you very much, Mr. Hayward.

Well, we have 15 minutes. I do not know if Mr. Highet would wish to continue right now? I understand he does not. So, tomorrow morning the American delegation will have the opportunity, if they wish, to cross-examine the expert. That will be the first matter in the morning for the Court, then I think Mr. Highet is going to take the floor and Professor Ferrari Bravo will finish the statement of the Italian delegation.

We will meet tomorrow, gentlemen, at 10 o'clock. Thank you very much.

The Court rose at 12,50 p.m.

SUPPLEMENT TO THE ORAL REPLY GIVEN BY PROF. BONELL TO A QUESTION PUT BY JUDGE SCHWEBEL AT THE SITTING OF 21 FEBRUARY 1989.

The Italian Delegation is honoured to state the following:

1. In July 1967 ELSI took the decision to dismiss 300 workers.

2. To avoid those dismissals, the Regional Government entrusted ESPI (*Ente Siciliano per la Promozione Industriale*) with the task of finding a solution.

3. As a result, an agreement was reached, in terms of which ELSI's workers were merely suspended, and not dismissed, and in August 1967 they began a retraining programme, their payment taking the form of a daily allowance, made by the Region (cf. Unnumbered Document annexed to Counter Memorial, Vol. I, p. 20/21).

4. In March 1968 the situation became critical. ELSI decided to close the plant and dismiss the major part of its workforce. The Italian Government — meeting of 29 March 1968 (cf. Memorial, Annex 15, Exhibit G) — offered to have the Region pay the salaries (by means of *ad hoc* regional legislation) if the dismissal letters were not sent out.

Requisition was not a formal condition for the assumption of the payment of wages by the Region.

The requisition kept the factory open.

For the payment of salaries, the Region enacted regional legislation.

By Regional Laws N. 12 of 13 May 1968 (cf. Document N. 37 annexed to Counter Memorial), N. 23 of 6 August 1968 (cf. Document N. 38 annexed to Counter Memorial) andN . 31 of 23 November 1968 (cf. Document N. 39 annexed to Counter Memorial), the payment of extraordinary monthly allowances equal to the actual monthly wages was borne by the Region until 15 October 1968.

Law N. 12 of 13 May 1968 (quoted above) also covered the wages of March 1968 which had not been paid by ELSI.

Prof. LUIGI FERRARI BRAVO
Agent of Italy

C 3/CR 89/8
Thursday 23 February 1989, at 10 a. m.

Mr. HIGHET – JUDGE ODA

The PRESIDENT: Please be seated. According to what was decided yesterday, I call Mr. Hayward, who will be cross–examined by the American delegation. Mr. Hayward, please.

Mr. MATHESON: Mr. President, we have no questions to put to Mr. Hayward.

The PRESIDENT: Very well. In that case, we shall continue with the Italian delegation. I give the floor to Mr. Highet.

Mr. HIGHET: Thank you, Mr. President.

Mr. President and distinguished Members of the Court, it is always a great professional honour for any international lawyer to be called upon to address this highest of tribunals. And it is also a privilege, for which I am particularly grateful, to be able to present the closing arguments of Italy to this Chamber in the first round of the ELSI case.

The Court has before it the arguments of both sides. Where do they stand? The Court has heard repeatedly, and effectively, what are considered to be the relevant facts. Applicant has stated them as being « disputed » and « undisputed », but it should be clear by now that many « facts » that are in dispute are not facts at all, but are conclusions ([1]). It is thus intellectually impossible, and probably wholly unnecessary at this stage, to respond cogently to the kind invitation of Mr. Matheson to « indicate which specific facts it disagrees witù, and ... [to] refer to the documentary evidence which supports its position ».

The Court has also extensive arguments on various points of law.

Now, my job today, Mr. President and distinguished Members of the Court, is to try to put it all together for our side, and to use advocacy to the extent I can to assist the Court in its task of sorting through all these troublesome questions of fact and law.

* * *

I would like to start, Mr. President, by discussing a particularly significant aspect of this case.

It is one of the first espousal cases that has been before the Court in a very long time. It is a derivative case relating to rights that — if they did exist — initially belonged to Raytheon or, in minuscule proportion, to Raytheonjs subsidiary Machlett Laboratories.

The factual harvest available to Applicant is therefore not of its own making. It many well be the case that Applicant's more extreme and tendentious characterizations have been quite naturally based on the longóterm frustrations and angers of its client and national, Raytheon.

Now, Italy does not suggest that Raytheon was not frustrated and disappointed by what happened to ELSI. That frustration is not even worth discussing further, however, unless it stems from a real denial of a right or privilege by the Italian authorities. It is also not worth discussing unless that denial can be proven by direct evidence and unless the burdens of proof and of persuasion can be satisfied.

That is not the case before you. The case now before the Court is based, to a wholly unacceptable degree, on circumstantial evidence, unfounded inference, and innuendo.

([1]) *E.g.*, C 3/CR 89/1 of 13 February 1989, p. 245.

Applicant has not satisfied the burden of proof in any normal sense of the expression. Nor has it carried the burden of persuasion. For Applicant, Mr. President, must demonstrate that there is no other reasonable, and rational, explanation for what has befallen its client Raytheon. The absence of only one link permanently separates the act or omission — assuming that one did exist — from the *iniuria* or damage.

There are therefore two elements that must be satisfied in all cases, particularly in unilateral cases brought by application. They are the burden of proof and its sister the burden of persuasion.

* * *

First, however, it is appropriate to review the recent development in the case that occurred over the weekend, that is related intimately to the issues of proof and persuasion. It is the « conspiracy » questions.

Applicant may try to deny it, but the basic case advanced by it in these proceedings is clearly based on the inarticulate major premise that there was a « conspiracy », or a form or concerted action, amongst the officials, various officials, any officials of the Italian Government. The case implies, but does not state or prove, that this concerted action existed at least between 1967 and 1969.

And it implies, Mr. President, but again does not state or prove, that this concerted action involved IRI officials, the officials charged with administering the *Mezzogiorno* programme for the Regional Government (including the transportation benefits); that it involved the regional officials of Sicily; that it involved the Mayor of Palermo and the Prefect.

The case implies, but does not state or prove, that this concerted action involved the bankruptcy trustee, the banks, and the officials concerned with any one of the four auction sales. It implies, but it does not state or prove, that this concerted action might also have involved the judicial authorities of Italy on various levels.

As our Agent has pointed out in his opening address on Monday, the existence of a plan of concerted action or conspiracy is so essential to the United States case that it is hard to imagine Applicant seriously denying that it relies on it — as it did in its answer of 17 February.

Now the Agent also pointed out, Mr. President, that this answer has placed Applicant on the horns of an uncomfortable dilemma. Either Applicant was seeking to assert State responsibility against Italy because of this concerted action, or it was not.

It has now denied asserting a conspiracy and that means — semantically and legally — that it also denies, and must deny, the equivalent: that of deliberate and concerted action. A claim that Italian officials engaged in a deliberate and concerted course of action, as envisaged by the United States case, is substantially no different from a claim that they engaged in a conspiracy.

This I hope will emerge with clarity, Mr. President, in a few minutes when I touch on the things that have been said in this case by the Applicant about the Italian motives and plans.

Applicant has therefore conceded that it can no longer rely on establishing that connection of will or purpose that might link the Mayor of Palermo to the President of the Sicilian Region to the trustee in bankruptcy, to IRI, to ELTEL, and so forth and so on.

Yet how else can one link their actions or omissions so as to form a composite whole, so that the end result of their asserted actions or omissions can be, in law, attributable to the Italian Government?

That is the dilemma. The only other way in which these actions or omissions can be linked one to the next is by a disciplined and cogent chain of causation — that is the only other way — a chain that admits of no rupture — not for an instant, no rupture, not a single link can be missing — and a chain that will satisfy the traditional and respected requirements of the international law of State responsibility for injuries to aliens.

These requirements, of course, are well-known to the Court and I will not dwell on them any further, other than to say that when one here applies even the most rudimentary test to find a necessary and sufficient chain of causation, Applicant's case falls apart instantaneously.

This is because there is no evidence in the record to support the connection of one link to another in the chain. One incident — say, the requisition — cannot be linked to another incident — say, the lease to ELTEL, the litigation on the guaranteed loans, the bankruptcy auctions — unless a relation of cause and effect is asserted, proved, argued and established.

And, Mr. President, this must be by a preponderance of the evidence. One need go no further than to say that there is simply no evidence of these connections before the Court, far less a preponderance of evidence. Now it is not for Respondent to deny that which has not been plainly asserted, and certainly it is not for us to contradict that which has not been supported by a factual assertion. It is like disproving a negative, it is like shooting in the dark.

I used the words « factual assertion ». It is, as ever, essential to distinguish between the assertions of fact and the conclusions to be drawn from those assertions. What Applicant has done here is, unhappily for Applicant, to claim the benefit of the latter without doing the work required by the former.

First, it has put an impressionistic, or descriptive, case. This was based on the claims of its client and national Raytheon. This case is largely comprised of conclusions of fact and of course also the related conclusions of law. But the conclusions of fact are stated first, without the supporting facts required to establish them.

And they are then in turn, as the pleadings move along, referred to as if they had been established. Such is the case, for example, with the conclusions that President Carollo's statements were somehow transmuted into actions, into State action. Proof? There is none.

The same is true of the conclusion that there was a « boycott » of one, two, three different public auction sales. Proof? None exists in the record. The same is true of the conclusion that ELSI could otherwise have sold off some or part of its product lines or finished products or inventory or goods in process in time, in time for what, to make the 800 million lire bank loan repayment to Banca Nazionale del Lavoro falling due on 18 April, so as to avoid the guillotine of bankruptcy. This was pointed out by Professor Libonati on Monday ([2]). Proof that it could have done so? None.

The same is true of the conclusion that, but for the stubborn and untoward interference of the Italian authorities, there could have been an orderly sale of the various elements of ELSI in weeks following the « firing » of 800 workers on 24 hours' notice. Proof? We do not even have to ask.

This case is difficult. It contains, throughout, like a dark thread running through a bolt of lighter-coloured cloth, a silent major premise that Italian public officials were acting in concert to bankrupt ELSI, to deprive Raytheon of its subsidiary, to acquire it for itself at a fraction of its fair market value.

Now Applicant has rejected the notion that it ever asserted there was a « conspiracy ». Perhaps, now Applicant will come back and say that all they are denying is that there was a sort of « quasi-criminal conspiracy », whatever that may be in international law — and I for one do not purport to know.

They will doubtless say, Mr. President, that the facts speak for themselves, in establishing that there were actions and omissions on the part of Italian authorities sufficient to comprise, taken separately and together, a violation of Raytheon's rights under the Treaty and the Agreement.

And this would merely be a variation on the statement in their 17 February communication, that:

> « [t]he relief sought in this case is based on the acts and omissions of the Respondent's agents and officials at the federal and local levels (including IRI), *without any allegation that these officials were working in conspiracy* » (italics added).

([2]) C 3/CR 89/5 of 20 February 1989, p. 372.

Yet, Mr. President, with no such « allegation », with no case made that these officials were acting in concert, where is Applicant's case? What is being complained of? The individual acts? That is not the way the pleadings read, and that is not the way the submissions read.

I mean, how serious was the unconscious reliance of Applicant's case on this point? It is worth making, and I apologize but I fear it must be done, a quick *tour d'horizon* of the pleadings, written and oral, just in order to see how deeply this point underlies Applicant's case. It is like a great white shark gliding, unseen and unheard, beneath the calm waters of a bay.

In the very introduction in the Memorial (p. 3), it was stated:

> « the Government of Italy requisitioned ELSI's plant and related assets, in *order to prevent* the liquidation and *to facilitate* that acquisition of ELSI's assets by Italy's commercial conglomerate Istituto per la Ricostruzione Industriale (IRI) » (italics added).

In the Memorial (p. 20), it was written that:

> « [t]he Government of Italy *thus achieved its objective* of acquiring ELSI's plant and other assets without paying or otherwise co-operating with ELSI's shareholders ... and without paying a freely market-determined price » (italics added).

Later on, it was said that (p. 36):

> « The declaration of a public emergency in this case was a *mere device*; if the closing of the plant was an ' emergency ', it was an *emergency of Italy's own creation* ... the planned closing was not a *bona fide* public emergency, nor was the requisition a *bona fide* public response » (Italics added).

It goes on to say,

> « The *purpose of the requisition appears to have been to create the appearance of action, while allowing time for IRI to step and to* take over the plant ... *IRI was developing plans* to expand into this area, but was not ready to do so » (Italics added).

A little bit further on in the Memorial (p. 41):

> « The requisition ... was only the first step in a *series of concerted actions taken by the Italian Government and IRI authorities* to acquire ELSI's plant and related assets at less than fair market value, while leaving Raytheon with responsibility for paying ELSI's outstanding debts. Having requisitioned the plant and caused ELSI's bankruptcy, the *Government of Italy discouraged private bidders, boycotted the auctions itself, and worked out special arrangements for a piecemeal take-over directly with the bankruptcy authorities.*
>
> « The *object of these actions* was to secure ELSI's facilities for IRI ... they were taken with *the clear object and effect of favouring a public Italian enterprise at Raytheon's expense* ... Thus, not only did the Government of Italy wrongfully cause the bankruptcy, it also proceeded wrongfully to exploit the bankruptcy which it had caused » (Italics added).

The Memorial continues (p. 41):

> « The Government of Italy's *objective* was to acquire ELSI's facilities for IRI at the lowest possible price. Toward that end, it *incrementally consolidated both the appearance and the substance of a take-over of ELSI's facilities*, which enabled it ultimately to dictate the sale price » (Italics added).

The Respondent does not exaggerate, Mr. President, when it says that Applicant's case is based four-square on the concept of a conspiracy by the Italian Government, or concerted action by Italian Government authorities. Applicant cannot deny this. Its submissions must therefore suffer the consequences.

Now it is not that the case is inartfully drawn. It is that it is an *espousal* case. It is as if Applicant, in preparing its case, had to pay uncritical heed to Raytheon and to its point of view.

A classic example was pointed out in correspondence last month with the Registrar. An attempt was obviously made by Raytheon over the years to falsify, suppress or paper over some small but critically important portions of the evidence — to pretend that they didn't exist or to conceal their existence. In a matter of this seriousness, surely such an attempt would only have been made if what was being covered up was of great importance. It is, in effect — can be taken, in effect — as a form of admission against interest that these indications were the best evidence of relevant facts as to state of mind.

What do we find that was in the undoctored manuscript minutes (kept by hand) of the critically important meeting between Raytheon's top officers and President Carollo of Sicily, but omitted from either or both of the typed versions of those minutes, ostensibly on the ground that they were « summarizations »? (They were not summarizations).

I refer to the meeting of 20 February. Now the Court will recall that five weeks before the requisition, the top officers of Raytheon — Messrs. Adams and Clare, whom we know, and Mr. Profumo — stated that they expected at that meeting that there would be an *inevitable bank crisis* a full month before the requisition and that a week later they expected to « *run out of money and shut the plant* ». These words had been dropped — carefully dropped, since the rest of the typescript seems to follow the handwritten minutes more or less word for word — from the texts filed with the Court.

Other words were dropped too, such as that March 8 was « *stressed repeatedly* », at that meeting at which Mr. Adams was present and Mr. Clare was present, as « the absolute limit for a shutdown, a shutdown due to [a] *total financial crisis* ».

The statement was even made by Mr. Adams, who was then the Chairman of the Board of Raytheon, at that meeting — but it was excised from the typescript — that, without more money, ELSI would « *shortly disappear* ». Where is the possibility of an « orderly liquidation », in the case of a company that was expected to shortly « *disappear* »?

Most of the evidence, such as it is in this case, has been produced by Applicant. And in fact it was produced by Raytheon and, as the Court can see, some of it has been tampered with. How reliable is the rest of it? I do not know.

Moreover, how forthcoming is it? It took a request, only a few days ago, under Article 62 of the Rules to obtain discovery of critically important financial statements of 30 September 1967, financials that Mr. Hayward and Professor Libonati have been so interested in. Now those were not filed voluntarily with Applicant's pleadings, although one might have expected that they would have been considered rather important, in the interests of justice and the amicable resolution of a matter of this kind.

In reverse, then, this is proof positive of the inherent value of the traditional rule that local remedies must be exhausted. Because, if they are not exhausted or not even seriously attempted — as is the case in the present proceedings — the result will be or may be something very much like this case before the Court today — a half-digested, conclusory, ill-established, impressionistic series of complaints without factual justification, based solidly on a conspiracy theory that has all the earmarks of a corporate grudge fight, and none of the signs of careful and critical juridical review.

In our judgment the point concerning the hidden agenda, or conspiracy, or concerted action, is a critically important one for the outcome of this case. And this point must be made clearly and unambiguously: in fact so clearly that Applicant will never be able to wriggle away from the horns of the dilemma that it has brought upon itself.

It must be made so clearly that the Court can, without regret, simply dismiss this entire proceeding as ill-considered and unjustified. The point, Mr. President, goes far beyond the issue, really, of whether or not there was a so-called « conspiracy ». It goes really to the integrity of Applicant's case.

I quote these passages here not merely to make it painfully clear perhaps that Applicant's case really did depend on an unproved assumption of concerted action. They are quoted here to illustrate to the Court directly: first how deeply this matter has infected the entire case of Applicant, and second how it is in fact impossible for Applicant to purge its case of these unproven assumptions.

In the Memorial (p. 43), Mr. President, it was stated that:

« the Government of Italy *skillfully took advantage of its own commanding position* and its initial wrongful requisition to acquire ELSI's plant and assets at a reduced price for the use of their own commercial enterprise. ... Having caused the bankruptcy, the Government of Italy *further shaped its results*, to the detriment of Raytheon and Machlett and the benefit of IRI ». (Italics added).

Then the Memorial said (p. 44):

« With the requisition, Italy » — this is important — « *embarked on a course of activity aimed at acquiring the bulk of ELSI's assets for a public enterprise at less than fair market value* ». (Italics added).

And again (p. 60):

« As shown above, a *principal object of the requisition* was to prevent Raytheon and Machlett from disposing of ELSI's assets. The Government of Italy wanted to acquire the assets itself and was not prepared to pay for them as of 1 April 1968. The requisition met the immediate political need of responding to the local outcry against the plant's closing, while *giving the Government of Italy the opportunity to plan its acquisition strategy* ». (Italics added).

Finally (p. 62), concerning the litigation against Raytheon for the payment of ELSI's guaranteed debts, the Memorial said:

« The evidence indicates, moreover, that these suits were not only a foreseeable consequence of the Government's actions, but *part of its plan to shift the costs of its actions* [viz., the bank suits] *to Raytheon* » (Italics added).

In the Reply, one finds the same assertions of conspiracy and concerted action, a hidden global agenda on the part of the Italian Government. Thus (p. 147):

« the Respondent was completely unresponsive to Raytheon and Machlett's efforts to stabilize ELSI financially, *precipitating the conditions* which led to the ' social unrest '» (Italics added).

No, I do not make this up. This sentence actually says that Italy deliberately did not intervene to help out ELSI, in the periods before those last days, and that Italy therefore precipitated ELSI's financial crisis! That is what it says. And the Reply also says that:

« The *real purpose of the requisition* was not to stem ' social unrest ', but to wrest control of ELSI's plant, *equipment and assets from its rightful shareholders* ... That purpose was arbitrary ». (*Ibid.*, italics added).

It would have been. The deep dependence of Applicant's case on the hidden premise of concerted action did not end with the written pleadings. As my colleague, Avvocato Caramazza, pointed out to the Court on Tuesday morning, the recent oral statements of Applicant's counsel were loaded with implications and innuendos to just the same effect.

In order to complete this exercise, I would like to touch on a few of the less gracious examples. They are possibly less overt than the many examples I have just cited from the written pleadings, because probably it is more difficult to stand up and say these things than it is to write them.

The Deputy-Agent, Mr. Matheson, alluded — in his catalogue of « undisputed facts » — to an « *intention* » on the part of the Italian Government, ostensibly evidenced by statements beginning before the requisition, « *to take over ELSI for itself* » (C 3/CR 89/1 of 13 February 1989, p. 252; italics added).

Later on, on that same morning of the first day, Mr. Mahteson said that:

« The Respondent clearly wanted ELSI for itself yet was unwilling to participate in ELSI on a lawful commercial basis. The *Respondent's tactics continued* following the requisition » (*Ibid.*, p. 265; italics added).

On the next page, he said that:

« Subsequent events [subsequent to the first bankruptcy auction] suggest that this too was part of a *national government plan* » (Italics added).

Even Professor Gardner was not immune from imputing a base and sinister plan to the Respondent. He stated that:

« Through the ensuing bankruptcy process the *Respondent's plan to take over ELSI through its State-owned conglomerate was brought to fruition* (3) ». (Italics added).

Mr. President, what are we to make of all this? As I have just noted, one of the things that it brings out is the wisdom of requiring the exhaustion of local remedies in espousal cases.

And this is particularly true, I would say, in commercial espousal cases such as this one. Here complex facts are readily susceptible of distortion, or incomplete recollection; the personal ill-feelings of corporate officers can readily be vented in the construction of a corporate response, hostile to the host country, but which, in a court of law, must be tested against the measure of objectivity.

The best way to test it is to require proof of the company that claims to have been injured. This the United States has not done of Raytheon or, if it has, it has not produced the fruits of that enquiry in this Court. For there is no evidence of any conspiracy, of any concerted or parallel action.

All that the Court has to deal with here is the recitation of a series of events, joined with assumptions and innuendos. They are set forth descriptively and impressionistically. They are repeated over and over and over again until they somehow magically acquire the specific gravity of actual facts.

There is an interesting analogy to the hidden conspiracy. That is the unjustified and silent amalgamation of all Italian things and persons into one enormous entity, known as « the Italian Government ».

Mayors, officials, trustees, prefects, business executives, regional presidents, central governmental officials, bank officers, lawyers, counsel, judges, potential bidders at auctions, officials conducting auctions — all of these, and many more, are magically homogenized into a uniform group of « Italian Government representatives », so that anything said or done by any of them can, by virtue of that homogenization, be attributed not merely to the Italian Government but also to each other.

There is a similar assimilation process at work on institutions: IRI, ELTEL, ITALTEL, the Region of Sicily, the city of Palermo, the bankruptcy courts, the banks, the regular court, the national government by its ministries, individual ministries, all the ministries, and so forth.

For some of these entities, of course, Mr. President, there is full justification for an attribution to the Italian Government. But that is not true for all of them nor is it true in such an indiscriminate manner.

What about IRI? What about the banks? What about ELTEL? Why, why must we assume, without any proof, that whatever they say or do is official governmental action?

The common denominator is of course nationality. This common attribute seems to inhibit careful thought, and arrest cogent analysis. And, at the end of the day, because of the « Italian » nationality of these people and these institutions, are we somehow to accept, without more, that it is appropriate that they can all be assimilated one to another?

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(3) C 3/CR 89/3 of 15 February 1989, (p. 315); emphasis added.

And are we also to accept, without factual evidence, that just because the actors are all of Italian nationality and just because the acts and omissions complained of occurred in Italy, there is therefore some content to the inarticulated major premise that there was an active and hidden conspiracy by the Italian Government, or a concerted series of action by its officials, to undo ELSI from Raytheon and take it over for itself? We submit no.

To turn back now to the other horn of Applicant's dilemma: the assertion that there is a lack of causation — an inadequate causal nexus — between one act and another. This is really another way of describing a lack of evidence. It is the same as saying that the burden of proof has not been successfully carried by Applicant. If Applicant cannot prove that *A* caused *B* and *C* and that *B* and *C* are related to *D*, it has neither produced enough evidence nor carried its burden of proof in that context.

In all probability it did not carry the burden of persuasion very well either: this elegant sister of the plainer burden of proof enters the court-room only when there is a rational choice to be made by the tribunal concerning the weighing of evidence that has been introduced and that would otherwise appear to have been adequately proven.

Yet, the burden of persuasion is not carried if, despite whatever evidence there may have been, an Applicant cannot establish and maintain a sufficient causal connection, or nexus, between the international wrong and the international injury.

First, the burden of proof.

The facts to be proven in this case include facts relative to state of mind — such as the attitude of Raytheon's management on 20 February 1968 or later about whether ELSI could possibly be viewed as a « going concern ». They also relate to factual conclusions — such as the conclusion to be drawn from that state of mind as to whether ELSI was in fact a « going concern ».

Applicant's case, Mr. President, must be objectively and realistically seen as crossing a « bright line » of proof. Their case must be made by a preponderance of the evidence.

Yet very few — if any — of the points critically relevant to the case of the United States have actually been supported by any evidence, and certainly not direct evidence. Now one might have hoped that the unsupported points would have slowly faded away — rather like the Cheshire cat in the tree — but it now appears that they need a little encouragement to disappear.

Then we have the burden of persuasion. Even if all the facts are as stated by Respondent — I say facts, not conclusions — there still remains another « bright line » on the terrain of the litigation. Applicant must also cross over that one to succeed.

And the hard conclusion is then that, unless Applicant can carry the twin burdens of proof and persuasion, can win every single point important to its case, and can establish the necessary causal link between each one, the Applicant's cause of action does hold water, and the case must be thrown out. Now it is a commonplace that this is an advantage for Respondent. But perhaps, Mr. President, it is only the melancholy advantage that accompanies the pleasure of being sued.

Each of the propositions that comprise the chain of progression from early 1968 through the final bankruptcy settlement and adjudication of third party debts in 1969 must form an unbroken line. Each part depends on every other. No part can be independent. The sequence must be intact.

Now, there is no way that the United States submissions can prevail unless they can prove the concerted action of which they complain, or unless all these « acts and omissions of the Respondent's agents and officials at the federal and local levels (including IRI) » are somehow otherwise connected by proof and by reasoning. But what is interesting is not just whether Applicant can escape the pitfall or the dilemma of its answer of 17 February. The more important thing is that Applicant cannot escape the underlying logic of the point. Most of its claims for the responsibility of Italy under the Treaty and Agreement fall away, unless it also asserts, and proves, that Italy did something that can be connected into a unified whole.

Applicant must prove that Italy did a series of things — a march of events joined by an inexorable and ineluctable chain of necessary cause and effect. But that argument requires proof of each step in the chain, just as much as any assertion of concerted action requires a similar proof.

And unless it can be proved that the Italian Government participated, in such a manner as to attract responsibility in international law, in a silent or hidden conspiracy underlying the asserted boycott for example — or unless it can be convincingly argued that the bankruptcy of ELSI was solely or even principally due to the requisition, and not necessitated by its terrible financial condition — then the chain of causation is broken, the logical imperatives of the case have evaporated, and Applicant's cause of action will have to go the same way.

On this analysis, there are three main problems with the case of the United States. Mr. President, the first problem is that the company described in the pleadings of the United States is an entirely different company from ELSI.

It was a different company, one that could perhaps have been known as « Raytheon Italia », that had run on the rocks and shoals of commercial difficulties in 1968, but as to which it was still entirely possible to conduct an « orderly liquidation ». But this was not ELSI. This was not Elettronica Sicula. It would have been a wholly different entity — a sort of heroic version of ELSI.

It would have had to have been a company that had not made the consistent losses described on Monday by Professor Libonati. It would have had to have been a company that would not give its employees pink slips in a disorderly manner, or without proper notice. It would have had to be a company, one would think, as to which the senior officers or the shareholders had already begun to obtain some concrete results in a search for buyers of product lines or divisions, in an orderly liquidation. Having regard to the consistent record of losses, one would have thought that it would have been a company as to which some decision of orderly liquidation would have been made a lot earlier — years earlier maybe, say even in 1965!

What did we learn from the testimony of Mr. Adams and Mr. Clare? Well, a number of things, but in this context first, that it was very clear indeed that Raytheon had decided not to put a penny more into ELSI perhaps as early as the late summer or early fall of 1967 (4). We learned that the top officer on the spot did not think that they could make the next payroll (5). We also learned that the same officer conceded that ELSI was « belly up just before the requisition (6) ». We learn that he said that « It was impossible to get rid of anybody there (7) », and that even to get « rid of two people off the television line » caused a three-week strike (8).

Nonetheless we also note that this same officer, because of the « very peculiar » thing « that the Italian staff in the office would not touch them ... personally inserted about 800 letters into envelopes and stamped them and took them round early in the morning and posted them off (9) ». Now it was an imaginary workforce, an illusory workforce, that could be dismissed in this way without, obviously, severe repercussions. For, if the dismissal of two workers can cause a strike of three weeks, how many weeks would be caused by the dismissal of 800?

The heroic or imaginary ELSI, however, was a company that could withstand these pressures. It perhaps was a company where these other « curious » things had not occurred. In addition, the heroic ELSI was an entity that was perfectly capable, in Applicant's view, of being sold to a willing buyer at current market values — of realizing a fair sale price.

The imaginary company had good products, good customers and good work-in-process. The real ELSI had none of these. The imaginary company had sufficient funds to meet the next few payrolls, at least. It surely could have met — or would have had to have made provision to meet — the April debt amortization payment I referred to. The real ELSI could do neither.

Thus the real ELSI had to dismiss 80 per cent of its workforce, like it or not, no matter what the risk. It had to shut down and close its doors. It could not go on while the Raytheon executives, Mr. Clare and Mr. Oppenheim, sewed up the last details on the spin-off proposal with Company X and Company Y, international firms eager to acquire portions of ELSI's pro-

(4) C 3/CR 89/2 of 14 February 1989, (pp. 271, 286).
(5) C 3/CR 89/2 of 14 February 1989, (p. 287).
(6) C 3/CR 89/2 of 14 February 1989, (p. 287).
(7) C 3/CR 89/2 of 14 February 1989, (p. 277).
(8) C 3/CR 89/2 of 14 Febrary 1980, (pp. 277 and also p. 290).
(9) C 3/CR 89/2 of 14 Febrary 1989, (p. 279).

duct lines and its considerable goodwill. It could not continue in existence while the sale and disposition of plant, inventory, finished goods and work-in-process was being brought to a conclusion to Italian or French or German purchasers.

That would have been an « orderly liquidation », wouldn't it? But that was not ELSI. That was not the situation here. The losses of the real ELSI had become completely crushing. The real ELSI was « doomed » by excessive interest and royalty payments. Its business was not flourishing — not even standing still. As Professor Libonati said, it could make only losses. It is sad to say, and it is sad to deal with a record of failure, but the real ELSI was a total disaster. The workers had occupied the plant, off and on, for weeks. There were wildcat strikes. The production lines had been stopped. The books and financial records had been moved from Palermo. No official business was being conducted in corporate headquarters — meetings were being held in Rome.

This was the real ELSI. It was a company in disarray — in flight. The real ELSI was a rout. The heroic ELSI was an utterly different animal, and, indeed, like the unicorn, it is one that sadly never existed.

The second problem with Applicant's case is that there is in fact no direct evidence of any of the critically relevant facts. Compared to most cases that have been resolved by the Court in the past, the evidence in this present case is not only highly charged with assumption and innuendo, it is also circumstantial in the extreme.

In order to cope with the inconvenience of a lack of direct evidence, an interesting pleading technique has been developed by the United States. It is proof by pleading, rather than pleading by proof: it is a repetitive technique, almost of incantation.

The United States pleadings, somewhat irritatingly, assume that claims and suggestion can be considered, established, or proven, if they are repeated frequently or vehemently enough — and then if they refer backwards to what was said earlier. Yet none of this is proved by any direct evidence. And such a proof is as fundamental to this case as – the Court will, of course, remember – was the question, in *Corfu Channel*, as to whether mine damage to the Saumurez and « Volage » had in fact occurred.

Reference is made to Applicant's case as if it had been proven, four-square, in law. It is a critical flaw. It is a reverse *petitio principii*. It is not merely begging the question; it is begging the case ([10]).

A single example — consider the opening pages of the United States Memorial (in Part I) once again. In the third paragraph it was stated that:

> « On 1 April 1968 ... the Government of Italy requisitioned ELSI's plant and related assets, *in order to prevent the liquidation and to facilitate the acquisition of ELSI's assets by Italy's commercial conglomerate* ... [IRI] » (Italics added).

That is what it says; that is how the document opens.

But what evidence is there in this case that there was an *intention formed* on the part of the Government of Italy to do this? Whose statement represents this state of mind? Did the Mayor of Palermo really hold a brief for IRI's acquisition plans? Where is the Court to find any respectable evidence, or hard proof, of such a plan?

Now none of this can satisfy the « common sense » test which usually succeeds when all other devices fail. Does it make common sense, Mr. President, to suggest that the Italian Government was at pains to dispossess Raytheon of ELSI in order to convey it to its own subsidiary entity, if in the course of so doing it was necessary for Italian State-owned banks to take enormous losses in the process? *It just does not make sense.*

In fact, on this theory, have the ultimate losses to the Italian State-owned banks been figured into the total « price » that the Italian Government is supposed to have « paid » to acquire the last vestiges of ELSI?

([10]) Italian Rejoinder, (pp. 207-208).

Seriously, Mr. President, if this whole affair really was a concerted action by the Italian Government and its representatives, why should these bank losses — no doubt reluctantly incurred in the overall collapse of ELSI — not have been worked into this « price » in the form of a huge offset or deduction from the damages sought in this case? The fact that no such account has been taken of losses like this, which were very substantial, is just another indication of the artificiality, if not the inconsistency, of Applicant's claim.

At least the point indicates one thing. If the « Italian Government » had set its cap at dispossessing ELSI from Raytheon it surely could have done so in a far more economical manner. There are far less expensive techniques of effecting a « creeping nationalization », if that is what one is after.

Yet what, one may ask, is wrong with circumstantial evidence, when no other kind is to be had? The Court's jurisprudence in this area follows a rule of reason and it respects the facts and circumstances of each case. In *Corfu Channel* it was tragically obvious that there had in fact been mines; their lethal effect had been plain to see. In the *United States Diplomatic and Consular Staff in Tehran* case, there was no question concerning the fact that United States Embassy employees were being held hostage. This was notorious and also plain to see. In the *Military and Paramilitary Activities in and against Nicaragua case* there was no real denial that the air attacks and similar incidents had in fact taken place. Their effect and existence were also plain to see, and in fact undenied — and even admitted against interest — by high US officials. This is where it becomes difficult to react to a request to agree to « disputed » and « undisputed » facts because, in the present case, there is surely no argument that a requisition did occur.

There is no argument that there was a bankruptcy, or that the properties of ELSI were ultimately disposed of to ELTEL by the receiver for a certain amount of money. Nobody is contesting those kind of things. Of course they are undisputed. But the real argument here is about a different order of things. It is about the motivation or the cause of the requisition, the nature, the legal effects to be attributed to it — what its necessary result in law was.

These are the elements that can, under appropriate circumstances, engage international responsibility: not just a single isolated action such as a bankruptcy or a requisition, without more. The real fact that is in controversy in this case, Mr. President, is whether there was a government-wide conspiracy, a hidden agenda, on the part of the regional and national authorities of the Government of Italy to shut down ELSI and let it wither on the tree, and then pluck it after a silent boycott of the bankruptcy auctions. And one might say that if one does not find a government-wide conspiracy or a hidden agenda, that must affect the characterization to be given to the requisition of the plant by the Mayor of Palermo.

Indeed, it is remarkable how highly the Applicant's case is coloured by innuendo and unjustifiable characterization. A fine small example is the rigid, deliberate repetition of the impassioned and undiplomatic comments by President Carollo in his memorandum of 20 April 1968[11], and the mistranslation of the future indicative into the English imperative « *shall* », the point made on Tuesday by my colleague Professor Bonell.

We were, of course, gratified to note that Professor Gardner confirmed our analysis of the word « shall »; in his discussion of Article I of the Supplement he stated that « [t]he terms of this provision — ' shall not be subjected ' — are imperative and unqualified [12] ».

Another example is that it is in effect asserted that unnamed Italian authorities secretly conspired to cause purchasers not to appear at the auction sale. This has not a fragment — not a fragment — of evidence to support it. Quite to the contrary: the bankruptcy sales were widely and publicly advertised all over Europe. The notices are in evidence, and were filed at least with the 1974 Claim. Professor Bonell noted this point on Tuesday [13].

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[11] Annex 38 to the Memorial.
[12] C 3/CR 89/3 of 15 February 1989, (p. 318).
[13] C 3/CR 89/6 of 21 February 1989, (p. 407).

Now, does Applicant not have to prove something more, in order to establish a « conspiracy » or a « boycott » — deliberate boycott — of auction proceedings, than merely asserting that no purchaser showed up and that there must therefore have been a boycott? Of course it does.

If an auction is taking place, and if the ultimate buyer does not go to the auction hall on the first day, did he « boycott » the auction? And if he « boycotted » it, and if no one else showed up, can we conclude that he also caused everyone else to « boycott » it? In fact, anybody who did not show up at the auction, no matter who they were, theoretically would have « boycotted » the auction. Now, in neither instance is there evidence of any kind, and this point just does not make sense.

And you cannot answer questions of this sort, Mr. President, by stringing together, as Applicant's pleadings have done, a series of unsupported innuendos, conclusions and repetitive inferences of mixed fact and law, instead of presenting some hard, clear evidence that certain things were in fact so, and that certain things in fact were done.

Even then they would have to link clearly, and unambiguously, to the Treaty. It is similar to the burden of proof. It could be called the burden of interpretation. It is not acceptable for a sovereign State to be held responsible for violating international law and treaty obligations on any other basis.

The third problem, Mr. President: there is no necessary chain of causation and causality from the act or omission to the injury claimed to have been suffered.

It is a commonplace that there has to be a causal connection between the asserted act or omission and the injury suffered. This is true of course in international litigation as much as it is in municipal law. Now, if there is an intervening cause — and if the injury is not a necessary consequence of the act or omission — you cannot find responsibility. It isn't there. And the Italian Rejoinder has set forth the principles and authorities (14) and Professor Monaco yesterday reminded us of the law on this subject.

One of the key links in the chain — here, in this case — is the actual condition, as the Court is well aware, of ELSI on the eve of the shutdown. If you can prove that ELSI was in disastrous shape on 21 March 1968 — and I think it difficult to hold that it could have been in any other condition — then that seems to go to the issue of making the value less attractive, and the possibility of an « orderly liquidation » hopelessly remote. 21 March, 29 March, any of those dates before the dismissal notices were sent, will suffice. Was it able to be liquidated in an orderly manner? Now, the pleadings, of course, are replete with evidence advanced by Italy that ELSI was grossly overburdened by debt, undercapitalized, and was even then at a severe shareholders deficit.

This evidence has never been rebutted. Why? Because it is not rebuttable.

Neither side can deny that ELSI was a real money-loser. In the words of Mr. Adams, it was shortly going to « *disappear* » unless it could be shored up by a further injection of working capital (15). It was « *belly up* just before the requisition », according to Mr. Clare (16). And far from being a going concern, ELSI had already gone; in a familiar American expression, — sad to say, — it was a « goner ». The requisition could not have made much of a difference, if any.

Where then is the causal link between the requisition and the bankruptcy? What is the key point? Is it not that the financial condition of ELSI was the thing that made it necessary for the Board of Directors to vote bankruptcy? It was not the Mayor's requisition.

If the company had been healthy and a « going concern », and the Mayor requisitioned it, why would there be a need to declare bankruptcy? As Italy pointed out in its Rejoinder (17), ELSI had in effect acknowledged that it was unable to pay its debts, « as is clear from the fact that it was intended to satisfy unsecured creditors, claims to the extent of only 50 per cent ». Now if ELSI had been able to pay its debts, why could not Raytheon (and Machlett, for its 1 per cent) just have taken their lumps and endured for one month or two months? Sort it out?

(14) Italian Rejoinder, (pp. 234–236).
(15) See the handwritten minutes of the meeting of 20 February 1968.
(16) C 3/CR 89/2 of 14 February 1989, (p. 287).
(17) Italian Rejoinder, (p. 197).

Why not? Could it have been that there was no realistic hope whatever that the offer of 50 cents on the dollar to the senior creditors would be acceptable? Could it have been that the situation was already too far gone?

The answer is: obviously the enterprise was no longer a going concern; obviously it could not seriously offer anything more than 50 cents on the dollar for the vast amount of corporate working capital obligations it had; and obviously it was insolvent and technically bankrupt, it could not pay anything. Everything was coming due in a matter of days, just before the requisition.

It is useful here, Mr. President, to apply a form of what we, in the United States, like to refer to as a « but for » test. Would X have happened, *but for* Y ? Has Applicant sustained the burden of proof that, *but for* the requisition, ELSI would not have gone into bankruptcy; would have been an attractive target for an assets purchase, and could have been liquidated in an orderly manner at current market values? No: Applicant has not! And yet unless Applicant can satisfy the « but for » test — right then and there — it loses the case. You cannot murder a dead man. ELSI was already a dead company.

Then how is the « but for » test to be met? By making sure, obviously, that the chain of causation is impeccable. And yet here there is no objective realistic connection between whatever the Mayor of Palermo did or didn't do, or whatever the courts did or didn't do, and the ultimate damages asserted to have been suffered by Raytheon.

Mr. President, the banks would have sued *anyway*. The guarantees would have been called *anyway*. There would have been serious problems with finding purchasers *anyway*. All of this would have happened *anyway*, whether or not there ever was a requisition. Unless someone can produce a miracle.

This is a corollary perhaps of the old device in logical philosophy called « Occam's Razor »: that one should seek the simplest explanation, the least complicated explanation for things. And the simplest answer to what befell Raytheon and ELSI is that they suffered severe business reverses as a consequence of bad planning and management, inefficient communications and insensitive handling of the local situation. This is a business tragedy such as is frequently seen. It is not unusual. But it does not mean it is actionable.

If one cuts this case with Occam's Razor, one gets the same result that one does with the « but for » test. And it underscores the need for satisfying the burden of proof. Now if Applicant wishes us to believe that there is a more complex explanation for what befell Raytheon and ELSI, in order to invoke Italy's responsibility under the Treaty and Supplement, surely it is for Applicant to prove by a preponderance of the evidence that Occam's Razor should not be used to cut off its argument.

And stated another way: why should a respondent in a case brought by application have to prove that something did not happen, when the applicant has not been able to establish that it did? Is it for Italy to *disprove* something which, although not proved by the United States — and although not supported by factual evidence — is merely stated as a conclusion by the United States? Is it for Italy to prove that the requisition did not bring about the bankruptcy, or that bankruptcy did not cause the losses suffered?

No, to the contrary, Mr. President. It is the job of the United States to prove, by a preponderance of persuasive evidence, that the requisition necessarily did cause the bankruptcy, and that the bankruptcy necessarily in turn did cause the losses.

It has, very simply, not done its job. It cannot be satisfied with merely asserting something. Even repeatedly. It must prove it, and it must carry the burden right across the bright line of proof and persuasion — and carry that burden all the way down the field, and establish its affirmative case against Italy by a convincing preponderance of reasonable evidence.

The reason for this is that the consequences to Italy of a negative finding of responsibility in this case would be grave and serious. The United States has to do more than just state a claim: it must prove it by a convincing preponderance of the evidence — just the same way that Italy, were it suing the United States under the Treaty, would have to do.

Mr. President, I am coming to a more or less natural break in my presentation. I expect that it will take approximately one more hour.

The PRESIDENT: Then we are going to take a break now.

Mr. HIGHET: Good. Thank you Sir.

The Court adjourned from 11.10 *to* 11.30 *a.m.*

The PRESIDENT: Please be seated. Mr. Highet.

Mr. HIGHET: Thank you Mr. President. Mr. President, Members of the Court, just before the coffee break I had pointed out that the United States has to do more than just state a claim. It must prove the claim by a convincing preponderance of the evidence just as Italy, were she suing the United States under the Treaty, would have had to have done.

I now would like to turn to five main assertions of mixed fact and law upon which the case of the United States depends. They are the *grandes lignes* of the Applicant's case.

The *first* — I have of course said it repeatedly and it is one that the United States can neither escape nor avoid — is that there was a hidden conspiracy or concerted course of action on the part of the Italian Government.

But this has two parts. The *first* part is a *conspiracy of omission.* It is, in substance, that the Italian Government and its various dependencies deliberately failed to help ELSI.

The *second* part, the second leg, is a *conspiracy of commission*: to bankrupt, to requisition, to split up ELSI.

Let us deal *first* with the sins of omission. Amongst other things, it has been suggested in the written pleadings and certainly orally that the *Mezzogiorno* benefits that should have belonged to ELSI were not forthcoming and particularly [18], the preferential purchasing arrangements with State agencies were not concluded, that incentives and other benefits were not granted, that regional and national authorities had been of no assistance. And these statements are produced in essence to convey the message that somehow Italy and its various homogenized dependencies helped or had substantial part in placing ELSI in the difficulties in which she found herself by March 1968 and certainly even by 30 September 1967.

But nowhere is it clearly stated that there was any duty whatever on the part of any authority to give any of those benefits. And I mean that duty under Italian municipal law, a duty under the Treaty. No duty, none. Neither Mr. Adams nor Mr. Clare were able to say that they were certain that Raytheon and ELSI had an unqualified right to any of those benefits.

Now my colleague, Avvocato Caramazza, has explained these benefits to the Court, and quite honestly why they were really not available to Raytheon and ELSI. And again neither Mr. Adams nor Mr. Clare were able to testify that Raytheon or ELSI had effectively followed up, had done something, to pursue, to pin down, to make a determination, to obtain the rights, if any they had, that they might have assumed to be in existence.

Now it may have displeased Raytheon that such benefits were not available. I am sure it would have displeased Raytheon to find out that what it had been told by its lawyers and its advisers could not bear fruit but, Mr. President, this does not create a cause of action for Raytheon or ELSI. It does not justify a claim by the United States under the Treaty or otherwise.

There is not a single shred of evidence that I am aware of in this case that there was any benefit or purchasing allowance, *Mezzogiorno* benefits, transportation subsidy or otherwise, as to which ELSI was clearly entitled or Raytheon entitled that was requested and denied. There is no evidence. It is a *leitmotif*, this point, it is a bass counterpoint, to the main case. You hear it in the background throughout these pleadings as you read them and as you listen

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[18] *See for example* US Memorial (pp. 6-8-9); Adams Affidavit (Annex 9 to the US Memorial) at para. 28; Schene Affidavit (Annex 13 to the US Memorial) at para. 12; and Clare Affidavit (Annex 15 to the US Memorial) at para. 21–42; US Reply (pp. 127–128); and see (contra) Italian Rejoinder (pp. 204–205);

to counsel. It helps to lay the groundwork for the « conspiracy » theory. It sets the tone. But the point — such as it is — sadly is discredited by the uncontrovertable evidence.

One other point will prove this result. In the 1967 ELSI Reorganization Plan, the Clare Report, which you will recall, Mr. President, the Raytheon officials suggested that this should be a modification of the *Mezzogiorno* programme and regulations in order to permit ELSI to claim thereunder and to benefit thereby (19). Well, common sense requires this to be in effect a black–and–white admission that ELSI was not otherwise entitled to any of these benefits.

I should add in this context that, as part of this *leitmotif*, Raytheon and Applicant appear to studiously avoid referring to the fact that Italian public authorities indeed gave a huge amount of assistance to ELSI over the years. This does not really come out of the case. I am referring here to 7 billion lire in low–interest loans made over the decade from 1956 to 1966, that Mr. Adams did not seem to recall even when I asked him about them (20).

And there is more importantly, the acts of commission, the *second* leg of this first point: the alleged conspiracy to bankrupt and split up ELSI. Now I have said, and it is true that this is not proved by evidence before this Court, there is neither proof nor persuasion and every component of this theory just evaporates when you look at it carefully.

Mr. President, rereading the famous 20 April Memorandum, the « shall and will » memorandum, that was cited *verbatim* I believe once by Mr. Sofaer, two or three times by Mr. Matheson on the opening day: Is that Memorandum really as threatening as the United States would have it be? Can it not also really reasonably be interpreted in a different way? It is an impassioned statement, an emotional prediction, as to what the consequences would be. Not just a threat.

Well, indeed, it is not inconsistent, such an analysis, with what was said when, on Wednesday 27 March, President Carollo had warned the Raytheon negotiating team:

> « that if we proceeded [that is Raytheon], if we proceeded with sending out of the letters of dismissal, then the plant would almost certainly be requisitioned; that he [Carollo] was prepared to pay the people for 1 1/2 months while the liquidation of the Company was sorted out; and that the Region and the unions, together with the Central Government would then prepare for the liquidation of ELSI, with subsequent rebuilding » (21).

What was wrong with that?

Was it then prudential, or realistic, for Raytheon to conclude that « this was nowhere near a definite enough offer for Raytheon, Lexington, to accept (22) », having regard to the fact that the alternative to what the kind of thing that President Carollo was suggesting here was what? It was complete disaster. That was the only alternative.

Moreover, had Raytheon not in fact had « fair warning »? What did they expect to happen when dismissal notices were sent to about 800 out of a 1,000 employees over one weekend, in a year of great unrest, serious economic trouble, serious unemployment in Italy and the Region and when their own senior officers knew perfectly well, as came out of Mr. Clare's testimony, that the discharge of only two workers had tied up the television line with three weeks worth of strikes (23)? What else did they expect? But that is not Government action. It is assumption of a risk. It is a very deliberate refusal to take into account the realities of the situation.

On Friday night (29 March) — I point out that I checked the calendar and it comes out to be a Friday night — the last real meeting of the Raytheon team and the local officials started at 9.30 p.m., and among other things, Mr. Carbone:

> « commented, that, at this hour of the night, we [that is to say, the Raytheon team] would have to take the word of the Prime Minister of Italy as we could not expect him to put something in writing within the next hour or so ... (24) ».

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(19) Annex 22 to the Memorial, p. 41.
(20) C 3/CR 89/2 of 14 February 1989, (p. 274).
(21) Exhibit F to Clare affidavit, Annex 15 to the US Memorial, p. 2.
(22) Exhibit F to Clare affidavit, Annex 15 to the US Memorial, p. 2.
(23) C 3/CR 89/2 of 14 February 1989, (p. 277).
(24) Exhibit G to the Clare affidavit, Annex 15 to the US Memorial, p. 3.

Of course. How could you expect a Prime Minister to put something in writing at 9.30 p.m. on a Friday night. But this was not good enough for the Raytheon people. Extensive proposals were made — and I invite the Court to go back and look at precisely those Minutes in the exhibits — but again the Raytheon people balked. Mr. Clare:

« emphasized the danger of losing markets, losing people ».

He proceeded to lose them by himself, didn't he? ...

« and the need to either open the plant on full production as soon as possible or shut it. Any concept of an interim solution was really doomed to failure for those reasons ([25]) ».

This is like one of those children's puzzles where it is said: « What is wrong with this picture? » What is wrong with this? Why is it that he does not seem to see that he is doomed to failure anyway? They couldn't even meet a payroll, as Mr. Clare conceded on cross-examination. Yet, only two days earlier, the same negotiating team had been explicitly warned by Mr. Carollo that « the plant would almost certainly be requisitioned » if they shut it down.

To be fair, however, and looking again at the flurry of last-minute meetings — 26, 27, 29 March (Carollo, Carollo and Carbone) ([26]) — it is worth looking back over them. What is the overall impression that you get from these documents?

Is it not that the local, regional, and national authorities of Italy were all sincerely and deeply concerned about ELSI's terminal fiscal crisis, what would happen to the workers, what would happen to the Region? Of course that is true. It comes right out of the paper.

Does it not appear that all these officials, these homogenized representatives of the Italian Government, that they were doing their best to try to get something together, as best as they could, to salvage a disaster, an impending disaster — something which appeared to them to be right around the corner and to promise no good to anybody involved? How does it look like a conspiracy to *hurt* ELSI? Earlier I read that passage to the Court, before the break, where it was said in one of the written pleadings that the requisition was trumped up and that the Italian Government had indeed caused this crisis, caused this financial crisis, by not stepping in and intervening.

Why — this is becoming, as you see, Mr. President, increasingly, difficult to understand — why were Raytheon's executives — in the American expression — so « hard-nosed ». Why couldn't a little flexibility be shown? I asked Mr. Clare: he said no, the decision had been made. Mr. Adams testified very clearly that the decision had been made back in September 1967 that they were not going to invest any more money. But why did Raytheon's negotiating team continue stubbornly to assume the risk at this time? And now to be represented by their Government and to pretend, or to demonstrate, that they are shocked by the consequences — that they must have known perfectly well would have happened. I am not talking about a plot that they would have known about. I am talking about the simple human consequences of what they did in Palermo.

In fact we know, thanks to Mr. Adam's and Mr. Clare's testimony, that Raytheon had made the decision to cash out long, long before the end of March — unless something wonderful turned up, like Mr. Micawber. There was no possible « give » on Raytheon and ELSI's part. There was no way in which they could have moved a single centimetre toward the middle of the table in discussions with Carollo and others.

We can see, Mr. President, — by looking back — that, if anything, this made things irretrievably worse.

Why was it necessary, Mr. President and Members of the Court, for the Raytheon and ELSI officials to proceed in such a seemingly precipitate manner? The mailing of the letters of dismissal at 3 in the morning or whatever it was — the hurry to end it all — seem almost spiteful, with hindsight, trying to read between the lines. Consider how long it must have taken for two or three tired senior executives themselves to stuff 800 envelopes. How long do you think that

([25]) Exhibit G to the Clare affidavit, Annex 15 to the US Memorial, p. 3.
([26]) Exhibits F, G, and H to Clare affidavit, Annex 15 to the US Memorial.

took them at 2 in the morning, or whatever it was, while the local ELSI employees glared at them?

It is as if Raytheon and ELSI had wished to make it very clear indeed to the local and national authorities that this was somehow their mess, for which they too were responsible, and if they were not going to help Raytheon and ELSI get out of it, well then the devil take the hindmost. It almost comes out of reading merely the documents, and it is confirmed, I think, without question, by the direct and cross-examination testimony at least of Mr. Clare.

This kind of conduct or rigidity raises the suspicion — and it could raise the suspicion certainly — of yet another unspoken and unmentioned influence on the situation: something that we deduce or infer is there, but we do not really know is there, like the orbit of a dark star, the companion of Sirius. Something, for example, like whatever the effects would have been of that very restrictive investment programme of the US Government that went into effect in January 1968, that I have mentioned — or something, perhaps, more along the lines of a secret agenda on the part of Raytheon that we do not know about. There must have been something there to explain this. There really must have been.

Could it have been a plan to push the local authorities to the absolute brink; to disregard their warnings; to turn down requests for delay; to request everything in writing late on a Friday night, when you know you could not get it — all of this, perhaps, with the knowledge that if you did not obtain those written undertakings that they were trying to pressure the State authorities into, they would in a curious way be « sheltered » by something like a requisition that they were told would probably, or almost certainly, happen?

A requisition might allow Raytheon to get off the hook for the time being in a situation that was a complete disaster anyway — that they had not been able to work out. The company was « belly up ». There was not enough money to make the next payroll, unless they essentially fired four out of five of the workers.

There was nothing in fact that Raytheon and ELSI could do, given Raytheon's unbending decision to wash its hands of ELSI's operations and to make no further investment. Only Italy and the Italian local and regional authorities, and perhaps IRI, could perhaps « bail them out ».

But if they were not bailed out, and since they had made no progress whatever in arranging the sale of whole or part of ELSI's business on the famous « going concern » basis in the oft-repeated « orderly liquidation », werent' they really stuck? They were in a hole. They were painted into a corner. Look at it this way:

1. ELSI had been steadily doing nothing except lose money for years; it had never made any money.

2. Raytheon had long since made the decision not to put more money into ELSI.

3. We now know that ELSI was at a state of shareholders' capital deficit during the period we are worrying about.

4. Raytheon had tried, unsuccessfully, although seemingly even not very efficiently, to arrange for a buyer for all or part of ELSI.

5. Few purchasers bought ELSI's products — that is the problem, that is one of the reasons why the company did not make money — and so even fewer purchasers might be expected to want to buy the product lines;

6. Raytheon and ELSI had tried unsuccessfully to arrange for IRI or the regional authorities to step in — there was no obligation for them under the Treaty to do so;

7. ELSI had « run out of cash »;

8. It could not even make the next debt repayment coming due in April;

9. The labour tensions were such that it obviously should have been — it must have been — thoroughly well anticipated that these mass dismissal would simply cause an horrendous plant-wide strike, sit-ins, and goodness knows what else, and yet...

10. Mr. Clare mailed the dismissal notices and shut the plant.

The only conclusion that really can be drawn from this sad sequence is that this whole affair is at least 99 per cent Raytheon's and ELSI's own doing.

Raytheon made the decision not to put in more money. Raytheon was unable to sell off all or part of the plant, even though it had known *for five or six years* that ELSI was a loser. The Clare Report came out in 1967. They circulated it — as we learned in testimony — widely. They still were unable to sell the plant. Raytheon and ELSI could, or would not make a deal with IRI or the regional authorities for a bail-out, because of its policy against additional cash exposure, cash investment, by the mother company.

Raytheon and ELSI, Mr. President, knew the risks full well — that, if they dismissed 800 people and shut the plant, it would probably be the end of the road for the whole enterprise: That is what had to be the fact. How could anybody, even only listening to the evidence before the Court, sensibly conclude, otherwise? The situation was a disaster.

The conclusion could only be that Raytheon and ELSI were forced, by their own economic planning, into that decision and, it was they who, in fact, pushed the button that led ineluctably to the bankruptcy they voted on three weeks later.

The requisition by the Mayor of Palermo was a disruption, to be sure, but in the face of all the evidence it was a relatively minor one. The plant was already in terrible shape. The real disruption was caused by Raytheon and ELSI. It was the decision of Raytheon and ELSI to « fire » 800 employees without notice, in the middle of the night, that was one of the things that just obviously was to bring about this whole catastrophe — or, more properly, since it already was a catastrophe, that accelerated the conclusion of this sad business tragedy.

It really was Raytheon that caused the bankruptcy, not the Mayor of Palermo.

This is true, for two reasons:

First, it was Raytheon and ELSI's actions that inevitably triggered the requisition as to which Raytheon and ELSI had already been amply, and not necessarily maliciously, or even threateningly, forewarned. Wasn't it obvious what would happen — as night follows day?

Second, Raytheon and ELSI would have been staring bankruptcy in the face in any event, even if the workforce had peacefully gone off to « get jobs digging ditches », in Mr. Clare's poignant phrase » ([27]).

They would have been bankrupt, as Professor Libonati made plain on Monday, for the simple reason that they had debts coming due — even forgetting about the payroll — and they had no more cash to speak of and Raytheon was not going to add any.

800 million lire were due to Banca Nazionale del Lavoro on 18 April ([28]), plus even reduced payrolls, and as Mr. Clare had agreed that ELSI was going into the month of April with no more than approximately 22 million lire in the kitty, what other conclusion can you come to?

Now comes the Mayor of Palermo, requisitioning the plant on 1 April, after Mr. Clare has stuffed his envelopes and mailed his notices. This introduces a new element. It creates an escape hatch, a distraction, from the business failure that Raytheon had in fact created and maintained for a number of consecutive years.

Thus Raytheon in 1968 had nothing to « lose ». In this sense, it had already been lost. Either some real help might appear, in writing, over the weekend, that could have been acceptable to Lexington, or Raytheon would be taken off the hook and could blame the authorities for interference. And Raytheon would therefore suffer no more by being adamant, and perhaps could benefit by such conduct.

However, the Italian Government does not chose to make *its* legal case by surmise and speculation concerning motives, secret agendas, and conspiracies.

It just suffices to say that the conduct of the Raytheon officials at these meetings, at the critical period just before the requisition, appears not merely obdurate and stubborn, but almost incomprehensible, when read in the larger context of the consequences for the many employees of the second-largest employer in Sicily.

([27]) C 3/CR 89/2 of 14 February 1989 (p. 284).

([28]) Unnumbered Documents submitted by Italy and annexed to the Counter-Memorial, Vol. II, p. 179.

At least, Mr. President, what kind of « orderly liquidation » could possibly have been seriously expected to have been conducted, starting 9 o'clock Monday morning, 1 April? No payroll, no funds, no books and records, some employees occupying the plant, everything in disarray, corporate meetings held elsewhere? There is enough here to push the burden of persuasion all the way back to Applicant's side of the field — indeed, all the way back to his ten-yard line.

* * *

Now the second *grande ligne* in Applicant's case is that the requisition caused the bankruptcy of ELSI.

I have already dealt with much of this idea, but there is one important and relatively unattended point that should deserve fresh scrutiny.

This is the fact that the question of the causal link between the requisition and the bankruptcy has been thoroughly dealt with already, with first-hand information and within years — not decades — of the incidents in question. There was a whole string, as the Court will recall, of serious judicial proceedings that concerned ELSI. Why should they not be taken account of now?

Let me say first that, by failing to challenge the various actions in the Italian court system by remedies that should have been available to them, Raytheon and ELSI never put their causes of action to the test, with one obvious result that their case should later be found wanting under the international law requirement of exhaustion of local remedies.

But, going back to these cases, these Italian cases, my conclusion is that the law found in them, or at least parts of the law, should constitute a persuasive indication as to what the « law of the case » could be on this one point to a significant degree.

It is persuasive authority — of course, hardly conclusive or binding on an international tribunal, and certainly not on this Court — but nonetheless persuasive, on certain aspects of the factual situation and the legal conclusion that can emerge from those facts, unless there really are arguments that were not considered by those courts and that could have been made by Raytheon and ELSI, had they been in the proceedings in one way or another — and we have heard nothing about that, we haven't heard a peep from Applicant.

The point to which I draw the Court's attention is really, Mr. President, a very simple one, and it depends on a very simple analysis. It is the question whether it really was the requisition, or whether it was the financial condition of ELSI, that was the proximate cause of ELSI's bankruptcy.

The fact that this point was considered at some length in these cases should be given considerable weight, I submit, particularly since the United States has never even hinted at why those cases might be wrong. It does not even discuss them.

The first case was brought about by the complaint by the trustee in bankruptcy against the Minister of the Interior and the Mayor of Palermo ([29]); the second was the 1973 Judgment of the Court of Palermo ([30]) on that question; the third was the 1974 Judgment of the Court of Appeal of Palermo, reversing the lower court decree ([31]); and the last was the 1975 Judgment of the Court of Cassation ([32]). And I invite the Court's attention again to these decisions.

None of the proceedings has been challenged, as such, by the United States. No allegation has been made that the judges of these Courts were part of the conspiracy against ELSI and Raytheon. Applicant has not overtly made that claim, and has surely produced no shred of evidence that could support such an inference.

Of particular importance, Mr. President, is the Judgment of the Court of Palermo (supplemented by the decision of the Court of Appeal of Palermo). Now that judgment specifically

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([29]) Complaint dated 16 June 1970 (Annex 79 to the US Memorial).
([30]) Judgment of 2 February 1973 (Annex 80 to the US Memorial).
([31]) 24 January 1974; Annex 81 to the US Memorial).
([32]) 26 April 1975 (Annex 82 to US Memorial).

dealt with a number of the very issues that are before the Court here today ([33]) and they are worth a fresh reading in the light of these oral proceedings. The Court said, very simply:

> « It is clear from these conditions that the connection between the company's bankruptcy and the takeover is unfounded, as the defendant administration correctly maintained, since Raytheon–ELSI's economic situation had already been seriously compromised, as its own management explicitly admitted ».

And the Court continued, Mr. President:

> « the precise definitions above show that the bankruptcy was due to other, much more relevant causes and not to the takeover which had no such effect ([34]) ».

The Court of Appeal of Palermo agreed, and it pointed out specifically in regard to the causation issue that:

> « The fact that the company was insolvent during the time immediately prior to the Mayor's intervention — in connection with which we may recall the many and noisy demonstrations which this gave rise to, as we are reminded by the Court — [that fact] is sufficient to rule out any causal link between the subsequent requisitioning order and the company's bankruptcy and that the company's state of insolvency was decisive and sufficient cause for its failure ... ([35]) ».

Mr. President, as well as the three decisions in the case brought against the Minister of the Interior and the Mayor of Palermo, extending from 1973 to 1975, there were three more proceedings (including a decision by the President of Italy) ([36]). There is also a court decision approving the lease to ELTEL ([37]) and a judicial confirmation of the approval of ELTEL's offer to purchase the remaining physical assets ([38]).

If these judicial processes are excluded from the conspiracy theory, they contain the only real evidence before this Court on the issue of the causal relationship between the requisition and the bankruptcy.

What then happens to the chaim of causation? To the burdens of proof and persuasion? The question, I submit, Mr. President, answers itself.

* * *

The *third grande ligne* of Applicant's case is that the bankruptcy that then occurred made an « orderly liquidation » impossible.

The short answer is that it would have been impossible anyway. The idea of an « orderly liquidation » is legend. It is pure fantasy. The Rejoinder of Italy described it unarguably (p. 196):

> « the overall picture was as follows: the company had a chronic deficit; its production lines were shut down; its workforce was occupying the plant; its management had practically disappeared ([39]) ».

([33]) These are dealt with on pages 8, 9, and 10 of Annex 80 to the US Memorial.

([34]) Annex 80 to the US Memorial, p. 10. [Emphasis added].

([35]) Annex 81 to the US Memorial, p. 14. [Emphasis added].

([36]) These include the Judgment of the Prefect of Palermo of 22 August 1969 (Annex 76 to the US Memorial); the appeal to the Council of State of that decision, in turn decided on 19 November 1971 (Annex 77 to the US Memorial); and the ultimate ruling by the President of the Republic of Italy dismissing the appeal of that decision by the Mayor of Palermo, on 22 April 1972 (Annex 78 to the US Memorial).

([37]) Decree of the Civil and Criminal Tribunal of Palermo of 9 May 1969 (Annex 64 to the US Memorial).

([38]) Appeal of the 7 June 1969 order of the Bankruptcy Judge of the ELTEL offer to purchase ELSI's remaining physical assets, filed on 9 June and rejected on 20 June 1969. See Bisconti Affidavit, Annex 26 to the US Memorial, para. 24. (Exhibit 38 of « The Claim »; see Italian Counter-Memorial, p. 91).

([39]) Italian Rejoinder, (p. 196).

What more needs to be said?

How can anybody say, with a straight face, that this hopelessly disorganized business disaster was a « going concern », or that these assets could somehow be sold off at « current market value »? Yes indeed, or at book value with increments for goodwill? The idea is tragically ridiculous.

Yet all that is necessary for Italy to demonstrate to the Court is that there are serious *difficulties* with the propositions. We do not have to prove that they really are as absurd and far-fetched as they really are. It is not Italy that is suing the United States in this case. The burden, Mr. President, is on the other side.

Now there is a related point: that there was a harmful delay in appealing and lifting the requisition. But what unequivocal evidence of this exists? Where has the burden ended and what is the chain of causation there?

As the Court of Appeals of Palermo pointed out, the requisition order, moreover, was only addressed to ELSI's plant and equipment, not to all of its assets (40). The pleadings of the United States — and most specifically the Affidavit of Dr. Bisconti (41) — seem to imply that the requisition was universal and of eternal duration. Well it was not. The requisition expired in accordance with its terms by the end of September 1968.

Moreover, we know that ELSI's books had been removed to Milan a month earlier (42). We know that the production line was to be shut down by ELSI's own Board, that it had only been partially operative before, and that workers had been in and out of occupying the plant for some weeks.

The requisition or requisition decree was obviously protective. The evidence combines to indicate as much. But it is certain that the burden has not been carried, Mr. President, as to the contrary proposition. And the United States must bear this burden, it must discharge this burden and convince the Court that it was not obviously protective.

Even the Merluzzo Affidavit annexed to the US Memorial fails to convince the reader (43).

* * *

The *fourth grande ligne* is that there was a hidden conspiracy to boycott the bankruptcy sales and to prevent the buyers from bidding in.

Once again, it becomes repetitive to say this, but there are elements in this case which are fearsomely repetitive. The evidence supporting this is quite literally, nonexistent. There is not a shred of factual justification, not a shred to justify this claim. Now, Mr. President, the charge is even harder to entertain when it is recalled that there was widespread advertising of the bankruptcy sales in the international financial press.

If an international firm — say a hypothetical major European or Japanese electronics firm — reading the financial press, wished to buy ELSI's product line or plant, or inventory, or work-in-process or the whole thing or what-have-you: and if Italian enterprises were staying away and « boycotting » the bankruptcy sales, why couldn't the international firms then have benefitted from a lack of bidding competition?

Why wouldn't they have *taken advantage* of an alleged « boycott » — of the absence of other bidders? The point does not even make common sense. Merely to say that ELTEL or IRI affiliates did not show up — it is true they did not show up — is not to conclude that there was a « boycott ». It means that they were not interested in buying at a knockdown price for that particular auction, or wished the price to go further down, or were not interested in buying the particular mix of assets that were then being offered for sale.

In addition, the point begs the question as to whether there existed a duty to buy anything, or to pay anything. Where is this duty? What obligation does the Government of Italy have?

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(40) Italian Rejoinder, (p. 196).
(41) Annex 26 to the US Memorial.
(42) Nett affidavit, Annex 30 to US Memorial, p. 2.
(43) Annex 21 to US Memorial.

Or IRI or ELTEL: were they obliged to come in and bid at a high price? Was ELTEL obligated, under some Byzantine theory of international responsibility, to pay more than it « had » to? If so, how much?

We were reassured, of course, to hear Mr. Lawrence, Applicant's expert, support this point when he stated that he « would not criticize Siemens for seeking to obtain the best possible bargain » in relationship to an appraisal (44).

The *fifth, and last, grande ligne* is the assertion that certain consequential losses would *not* have occurred *but for* the requisition and the resulting bankruptcy.

Mr. President, these include the non-payment of debts by ELSI to Raytheon; the requirement that Raytheon satisfy its guarantees of ELSI's indebtedness; and the fact that an « unfounded » derivative suit was brought by five « Government-controlled » banks in relation to the unguaranteed loans to ELSI and the position of Raytheon as a leonine shareholder.

In each and every one of these subordinate claims the United States has fallen far short of carrying the burden of proof. It has not even carried it across the half-way line. There is no evidence to connect these secondary, contingent losses to any Italian Government action whatever.

Let us deal first with the derivative suit by the Italian banks. What is so outrageous about a suit of this type against a dominant shareholder? One notes perhaps with curiosity the ubiquity in the United States pleadings of constant references to Machlett Laboratories as if it were a substantial enterprise — one that had to be named at all times as if it were a co-joint venturer. You know, when I first saw the written pleadings I really thought that the case involved Raytheon and a giant and little-known electronics firm that had always been very publicity-shy. It then emerged that Machlett is only a tiny Connecticut company, 100 per cent owned by Raytheon, and that in turn it owned less than 1 per cent of ELSI.

Well, why is it inappropriate for Italian banks, in order to recover their big losses against a sole shareholder, at least to try to seek to establish that Raytheon was in substance, although perhaps not in form, effectively the 100 per cent owner of ELSI? Moreover, the very fact that they lost the law suits proves the fairness of the process. It is quite conceivable however that they might in fact have prevailed.

Now the non-payment of debts by ELSI and the calling of the guarantees were consequences as much of the financial disaster — « the total financial crisis » — of ELSI, as they were of anything else (this is true both of the guaranteed debt and the non-guaranteed debt).

And to hold, or to imply, that it was Italy that was responsible for Raytheon having to perform guarantees on its failed subsidiary's indebtedness is only possible if there is no reasonable doubt that, if Italy had not intervened in any way, such guarantees would not have been required to be performed for other reasons.

Was there any prospect that ELSI, with its unbroken string of loss years, could ever have paid these loans off? How? Especially how, given Raytheon's announced decision not to bring the capital up to the legal requirement, or not to invest more money? Was not the only prospect, Mr. President, for paying them off that ELSI would be split up, carved up and sold piecemeal or, perhaps, some kind of commercial miracle might have occurred? But there was no realistic prospect of repaying those loans: how could there be with consistent losses? It is simple. We are therefore talking about a company that was incapable of meeting its obligations in the ordinary course of business. In just another two weeks the guillotine would have dropped. ELSI was in fact a company that could not pay its debts when they came due and had to be put up on the auction block to meet its working capital loans.

On this series of unassailable premisses, one can see that the guaranteed loans would have had to have been called in any event, unless Raytheon had succeeded, *mirabile dictu*, in finding a buyer for all or part of ELSI, by the end of March or in the first week or two of April.

But, because Raytheon decided to dismiss the workers and « shut the plant » over the weekend of 29, 30, 31, it made practically impossible — and not merely improbable — the likelihood of finding such a buyer in the first few weeks in April. Unless Raytheon could have done so, by the time the instalment and the guaranteed loans became due, quite without regard to anything

(44) C 3/CR 89/4 of 16 February 1989 (p. 337).

else, they would have to have declared bankruptcy with no help, even cosmetic, from the local authorities.

Finally, in order for Applicant to have us take its proposition seriously, it really does have to show that there was, or could have been, one or more buyers or bidders in the wings, who could have, or would have, purchased something to stave off the bankruptcy or the performance of the guarantees and the repayment of the loans if the Mayor had not intervened.

There is no such showing, Mr. President. There is in fact no showing at all. I invite the Applicant to produce any evidence or even a description of any such possibility. One imagines that if there had been any, we would certainly have heard about it before today. In short, there was none.

And if there was none, then we go right back to the same sequence of events: that Raytheon and ELSI made the decision to fire 800 workers, and close the plant, that Raytheon and ELSI precipitated the obvious situation prevailing in Palermo in 1968.

The United States must not only meet these points of logic, and deduction and common sense. It must do more. It must produce evidence: facts, events, records, incidents, occurrences, correspondence, messages, telexes, cables, minutes. It must tell us that ELSI in fact did have a realistic chance of surviving the shutdown and disaster that would surely have befallen it when the workers got the word on Monday morning.

* * *

Mr. President, where the factual case of the United States suffers to a shocking degree, from an almost total absence of direct evidence, and relies on circumstantial matter, conclusions, and innuendos: the legal case of the United States also suffers a nearly analogous disability.

The claims of rights and obligations under the Treaty and the Supplement are just not sustainable. Yet the United States simply *says* that they are: in much the same way that it *says* that certain things happened and that, because of the circumstances, the Chamber should then draw certain conclusions. Yet the legal assertions come off no more strongly or better than the factual ones.

A quick glance back at these instruments will first inform the interested reader that ELSI itself was of course not broadly covered, being very much of an Italian corporation. ELSI's shareholders were protected but only in a limited and controlled way.

Professor Capotorti set forth yesterday our carefully measured and non-heroic interpretation of the Treaty and the Supplement. The United States Legal Adviser and Professor Gardner have both told the Court that they are concerned about the effects of the Court's interpretation of the Treaty instruments in this case on the other FCN treaties to which the United States is a party ([45]).

On our side, we would like to reassure them. The interpretation of the Treaty and the Supplement that they are urging upon the Court is wrong: it is a misinterpretation. So the effect of a finding by the Court consistent with the Italian position on these instruments will then, they will doubtless be happy to learn, support the integrity and cogency of those agreements, rather than disrupting them by heroic interpretations.

An example is the over-broad use of Article III of the Treaty by the United States. Professor Gardner has sought to make a major point out of Article III. I note the verbatim record of last Wednesday, ([46]). He went so far as to say that « Article III ... is really the heart of the Treaty », and devoted no less than six pages of argument to this point. Now, I know that Professor Capotorti has most ably presented the Italian case on the Treaty, but as an American lawyer, I cannot resist pointing out a few things, Mr. President.

Article III, as any US business or corporate lawyer with any experience will confirm, is specifically aimed at measures that might otherwise prevent the recognition of foreign corporations; or their exercise of the functions for which they were created; or their organization by

([45]) C 3/CR 89/1 of 13 February 1989 (p. 251); C 3/CR 89/3 of 15 February 1989 (p. 328).
([46]) C 3/CR 89/3 of 15 February 1989 (pp. 315-317).

the nationals of the other State; it is designed to prevent action that would prevent service on or election to the boards of directors of these companies by non-nationals — disqualifying them in other words; or restrict ownership by non-nationals to, say, less than 50 per cent of the equity or voting stock of those companies.

It provides also for recognition of corporate enterprises formed under the laws of the other party; it also permits direct branch operations, as opposed to subsidiary operations, under the laws of the host country; and finally, it permits corporations controlled by nationals of the other to engage in a specific laundry-list of activities as mentioned. It is a perfectly routine provision.

These provisions are technical, they are permissive, they are regulatory. They do not concern the ongoing operations of corporations — they just do not — save in the specific context of being able to engage, possessing the legal power, protected under the Treaty, in the types of activity specified, or to maintain a corporate identity — things like that. It is a heroic distortion of such provisions to assume that they concern the ongoing governance of corporate affairs in all other respects. And this is my point.

Professor Gardner and the Applicant attribute magical qualities to the words « organize, control and manage » in Article III, paragraph 2. They have become a sort of « universal solvent » in Applicant's case. Professor Gardner would have them apply to anything that is done to affect the affairs of a corporation, to any interference with the effective management and control. Is that what the Treaty says? By no means.

As usual, Lewis Carroll got it right:

> « ' When I use a word ', Humpty Dumpty said, in rather a scornful tone, ' *it means just what I choose it to mean — neither more nor less* ' (47) ». (Italics added).

But you cannot make words mean what you want them to mean.

Just because Article III of the Treaty uses the words « *organize, control and manage* » does not mean that we can use them out of turn, out of their normal context, by tacking on a concept such as « *effective* », or « *continuous* ».

With respect, Mr. President, the artificiality of Professor Gardner's interpretation cannot avoid popping out between the lines. I refer to his *Compte rendu*, (p. 317), where he said that « [a]t all times Raytheon and Machlett conducted their management and control of ELSI in conformity with Italian law, and therefore Article III provides a guarantee that they ' shall be permitted ' to organize and control ELSI ». Leaving aside the touchy issue as to how Machlett, of all companies, could exercise either management or control — I was much taken by the idea of Raytheon « conducting » its « management and control ». How does one *conduct* management? How does one *conduct* control?

It would be doing Professor Gardner, I think, a service, to restore his reading of the Treaty to its correct proportions and to limit the meaning of Article III to the subjects that it was clearly intended to cover, and not apply it as a universal solvent for all business problems and operations, howsoever described.

They can be picked up, where and as relevant, by the other provisions of the Treaty and the Supplement that Professor Capotorti has ably analyzed for the Court. It may well be that this Treaty is anachronistic, and should be updated and revised. But one thing is clear: in an old-fashioned way, Article III does not say more than what companies can do, or what shareholders and directors can be or do, and that corporations and branches should be cognizable and valid, under the laws of each party. It is not an operational provision. It is not a code of conduct for multinationals and their hosts.

The question might arise as to why such excellent lawyers could so easily mistake the meaning of Article III. The answer is quite clear. It is because they are not comfortable with the limitations on the provisions of Article I of the Supplement. That Article provides that:

> « nationals and corporations of either [party] ... shall not be subjected to arbitrary or discriminatory measures ... resulting particularly in (*a*) preventing their effective control and management of enterprises which they have been permitted to establish or acquire ... [etc.] ».

(47) L. CARROL, *Through the looking-glass* (1986; 1965 ed.) p. 94.

There it is! There we find that prevention of « effective control and management » is mentioned. It is directly mentioned. This is where it belongs, not in Article III of the Treaty.

A question for the Applicant: *if* Article III means what Professor Gardner said it means, *why* did Italy and the United States need to sign Article I of the Supplementary Agreement *at all*? It would not be required. Article III would already have covered the field. Indeed, covered it without any pesky or irritating need to allege and prove that the measures taken were « arbitrary or discriminatory ».

It was Professor Gardner who put Applicant's motivation into a triumphant nutshell when he said, (p. 316), that part of Article III « expresses a treaty right that is not qualified by a national or most-favoured-nation standard ... the provision is non-contingent — it is absolute ».

It was therefore to escape the straitjacket of the arbitrary and discriminatory standards of Article I of the Supplement that our opponents have so cleverly tailored a wholly new suit out of the old cloth of Article III. The problem is that it does not fit.

Similar concern can arise concerning Article VII of the Treaty. Those provisions really seem, quite clearly, quite obviously, to be limited again to a facultative context: to make sure that Treaty nationals have the right, the power « to acquire, own and dispose » of real property or of personal property on Treaty terms.

It concerns a power of acquisition and disposition to convey title to real and personal property — powers that we all know that years ago (and sometimes even today) are denied to non-nationals. But this emerges from a straightforward reading of the Article. The Article has nothing to do with ELSI.

Turning to Article V, and from legal interpretation to factual support: when one recalls the numerous Italian legal proceedings that I mentioned 20 minutes ago, how can you possibly employ Article V? How can it be said that there is anything approaching a denial of justice of any kind, leaving aside the local remedies rule? And if such were alleged, why were the Italian courts wrong? This has never been even suggested or discussed. What hearings were truncated, or denied? It is not stated. Why is a protective order, such as the requisition, not to be treated as what it purports to be — « protection and security » for ELSI? It is not stated. Is there not at least a presumption of legitimacy and good faith? There should be a burden to overcome that presumption. And the burden is not on Respondent, it is on Applicant.

Now, if so, has Applicant really overcome the presumption, carried that burden, other than by merely labelling the requisition as a bad thing, or saying that it was in bad faith or not in good faith? No, it has not. When one turns to the prohibition against takings without prompt adequate and effective compensation in the Treaty, and reflects on the factual background presented to the Court here, how has the United States proved that Italy *took* anything?

Where is the evidence of the degree to which (if at all) ELTEL and Italy are supposed to be one and the same? Why are prices paid by major public companies at bankruptcy sales to be measured as if they were compensation by a government for expropriated property? We are not told.

In addition, the Supplemental Agreement requires not merely that an action be found to be arbitrary and discriminatory. It also requires that an action to interfere with the effective control or management of enterprises, or to impair legal rights and interests, not be an application of the laws of Italy and the enforcement of those laws.

Now, this clause of the Supplement does not mean, and cannot mean, as a matter of common sense, that nationals of either Party are free to enjoy unlimited freedoms and liberties of all kinds in each other's territories. The control and management of enterprises does not mean an absolute license to conduct an enterprise without regard to corporate laws, bankruptcy laws, and the laws and rights of creditors generally.

* * *

Why was this litigation started? One does not know.

From the point of view of Respondent, one would not wish to conceive of a situation where the Government of Italy would be held internationally liable for insufficiently specific acts or

omissions that were neither arbitrary nor discriminatory, that are unsupported by evidence, other than the most conjectural or vague, and that are not connected with the claimed damages by a direct chain of causation that has not been interrupted, or affected, by other events or by the inexorability of the laws of commercial disasters.

The fact that ELSI was just such a commercial disaster and that Raytheon was angered and deeply unhappy with its demise, does not mean that Raytheon has a claim in law that can be validly espoused by the United States. The law of State responsibility is not the same as free business insurance. The loss in this case, to Raytheon, does not create remedy under a treaty, just because it happened abroad. *Iniuria non curat legem.*

Far less should it create international responsibility where that has not been established by reasonable or persuasive evidence of any kind, and has not been justified by legal analysis sufficient to meet the minimum standards of an international legal claim or cause of action.

It might be, Mr. President, that this evidence could have been brought out in local proceedings undertaken by Raytheon to safeguard its rights under the Treaty and the Supplement. It would surely have been the case that the facts there would have been winnowed through and filtered by courts or judicial authorities closer to the scene than The Hague and closer in time to the events than 20 years later. This would very likely have presented the Chamber — if that were necessary — with a better record of developed facts on which to work, and it would most likely have made the work of the Court in this case much easier.

This case, Mr. President, is thus almost a physical representation of the importance and value of the local remedies rule. Surely it does not prevent all unmeritorious or unfounded cases from being espoused by States. But at least it can prevent some of them.

If the Legal Adviser of the United States is really concerned, as he says he is, about the effect of the Court's decision on existing Friendship, Commerce and Navigation treaties, then surely one of the most important things that the Court can do to respond to his concern might be to reinforce the importance of the local remedies rule in espousal cases such as this one, and throw the case out.

It protects international tribunals, such as this Chamber, from having to sort through claims and assertions that should have been proved and tried elsewhere, or discarded. It protects governments from the premature insistence of influential citizens, like Raytheon, that their claims against foreign sovereigns must be espoused and brought to international justice. And it might even help those governments to resist the more extreme allegations of fact and conclusory statements that those nationals might, in their anger at the treatment they believe to have received, urge upon their foreign offices.

Most important: at the end of the day, the local remedies rule helps us all avoid the kind of untoward and uncomfortable situation such as that presented by this case. Here the government of a friend and ally is impelled to assert, before this highest of courts, that another friendly government has indulged in some mysterious and complex conspiracy and course of action that has harmed its nationals, but without producing one single element of objective proof or direct evidence in support.

It is in part in order to prevent this kind of inequity, or embarrassment, that the local remedies rule exists. The Court should apply it here, Mr. President, or at the very least should dismiss Applicant's case against Italy as being totally unfounded in fact, and wholly unsupported in law.

Thank you, Mr. President. If you would kindly call upon the Agent.

The PRESIDENT: Thank you, Mr. Highet. I call upon the Agent of Italy, Professor Ferrari Bravo.

Mr. FERRARI BRAVO: Mr. President, distinguished Members of the Court, it is my privilege, pleasure and honour to read out the final submissions for the Government of Italy.

The Italian Government makes the following submissions:

« May it please the Court,

A. To adjudge and declare that the Application filed on 6 February 1987 by the United States Government is inadmissible because local remedies have not been exhausted.

B. If not, to adjudge and declare:

1. That Article III of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;

2. That Article V, paragraphs 1 and 3, of the Treaty has not been violated;

3. That Article V, paragraph 2, of the Treaty, and the related provisions of the Protocol to the Treaty, have not been violated;

4. That Article VII of the Treaty has not been violated;

5. That Article I of the Supplementary Agreement of 26 September 1951 has not been violated; and

6. That no other Article of the Treaty or the Supplementary Agreement has been violated.

C. On a subsidiary and alternative basis only: to adjudge and declare that, even if there had been a violation of obligations under the Treaty or the Supplementary Agreement, such violation caused no injury for which the payment of any indemnity would be justified.

And, accordingly, to dismiss the claim ».

Thank you, Mr. President.

The PRESIDENT: Thank you, Professor Ferrari Bravo. At this stage of the proceedings, and before the second round pleadings, some judges want to put questions to the Party. I give the floor to judge Oda to put a question.

Judge ODA: Thank you, Mr. President. I have some questions for clarification. First, I would like to put the following question to both the Agent of the United States and the Agent of Italy:

Suppose that the decision of the Prefect of Palermo (which was actually given on 22 August 1969) had been given one year earlier, say in August 1968. Could the trustee of ELSI, under Italian law, have withdrawn the previous petition to bankruptcy which had once been filed on 9 April 1968 and have proceeded to liquidate in spite of the judgment of bankruptcy by the Tribunal of Palermo, which was delivered on 7 May 1968?

Now, I would like to put the following question to the Agent of Italy:

1. Am I right in understanding that the order of requisition of 1 April 1968 did bar ELSI from closing the plant in the framework of a liquidation process, but did not, or could not, prevent its closure in the framework of the bankruptcy procedure?

2. What kind of management plan did the Sicilian Regional Government have for the six-month period after issuing the order of requisition on 1 April 1968? In fact the Regional Government continued to pay wages to some 800 employees until 15 October 1968, even after the judgment of bankruptcy was delivered on 7 May 1968. What could have been the intention of the Sicilian Regional Government in paying the wages after the procedure of bankruptcy had started in May 1968? Thank you, Mr. President.

The PRESIDENT: Thank you very much Judge Schwebel.

Judge SCHWEBEL: Thank you, Mr. President. I have several questions, Mr. President, the first for both Parties.

Let us assume, *arguendo*, that it has not been proved that the requisition was the cause of the bankruptcy. Does it follow that ELSI and its stockholders sustained no damage by reason of the requisition?

Questions for Italy:

1. Mr. Highet spoke this morning of, I believe it was, 7 billion lire in low-interest loans extended by Italian governmental authorities to ELSI. May I ask how much lower than commercial rates of interest were these low-interest loans, that is to say, what was their real value?

2. And much more generally, what in the view of the Respondent were the purposes of the requisition? Were those purposes achieved?

3. The Respondent has pointed out that the Prefect's decision holding the Mayor's order of requisition to be « destitute of any juridical cause which may justify it or make it enforceable » depended on his conclusion that the order did not, and could not, achieve the goal to which it was directed. However, the Prefect also held that the order was issued:

> « under the influence of the pressure created by, and of the remarks made by the local press; and therefore we have to hold that the Mayor, in order to get out of the above and show the intent of the Public Administration to intervene in one way or another, issued the order of requisition as a measure mainly directed to emphasize his intent to face the problem in any way ».

This holding of the Prefect appears to mean that the Mayor issued the order not for defensible juridical reasons but as a way of showing the public that he was doing something, whether that something was lawful or sensible or not: he issued the order « to show the intent of the Public Administration to intervene in *one way or another* »; the order was issued as a measure « mainly » directed to « emphasize his intent » to face the problem « *in any way* ». Now my question is this, is a measure taken by a public authority « to intervene in one way or another » with a view not towards resolving a problem — and the Prefect held that the order could not resolve the problem — but in order to appease press and public criticism or win public favour « in any way » an arbitrary measure?

4. In view of the fact that the Prefect found that the requisition by the Mayor of Palermo of ELSI's factory was « destitute of any juridical cause which may justify it or make it enforceable », and undertaken in order to permit the Mayor to show « the intent of the Public Administration to intervene in one way or another », can it be maintained that the requisition nevertheless was, in the words of Article III of the Treaty, « in conformity with the applicable laws and regulations » of Italy? Can an action which is taken « without juridical cause » in order « to show the intent ... to intervene in one way or another » be an action not merely under colour of the law but « in conformity with the applicable laws and regulations »? If not, and if the position of the Respondent is that these holdings of the Prefect were in error, why was not an appeal taken from them? If no appeal was open or was taken, does not that establish that the requisition was not in conformity with the applicable laws and regulations of Italy?

5. Italy has stated in its pleadings and oral argument that certain of ELSI's actions or inactions made its board of directors criminally liable. If this is so, why is it that no criminal actions were pursued against them?

6. Volume I of the Unnumbered Documents submitted by Italy with its Counter-Memorial reproduces a translation of the dismissal letter sent by ELSI to its employees. That letter states: « You will be paid an indemnity in substitution of notice equal to the amount of your remuneration for the period of the notice you are not given. Such period will be counted for the purpose of calculating your severance benefits and, if such be the case, for the purpose of any other payments owing to you, all in accordance with the laws and agreements in force ». In viewo f the terms of this letter, is there ground for complaining of lack of notice?

7. The written supplement of the Respondent to the oral reply to my question of 21 February states that: « The requisition kept the factory open ». Open to do what? Was work performed in the factory, by whom, and with what results, in the period in which the factory was requisitioned? In this regard, it may be recalled that the Prefect's decision of 20 November 1969 holds that it was « the fact that the activity of the company » was not « resumed », that the plant was « not working » and that it was occupied by the dismissed employees. Thank you, Mr. President.

The PRESIDENT: Thank you, judge Schwebel. I would like to put two questions to both Parties, as a Judge of the Court.

I want to ask a question about Italian law in regard to a situation described in the Report of Coopers & Lybrand to Raytheon–ELSI, of 22 March 1968.

In that Report, Coopers & Lybrand, who were Raytheon's own auditors, stated of the position at 30 September 1967:

> « 10. The adjusted accumulated losses at 30 September 1967 exceeded the total of the paid up capital stock, capital reserve and stockholder's subscription account by an amount of 881.3 million lire. Should this become ' officially ' the case (e.g., should the adjustments made in arriving at this total of accumulated losses be entered in the company's books of account), under Articles 2447 and 2448 of the Italian Civil Code the directors would be obliged to convene a Stockholder's meeting forthwith to take measures either to cover the losses by providing new capital or to put the company into liquidation ».

1. My question is this: if it was decided not to provide new capital but to put the company into liquidation, would it be possible, in Italian law, to conduct the liquidation without becoming bankrupt in law and, if so, under precisely what conditions could bankruptcy be thus avoided?

2. For the purpose of determining whether the requirements of Italian law as to the impact of losses on the capital of the Company were satisfied, was the management of ELSI entitled, as a matter of Italian law or of sound accounting practice, to base itself on the book values in the September 1967 balance sheet (first column) so long as the adjustments (second column) had not been made in the company's books, or was it obliged for that purpose either to make those adjustments forthwith in the company's books or to use the adjusted figures (third column) to determine the Company's financial and legal position?

We have put several questions to the Parties. I think they could have an opportunity to reply to them in the second round of pleadings. You will have to work during the weekend, ladies and gentlemen.

Therefore, we meet again to hear the rebuttal of the American delegation next Monday at 10 o'clock in the morning. Thank you very much.

The Court rose at 1 p.m.

C 3/CR 89/9
Monday 27 February 1989, at 10 a. m.

Mr. MATHESON – Ms. CHANDLER – Mr. BISCONTI – Judge SCHWEBEL

The PRESIDENT: Please be seated. The Chamber received, a few minutes ago, a letter from the Co-Agent of the United States by which, pursuant to Article 56 of the Rules of Court, the United States submits a document, a list of customers and the respective amounts due as of 22 April 1968; this afternoon Mr. Lawrence will make some reference during the hearings to this document. I understand that this document has been transmitted to the Italian delegation, and therefore I will ask this afternoon, at the beginning of the sitting, whether the Italian delegation has any objection to the submission of this document.

I now call upon the Agent of the United States.

Mr. MATHESON: Mr. President, distinguished Members of the Court: I now have the honour to begin the rebuttal of the United States in this oral proceeding.

Last week the Respondent presented a vigorous — and sometimes colourful — defence of its position in this case. Among other things, members of the Respondent's team observed that various arguments of the United States were « pure fantasy » (C 3/CR 89/8, p. 455) and « complete madness » (C 3/CR 89/5, p. 379), and likened our logic to that of certain characters from Lewis Carroll (C 3/CR 89/8, p. 459). Before these proceedings have come to an end, the Respondent will no doubt raise further concerns about our sanity. Nonetheless, we will do our best today to lay before the Court the primary reasons why the case we have presented is, on the contrary, correct and sensible, and — if anything — conservative in its request for relief.

It is essential at the outset to be very clear as to what the claim of the United States is based upon and what it is not based upon. The Respondent has repeatedly asserted that the United States must prove — and the Court must decide — issues which do not form the basis of the United States case and which the Court has no need to rule upon.

In the pleadings and oral arguments in this case, both sides have included subjective assessments of the reasons why various events occurred and the motivations of the persons and the entities involved. For example, the Respondent has commented at length on the alleged motivations of the officials of Raytheon and the United States Government, usually in unfavourable terms. This, of course, does not mean that either Party is obliged to prove such assessments or that its case is somehow flawed by the failure to do so. What is required is that each Party prove the elements upon which it bases its case.

To avoid any doubt as to what the United States is asserting as the basis for its claim, I invite the Court to recall the four specific actions of the Respondent which Professor Gardner listed in his oral statement as constituting the violations of the FCN Treaty alleged by the United States in this case (C 3/CR 89/3, p. 313).

They are: first, the unlawful requisition of ELSI's plant and assets; second, allowing ELSI's workers to occupy the plant; third, the unreasonable delay in ruling on the lawfulness of the requisition; and fourth, the flaws in the bankruptcy process which resulted in the acquisition of ELSI's assets for less than fair value.

These acts and omissions — and nothing else — are, and always have been, the basis for the United States claim before this Court. As we have shown, these specific acts and omissions constitute violations of the Treaty in and of themselves, without the need to establish that they formed part of a « conspiracy », a « diabolical plot » or any other form of « connivance » — and here I quote words used by the Respondent, and not by the United States.

These acts and omissions were by different officials and entities of the Italian Government at the national and local levels. Each of these acts and omissions is therefore attributable to the Respondent under the Treaty, as we shall demonstrate at greater length at a later point in our

rebuttal. This is true whether or not these various acts or omissions were part of a concerted plan or any other form of co-ordinate activity.

The sensitivity of the Respondent to the inferences which might reasonably be drawn from these facts is understandable, but the case of the United States is based on the facts and not upon such inferences.

These acts and omissions constituted Treaty violations — for which the Respondent is liable — whether or not the Italian Government entities involved knew of each other's actions, and whether or not they were acting in concert or at cross purposes. Although the Respondent asserts otherwise (C 3/CR 89/8, p. 437), the obligations of the Parties under the Treaty are clearly in no way limited to cases where there is some conspiracy or collusion between the authorities of the State in question.

The Respondent objects to our use of the terms « Government of Italy » or « the Respondent » in referring to these various officials and entities, but these references are perfectly appropriate. The use of these terms is not a disguised allegation of a grand conspiracy, but an affirmation that each of these acts is legally attributable to the Respondent.

Similarly, the Respondent has argued that none of these individual acts can be considered as violating the Treaty in and of itself, but only in combination and only when it is established that they are all tied together in a so-called « causal link » (C 3/CR 89/8, p. 437). This is most certainly not the case.

For example, the requisition alone violated a number of provisions of the Treaty, as we have shown, and this is true regardless of whether or not the other acts and omissions complained of by the United States were also violations of the Treaty. The case of the United States in no way depends on proving that these actions constitute a sequence of events bound together by a common plot or causal chain, however often the Respondent may insist that this is so.

Likewise, the case of the United States is not based on the assumption that ELSI was a profitable enterprise which was expected to survive indefinitely as a money-making business in the environment in which it found itself in 1967 and 1968. On the contrary — just to restate the obvious — ELSI's shareholders fully intended to liquidate the company, and it was the action of Italian authorities that prevented them from doing this in an orderly fashion.

The question, therefore, is not whether ELSI has suffered losses — obviously it had — nor whether it would at some point cease functioning as a fully operating enterprise — obviously it would, given the fact that the Italian Government was unwilling to provide an environment in which it could compete effectively.

The real question is whether, under the circumstances, Raytheon and Machlett had the ability and the right under the Treaty to place ELSI through an orderly liquidation, as they had planned to do. At a later point in this rebuttal, we will review in detail the measures that were being taken, and would have been taken, by Raytheon and Machlett to ensure that such a liquidation would take place, including their intention to provide the financial support necessary to avoid any insolvency problems during the liquidation.

Similarly, the case of the United States is not based on the allegation that the failure of the Respondent to provide *Mezzogiorno* benefits, or any other assistance to ELSI, violated the Treaty, although as Mr. Lawrence has shown (C 3/CR 89/4, p. 340) it is reasonable to take account of ELSI's expectation of receiving such benefits — for which it had applied — in determining ELSI's value, particularly in light of Article V of the Supplement to the Treaty.

It is important that we focus in this proceeding on the acts and omissions on which the United States actually bases its case, rather than those that the Respondent would prefer to talk about. Only in this manner will it be possible to see clearly what elements must be established to justify the reparations sought, and what elements are, on the other hand, essentially irrelevant.

I would also note that the case presented to this Court is based on specific Treaty provisions, rather than on the application of general customary international law. For example, questions about interference with management and control of enterprises, about expropriation and compensation, and about exhaustion of local remedies, all arise in this case in the context of specific provisions of the FCN Treaty, and do not require decisions about customary international law in general.

Now, the Respondent has argued that the United States has failed to produce the necessary evidence of its claims and has instead relied on unfounded assertion and innuendo (C 3/CR 89/8, p. 437). It is quite true that the United States has not attempted to introduce evidence to prove matters which do not form the basis of its case, such as those matters which I have just referred to. However, we have provided the Court with an ample body of evidence to support the assertions upon which our case does rest.

We have provided the Court with every available document that we have thought to be significant and relevant to this case. Documents have neither been altered nor hidden, notwithstanding the Respondent's suggestion to the contrary (C 3/CR 89/8, p. 440). Where an interest has been expressed by the Court or the Respondent in any other document, even during the course of these oral proceedings, we have immediately produced it. A mass of detailed affidavits have been submitted as Annexes to the Memorial, and few of the statements in those affidavits were challenged by comparable evidence in the Respondent's written submissions.

We have brought before the Court the individuals who were personally involved in the events of this case more than 20 years ago. They have testified from their personal knowledge of these events and their expert understanding of the circumstances. From time to time the Respondent has suggested that their testimony is inherently unreliable because of their association with Raytheon. With all due respect, this criticism is grossly unfair to these individuals, each of whom has a long-standing reputation for truth and integrity.

This is not a case of reliance on self-serving pronouncements which cannot be probed or challenged by this Court. Our witnesses have submitted themselves to questioning by the Respondent and by the Court, so that their knowledge, competence and credibility could be observed and tested first-hand. We invite the Court to judge for itself, on the basis of what it has seen, whether it has any doubts about their competence or credibility. The Respondent has not been able, or has not seen fit, to rebut the testimony of these witnesses with comparable first-hand testimony of its own. The Respondent is the party which has instead relied on unsubstantiated assertions in this case.

We have also brought before the Court a leading expert in valuation who, together with his supporting team, has laid out in the clearest manner possible the essential facts about ELSI's accounts and the value of its assets. He too has been subject to questioning by the Respondent and by the Court to probe his expertise and his conclusions.

In the course of our rebuttal presentation today, we will review each of the elements upon which our case rests and refer to the evidence we have provided in support of each element. No doubt the Respondent will continue to make general assertions about the alleged lack of proof in the United States case. We invite the Court to judge for itself whether we have failed to substantiate any of the elements of our case.

Durward SANDIFER, in his book *Evidence Before International Tribunals*, states as follows:

> « ... [T]he International Court of Justice has been sparing with its pronouncements concerning the burden of proof, as well as electic in its approach to the subject. In other words, the Court appears to be more concerned with ' establishing the facts ' and ' assessing the weight of the evidence produced insofar as is necessary for the determination of the concrete issue which it finds to be the one on which it has to decide '. Consequently, as Rosenne puts it, ' there is little to be found in the way of rules of evidence and a striking feature of the jurisprudence is the ability of the Court frequently to base its decisions on undisputed facts, and in reducing voluminous evidence to manageable proportion ' ». (p. 34).

Given the volume of undisputed facts, of testimony by witnesses and experts, of affidavits and other documents produced in this proceeding, we have no doubt that the Court will have ample basis for, as Sandifer puts it, establishing the facts and assessing the weight of evidence on the concrete issues it has to decide in this case.

In our rebuttal presentation today, we will focus on the important matters that remain at issue. I will begin with a brief review of the Respondent's objection on the question of admissibility. Ms. Chandler will then review the evidence that has been presented to this Court on

the ability of ELSI to carry out an orderly liquidation in the absence of the requisition, as well as the evidence of the damage that it suffered because of the Respondent's actions.

We will then call upon Mr. Giuseppe Bisconti, who is counsel to Raytheon and an eminent practitioner in Italian commercial and bankruptcy law, to review ELSI's ability under Italian law to carry out such a liquidation under the specific circumnstaces of this case. We will also call upon Mr. Timothy Lawrence of Coopers & Lybrand to respond to certain questions raised last week by the Respondent's expert on accountancy concerning the valuation of ELSI. Finally, I will conclude our rebuttal with a review of the Respondent's arguments on the violations of the FCN Treaty.

ADMISSIBILITY

I will now turn to the Respondent's objection that this claim is inadmissible because local remedies have not been exhausted. In our view, the Court could only accept the Respondent's objection if it were prepared to decide every one of the following points in the Respondent's favour:

– *first*, that the local remedies rule is applicable, under general international law, to the request of a State for a declaration that its rights under a treaty have been violated, and for reparation as a result;

– *second*, that the local remedies rule is applicable to this particular treaty, given its language and its object and purpose;

– *third*, that there were in fact effective remedies under Italian law which were not exercised by Raytheon and Machlett;

– *fourth*, that Raytheon and Machlett did not exercise all reasonable efforts to exhaust local remedies;

– *fifth*, that any remedies allegedly available under Italian law fully addressed all of the claims of the United States in the present case; and finally;

– *sixth*, that the conduct of the Respondent does not, under the circumstances, preclude it from invoking the local remedies rule now.

To prevail on the question of admissibility of the United States claim, the Respondent must establish each one of these points. We submit that the Respondent has established none of them. I will address each of these points in turn.

First, has the Respondent demonstrated that the local remedies rule applies, as a matter of general international law, to the request of a State under a treaty for a declaration that its rights have been violated, and for reparation as a result? In our view, the answer is no.

The local remedies rule is a rule of customary international law developed in the context of the espousal by a State of the claim of one of its nationals. The Respondent repeatedly asserts that the present case is simply a matter of diplomatic protection of United States nationals or « espousal », and that it « does not concern any direct injury allegedly caused to the United States » (C 3/CR 89/5, p. 364; C 3/CR 89/8, p. 436).

This is simply incorrect. The claim of the United States is based exclusively on the violations of a treaty and the rights and obligations of the States that are party to it. That is how the United States claim before the Court has always been formulated, from the first letter to the Registrar presenting the application to all the subsequent stages of the case. The case was occasioned by damage to particular US nationals, but the claim before this Court is an assertion of broader rights and interests of the United States under the Treaty. The United States seeks a declaration that the Treaty has been violated, thus vindicating its own rights and interests and clarifying the obligations of the Parties, as well as seeking reparation for these particular violations.

The Respondent cites the *Ambatielos Arbitration* for the proposition that the local remedies rule applies even in a case where a State brings a claim based on its rights under a treaty. But in that case — which arose under an old treaty that did not contain a compromissory clause —

the agreement of the parties establishing the Arbitral Commission specifically called upon the Commission to decide the local remedies issue (*Ambatielos Arbitration*, 12 Record of International Arbitral Awards, p. 88). Thus the Commission did not have to decide whether the rule would apply as a matter of law to a dispute under a treaty, let alone a treaty which contained a compromissory clause, as the FCN Treaty does.

A more relevant aspect of the *Ambatielos case* is the judgment of this Court which prompted Greece and the United Kingdom to submit to arbitration the question of whether local remedies had in fact been exhausted (*Ambatielos, Merits, Judgment, ICJ Reports*, 1953). Despite the argument by the United Kingdom that local remedies had not been exhausted, this Court found that it did not have to pass on that issue when interpreting the treaty in question.

Likewise, in the *Finnish Shipowners Arbitration*, the Arbitrator found that the local remedies issue only applied to the principal claim of Finland — a claim under customary international law, and not to the alternative claim of Finland — a claim based on a bilateral agreement (*Claim of Finnish Shipowners*, 3 Records of International Arbitral Awards p. 1490).

As we noted in our opening round of oral presentations, there is clearly no requirement in international law that a State must exhaust local remedies before it can seek to vindicate its owr rights through declaratory relief. The Respondent apparently now argues that the local remedies rule nonetheless applies to a request for such a declaration if the State is also seeking reparation.

The Respondent cites the *Interhandel case* for the proposition that it is not possible, in considering the application of the local remedies rule, to split off the request for a declaration from the request for reparation, if the treaty violation is based essentially on injury to a national (C 3/CR 89/5, p. 366). This is not a correct reading of the *Interhandel case*.

In that case there was no request for a declaration that a treaty had been violated. The Swiss Government primarily sought the return to its national, Interhandel, of assets frozen in the United States pursuant to US law during the Second World War (*Interhandel*, Judgment, *ICJ Reports*, 1959, p. 9), and in the alternative sought to implement a decision of the Swiss Authority of Review based on the 1946 Washington Accord. The Court concluded that while this alternative part of the Swiss claim allegedly involved an international decision, it was still directed at the restitution of assets to Interhandel. It is in this context that the Court found that « one interest, and one interest alone, that of Interhandel » was the basis for Switzerland's claim (*Internhandel, Judgment*, p. 29).

In the present case, the United States seeks a declaration that the FCN Treaty has been violated, as well as reparation to itself for violations of the Treaty. The United States explicitly recognized this distinction in the *Interhandel* proceedings when the US agent stated that the Swiss claims:

> « are not merely requests for declaratory judgments seeking declarations that treaty provisions have been violated; rather, Switzerland, espousing the case of Interhandel, its national, seeks specific relief for the benefit of Interhandel ». (*ICJ Pleadings, Interhandel*, p. 319; see also *Chorzow Factory case, PCIJ, Series A, N*, 6, p. 20).

It is also important to note that the critical element in the *Interhandel case* was the fact that a US court was actually considering the Interhandel claim at the time the case was before this Court (*Interhandel, Judgment*, p. 27). Obviously, there are no Italian court proceedings pending in the current case, and the relevance of the *Interhandel case* is accordingly minimal.

We must conclude, therefore, that the Respondent has failed to show that the local remedies rule is applicable to claims of the type involved in this case — that is, claims by a State under a treaty seeking declaratory relief as well as reparation to vindicate its own treaty rights and interests.

Second, has the Respondent demonstrated that the local remedies rule is applicable to this specific Treaty? Again, the answer is no.

As we pointed out in our initial argument, there is no reason whatsoever to believe that the Parties intended such a result. The FCN Treaty expressly states that *any dispute* as to the interpretation or application of the Treaty, which is not satisfactorily adjusted by diplomacy, *shall be submitted* to this Court. The ordinary meaning of this Article is clear, and its object and pur-

pose is obvious: it is intended to provide an unfrustratable international mechanism for the resolution of disputes under this Treaty. We are aware of no indication in the negotiation and ratification history of the Treaty that the Parties expected the local remedies rule to apply to disputed referred to the Court. Rather it appears that Article XXVI was considered an « unreserved » reference to the Court.

A further indication of this is the fact that Article X of the 1948 Economic Co-operation Treaty between the United States and Italy, which was negotiated at the same time and by the same parties as the FCN Treaty, expressly requires the exhaustion of local remedies. Had the United States and Italy wanted such a rule to apply to the FCN Treaty, surely they would also have included it in the FCN Treaty, which of course they did not.

Further, most of the provisions of the FCN Treaty at issue in this case concern specific obligations of conduct — such as the duty not to interfere in the management and control by United States companies of enterprises in Italy — which do not provide latitude for the Respondent to correct violations through decisions of its local courts. This approach has been adopted by the International Law Commission in its work on State Responsaibility (see *Yearbook of the International Law Commission*, 1977-II, Part Two, I, p. 50, para. 58).

Consequently, whether or not the local remedies rule applies in general to State claims under a treaty, it is not applicable in this case to this Treaty.

Third, has the Respondent demonstrated that there were in fact remedies under Italian law that were not exhausted by Raytheon and Machlett? In our view, it has not.

The Respondent's primary contention is that this claim is inadmissible because Raytheon and Machlett could have sued in Italian courts bases on Article 2043 of the Italian Civil Code. The Respondent asserts that the acts of the Government that allegedly affected the rights and interests of Raytheon and Machlett as shareholders come within the scope of this Article (C 3/CR 89/5, p. 367).

To support this, the Respondent cites the Talenti decision by the Court of Rome. That case, however, did not involve shareholder rights at all. Professor Fazzalari described in detail to this Court why shareholders would not be able to sue under Italian law for the rights and interests at issue in this case (C 3/CR 89/2, pp. 299-300), a position which is in accordance with the opinions rendered by both Mr. Bisconti and Mr. La Pergola in 1971.

But even if the shareholders could sue in Italian courts for actions such as those at issue in this case, Professor Fazzalari explained why Italian courts would not view these provisions of the FCN Treaty as sufficiently specific to provide a standard for an individual to bring a claim for damages against the Government of Italy (C 3/CR 89/2, pp. 295-298).

I will only add to Professor Fazzalari's comments by noting that the decision of the Court of Rome in the *Talenti case* does not state — as is implied by the Respondent — that an action may be brought under Article 2043 on the basis of conduct by the Government of Italy contrary to the provisions of the FCN Treaty. The court simply found that the plaintiff failed to specify any wrongful acts committed by the Government of Italy in that specific case.

As we have noted, the State Attorney of Rome in that case took the position that the FCN Treaty provided no additional protection above and beyond that already in existence under Italian law. The Respondent tries to downplay this by stating that the State Attorney's brief is « the result of the personal work of the individual State attorney » and is « never published » (C 3/CR 89/5); but the fact remains that when United States citizens have sued in Italian courts under Article 2043 and the FCN Treaty, officials of the Italian Government have argued that the Treaty cannot provide any added protection. Surely the Respondent cannot have this both ways.

A critical issue in considering whether further local remedies were available to Raytheon and Machlett is the effect of the suit brought by the bankruptcy trustee. The Respondent argues that the trustee suit differed materially from a suit that could have been brought by Raytheon and Machlett as shareholders (C 3/CR 89/5, p. 368). This argument does not hold up under careful examination.

The trustee's suit in Italian courts was based on the argument that the unlawful requisition of 1 April 1968 obliged ELSI to go into bankruptcy, prevented even the trustee from taking

possession of the plant and equipment through 30 September 1968, and thereby caused substantial damage to ELSI. The trustee also argued that the Prefect of Palermo was late in deciding the appeal filed by ELSI, and asked the court to order the Government of Italy to pay damages due to the illegal occupation of the plant and equipment. The trustee identified those damages as the considerable decrease in the value of ELSI's plant and equipment caused by these various actions (Memorial, Annex 79).

The trustee's suit was pursued right up to the Supreme Court of Italy. Except for the award of a minimal amount of compensation — essentially for the six-month « use » of the plant — the court considered and rejected all of these claims. It held that there was no causal connection between the requisition and the subsequent bankruptcy, that damages could not be claimed with respect to the bankruptcy, and that the actual value of the plant and equipment on the date of the requisitioning order could not be reliably established (Memorial, Annex 81, pp. 14–17).

Now there are some differences betwen the claim before this Court and the claim brought by the trustee. It is clear, however, that the substantive core of the two claims is essentially the same. Both identify the unlawful requisition as the cause of the subsequent bankruptcy. Both assert that significant damages flowed from the requisition due to the inability to have access to the plant and equipment and the failure of the Prefect to rule on the appeal.

The Respondent, however, contends that despite this decision of the highest court in Italy, a lower Italian court might find in a later proceeding by Raytheon and Machlett that the requisition did cause the bankruptcy and that quantifiable damages can be awarded in favour of ELSI's shareholders, even though they could not be awarded to ELSI's creditors. In our view, it is wholly unreasonable to require that such repetitive and purposeless actions be brought, particularly where the substantive issues at point have already been decided by the highest national court (see *Panevezys–Saldutiskis Railway*, 1939. *PCIJ*, *Series A/B*, *N.* 76, p. 19). This is especially so since some of the very rights and interests of Raytheon and Machlett protected by this Treaty are the same creditor rights that were litigated in the Italian courts.

Ironically, the Respondent argued last week that this Court should place great weight on these Italian court cases, precisely because they directly addressed all the relevant issues before this Court (C 3/CR 89/8, p. 455). Yet the Respondent at the same time finds the cases so different that it would bar the United States from pursuing this case because Raytheon and Machlett did not attempt to re-litigate the matter in Italian courts.

The correct analysis of the matter is, of course, quite the opposite: the decisions of even the highest national court of a Contracting Party cannot in any way prejudge the decision of this Court under the Treaty; but the fact that such decisions have been rendered precludes the objection that local remedies have not been exhausted.

Fourth, has the Respondent demonstrated that the remedies allegedly available under Italian law could provide an effective remedy for all of the claims brought under the Treaty in the present case? We believe it has not.

The local remedies rule certainly does not bar an action before this Court where the local remedies allegedly available could not effectively address all the claims brought before this Court, nor provide the relief sought from this Court (see *Claim of Finnish Shipowners*, 3 Records of International Arbitral Awards, p. 1498). No conceivable suits by Raytheon and Machlett in Italian courts could result in the relief sought by the United States in this proceeding — a declaration of this Court as to the interpretation of this Treaty, binding under international law on both Parties, as well as a decision regarding the payment of reparation to the United States for violations of the Treaty. Therefore, the claim brought by the United States before this Court is simply not amenable to suit in Italian courts.

Even if it were assumed that the claim before this Court is somehow solely a claim for damages by Raytheon and Machlett, most of the unexhausted « remedies » conjured up by the Respondent could not effectively deal with the claims set forth in this case. For instance, further appeals of the decisions of the bankruptcy judge would not have resulted in any decision by Italian courts regarding many of the claims in this proceeding, such as interference with the management and control of ELSI, impairment of the investment rights of Raytheon and Machlett, the taking of their property, or protection and security for their property.

Fifth, has the Respondent demonstrated that Raytheon and Machlett did not exercise reasonable efforts to exhaust existing local remedies? We think it certainly has not demonstrated this.

As judge Lauterpacht stated in the *Norwegian Loans* case, the rule only requires exhaustion of effective local remedies that are available « as a matter of reasonable possibility » (*Norwegian Loans, ICJ Reports*, 1957, p. 39). The primary reason for the rule — as the Respondent noted — is to provide the respondent State with an opportunity to redress the injury within the frameword of its own legal system.

In this case, the requisition was appealed, the key decisions in the bankruptcy proceedings were appealed, and suit was brought in Italian courts against the Respondent based on the Prefect's ruling that the requisition was unlawful. Hence the Respondent was provided ample opportunity to redress the injury within the Italian legal system. When none of these actions provided adequate relief, Raytheon sought the advice of two eminent Italian legal experts, who advised them that no further remedies were available under the Italian legal system. Nothing more could reasonably have been demanded of these companies under the circumstances.

The local remedies rule is a flexible rule, subject to various exceptions, and policy has a significant part to play in determining the scope of the rule (JENKS, *The Prospects of International Adjudication* 1964, p. 530). The Respondent's arguments in this case would create a rigid rule under which a claimant must exhaust all conceivable avenues of redress and all conceivable issues of fact and law. Such a rigid rule would be unrealistic, particularly in light of the complexity of modern administrative and legal systems. It would effectively preclude resort to this Court or other international tribunals in most cases where disputes arise among States.

We believe the rule only requires that a reasonable and good-faith effort be made to exhaust local remedies after diligent consultation with qualified local counsel. And this is most certainly the case in this proceeding.

Sixth, and finally, has the Respondent demonstrated that its conduct did not, under the circumstances, preclude it from asserting the local remedies rule now? In our view, this is certainly not the case.

We have shown that the Respondent's conduct — right up to the time that a decision was taken to bring this case before the Court — caused the United States justifiably to believe that no further remedies were available (C 3/CR 89/3, pp. 306). In 1974 the United States presented this claim to the Respondent, explicitly asserting that the only legal remedy available to Raytheon and Machlett in Italian courts had been taken. For 11 years the United States then pursued extensive discussions with the Respondent, first in an effort to obtain reparation for the United States directly and then in an effort to agree on some appropriate means of international adjudication, and all of this without any assertion by the Respondent that further recourse by Raytheon and Machlett under Italian law was possible.

Only when a decision was taken to bring the claim before this Court, did the Respondent object that local remedies had not been exhausted. If, as the Respondent now asserts, any diplomatic claim by a State based on injury to one of its national is « irreceivable » by another State if local remedies have not been exhausted (C 3/CR 89/5, p. 364), then the Respondent should have so stated in 1974 and not caused the extensive diplomatic efforts to place the claim before an international forum. We have shown that under international law the Respondent's conduct precludes or estops the Respondent from now asserting that further local remedies existed, simply to avoid consideration of the claim by this Court (C 3/CR 89/3, pp. 307-309).

The Respondent has advanced several lines of argument in an attempt to rebut this conclusion. The Respondent argues that in the 1974 diplomatic Note the United States did not suggest there had been a waiver or estoppel (C 3/CR 89/5, p. 365). Of course we did not do so, but this is hardly relevant to the estoppel argument, which is based on the Respondent's conduct after 1974.

The Respondent also argues that the Italian Aide-Mémoire of 1978 « clearly in no way represented Italy's final position on the case » and « dealt with only a few aspects of the claim, which was described as unmeritorious » (C 3/CR 89/5, p. 365). This is the first time we have heard this. A careful reading of the Aide-Mémoire indicates that this response was indeed a final

response by the Respondent to the validity of the United States claim, and was made on the basis that there had been no injury to Raytheon and Machlett. In any event, the Respondent had repeated opportunities to alert the United States to this objection over the years after the claim was first presented, but declined to do so.

The Respondent further argues that the position of the United States would mean that any government which fails to make any argument during the course of diplomatic discussions would be held to have waived it (C 3/CR 89/5, p. 365). This, of course, is not our contention.

What we contend is that a State may not listen silently to good-faith assertions that all remedies that are available in its courts have been exhausted, and then engage in a long diplomatic process to find alternative means of resolving the dispute — a process made necessary by the asserted absence of local remedies, and then finally allege, after proceedings have been instituted with its concurrence, that the dispute cannot be adjudicated because there really were unexhausted local remedies in the first place.

The Respondent suggests that its conduct after the submission of the US Claim in 1974 is irrelevant because a five-year Italian statute of limitations had already barred suit by Raytheon under Article 2043. This appears to be incorrect as a factual matter, since the acts complained of by the United States were not just the 1968 requisition but subsequent acts such as the delay by the Prefect until 1969 in revoking the requisition, and the outcome of the bankruptcy process which did not close until years later. Further, the damages alleged by the United States continued into the early 1970s – such as the cost incurred by Raytheon and Machlett in defending suits by Italian banks — while the suits by the trustee that resulted in a minimal payment by the Respondent also continued into the early 1970s.

But more important, this argument in no way disposes of the reliance of the United States on the Respondent's conduct, subsequent to 1974 right up until the dispute was brought before this Court. The United States negotiated with the Respondent, reasonably and in good faith, on the assumption that there was no local remedies issue, and that recourse to this Court and other international tribunals was not barred.

Finally, the Respondent finds relevance in a mistaken assertion by the United States to Switzerland in the *Interhandel case* that Interhandel's US court case had failed (C 3/CR 89/5, pp. 365–366). Again, the Respondent has not considered closely enough the facts of that case. When the Swiss Government in 1948 asked for the release of Interhandel's assets in the United States, the United States immediately told the Swiss Government in two diplomatic notes of the very same year that redress for such a claim could be pursued under the US Trading with the Enemy Act (*ICJ Pleasings, Interhandel*, p. 25 [Swiss Note of 4 May 1948, p. 27; US Note of 26 July 1948 p. 35; US Note of 12 October 1948]. This is exactly the type of response that reasonably can be expected by a government if it believes local remedies exist. It was at this point in the diplomatic negotiations between the United States and Switzerland that the litigation by Interhandel in US courts began.

Mr. President, the failure of the Respondent to establish all of the six points I have considered today must lead to a rejection of the Respondent's objection. Even if the local remedies rule were applicable in this case, the letter and purpose of the rule was satisfied. Invocation of the rule to deny access to the Court in this case would be a victory of formalism. We therefore respectfully submit that the Court should reject this objection.

Mr. President, this concludes the segment of our rebuttal on admissibility, and I therefore now request that you give the floor to Ms. Chandler, who will deal with the evidence before this Court on the ability of ELSI to carry out an orderly liquidation.

The PRESIDENT: I think judge Schwebel would like to ask a question.

Judge SCHWEBEL: Mr. President, on the subject of local remedies: may I ask a question of the US Agent at this juncture? In the process of the exhaustion of local remedies, did ELSI rely on the Treaty and Supplement at any point? If not, why not? And, in so far as this is within the knowledge of the Applicant, did the trustee in bankruptcy, in his legal actions, invoke the Treaty and Supplement? If, as far as can be ascertained, the Treaty and Supplement were not invoked before Italian jurisdictions, what follows, if anything? Thank you.

Mr. MATHESON: Mr. President, I know the answers to those questions but, if I might, I would prefer to answer them this afternoon, after we have thoroughly looked at the record.

The PRESIDENT: Of course you can answer in the afternoon if you wish. I call upon Ms. Chandler please.

Ms. CHANDLER: Mr. President, distinguished Members of the Court. The Respondent has not presented any real disagreement on the basic sequence of facts in this case: that Raytheon and Machlett attempted to commence an orderly liquidation of ELSI's assets, that the illegal requisition prevented the execution of the liquidation plan, and that ELSI subsequently was placed into bankruptcy. The essence of the Respondent's argument really goes to a different issue: whether the bankruptcy and eunsuing financial damages were caused by the acts and omissions of the Respondent, or were the inevitable consequences of ELSI's financial situation.

The Respondent's contentions on this point can be summarized into three lines of argument. The Respondent asserts: first, that there was no realistic plan for the orderly liquidation of assets; second, that ELSI should have been placed in bankruptcy at some point prior to the requisition; and third, that even if the requisition did prevent the orderly liquidation, ELSI would have gone bankrupt anyway.

The United States does not contest the general principle that there must be a sufficient nexus between the unlawful act and the injury for compensation to be payable (see Memorial, p. 59). We submit, however, that the position urged upon this Court by the Respondent fall very wide of the mark, for the simple reason that we have provided abundant evidence of the causal relationship between the acts and omissions of the Respondent and the injuries suffered by Raytheon and Machlett in this case. I shall address each of the Respondent's three basic contentions in turn.

The Respondent disparages the orderly liquidation plan as « pure fantasy » (C 3/R 89/8, p. 455). As the record amply demonstrates, there was an orderly liquidation plan and the orderly liquidation plan would have worked. To appreciate the dynamics of the orderly liquidation plan, one must consider the context in which the decision to liquidate the company was made.

In 1967 Raytheon and Machlett recapitalized and refinanced ELSI with 4 billion lire of new capital and guaranteed loans, and simultaneously made the decision that no additional capital would be provided without some restructuring of the company to ensure its viability. This decision left several legitimate options. First, they could have negotiated a partnership with an Italian company that would aid in the growth of sales and jointly provide the additional financial resources needed. Second, they could have developed a plan for operating profitably by permanently reducing the number of employees and cutting back on other operating costs, with reduced new financing requirements being provided by Raytheon.

For a year, Raytheon and Machlett vigorously pursued the first option — a partnership with an Italian company — with officials of the national and regional governments, including IRI. They sought an Italian partner and Italian Goverment backing (including *Mezzogiorno* benefits), and an expansion of ELSI's product base. Neither the regional nor national governments — nor ESPI nor IRI — were willing to participate in ELSI. To correct one of the Respondent's many factual inaccuracies in this case, ELSI management did pursue every possibility for securing the *Mezzogiorno* benefits they had long been promised. ELSI's counsel did submit, and was preparing to resubmit, a claim for 300 million lire in benefits (Memorial, Annex 17, Exhibit A).

From experience, Raytheon and Machlett were convinced that the second option — large scale employee reductions in the workforce and operating costs — could not be implemented in the existing environment. The Respondent has suggested that the excess workforce could have been paid by the Sicilian Government. This did not present a long–term solution to the problem. In 1967, after discussions with the President of Sicily and with the unions about the surplus of the 200 workers, the Sicilian Region provided a 90–day training and wage subsidy programme. Training was given in the construction of electronic sub–assemblies in anticipation of new subcontract work. At the end of the year, the subcontract work had not materialized, thus

these programmes did not solve the problem of the excess workforce and therefore did not afford ELSI long-term relief.

The fact that Raytheon could not make ELSI successful does not mean that a purchaser of ELSI would have had the same problems. It should be remembered that any purchaser would have had the opportunity to structure the purchased business in an optimum fashion, starting from scratch. The purchaser would use only the direct labour in supporting overheads necessary. If the purchased business was being merged into a purchaser's existing business, then significant overhead savings could well be possible. These choices for optimization were not available to Raytheon in the then-existing environment at ELSI.

The only acceptable alternative that remained was the orderly liquidation of ELSI's assets. Raytheon and Machlett formulated a specific plan for the execution of the liquidation. To guarantee the plan's success Raytheon and Machlett made the commitment to back the plan both financially and technically. It was clearly understood that timely financial assistance would be required from Raytheon. Raytheon, the principal owner, was a major publicly-held US corporation with ample financial resources. It also had a responsibility to its shareholders to handle the affairs of ELSI in a manner that did not adversely affect the shareholder's interests. Raytheon therefore would provide whatever was needed in money and manpower to execute the orderly liquidation successfully. They also had an economic incentive to fund the liquidation. It is without question that a financially-backed, company-controlled sale or liquidation avoids the substantial losses that would otherwise occur in bankruptcy.

I will return to this financial commitment at various times over the course of the next several minutes, because it is an essential element of the liquidation plan and an element completely ignored by the Respondent.

The commitment by Raytheon and Machlett in 1968 to fund the orderly liquidation is not inconsistent with its decision a year earlier not to invest further in ELSI without certain restructuring. The decision to fund the liquidation reflected the firm belief that sale of ELSI's assets in an orderly liquidation would recover the maximum amount possible. Moreover, funds provided to ELSI during the orderly liquidation would likely be recovered after payment of all creditors.

The success of the orderly liquidation plan was further assured by the commitment of high-level managerial and technical expertise that Raytheon lent to implement the plan.

As a large multinational company, Raytheon has had considerable experience in selling — at book value or better — subsidiary companies, divisions, and product lines, some of which had consistently recorded losses. This was possible because of the important intangible assets which went with these operations because of Raytheon's worldwide reputation and its access to superior technology and networks of customers and suppliers.

In 1971, for example, in England, Raytheon sold for book value a company called "Best Products", a small loss company selling electric kettles andi rons, in direct competition with very large companies such as Philips and GEC.

Raytheon also sold Sorensen A.G., a Swiss power supply company, at book value to Chan Industrial Holdings A.G., a paper products company, seeking to diversify its product lines.

In France, Sorensen S.a.r.l., another company manufacturing specialized power supplies for the French Armed Forces suddenly lost all of its order intake when general De Gaulle issued an edict that such equipment was not to be bought from an American company. As a result, Raytheon commenced an orderly liquidation of Sorensen's assets. Discussions with the unions and the Ministry of Industry in Paris ultimately led to the sale of Sorensen at book value to a French power supply company.

These are just a few of the more than 30 examples in which Raytheon, at book value, has sold subsidiary companies both in the United States and Europe that had suffered consistent losses. In each of these cases, the sale of enterprises and product lines, and the orderly liquidation of assets, were a sensible response that minimized damage to the communities involved and losses to the creditors and stockholders. In each case, these actions were far preferable to the chaotic results of bankruptcy.

The keystone of the plan was the sale of ELSI or ELSI's product lines as going businesses with intangible assets intact. To retain ELSI's value as a business, ELSI would maintain 130 workers to complete work–in–process and to fill orders from inventory in order to preserve customer relationships. ELSI would also be sold with established markets for its products, with experienced suppliers of raw materials and components, and with all of the technological expertise and know–how that had accumulated during ELSI's operations. To enhance ELSI's value, Raytheon and Machlett also made the decision that they would continue to supply patents, licenses, trademarks, know–how, and other technical assistance to any buyer of ELSI's product lines. Indeed, as Mr. Adams testified, Raytheon had made the commitment that it would funnel any new business from the Improved Hawk programme into ELSI (C 3/CR 89/1, p. 261).

The Respondent sweepingly concludes that because ELSI's stockholders had decided to liquidate the plant, it was « dead and obsolete » and had no value or «scrap value» (C 3/CR 89/5. p. 379). The Respondent's assertion of the obsolescence of ELSI's product lines is simply unfounded. There is substantial and persuasive evidence in both the written and oral proceedings that ELSI's product lines utilized top–of–the–line technology, that they enjoyed solid markets throughout Europe, that they would be sold with customers and suppliers intact, and that Raytheon and Machlett would support potential buyers with patents, trademarks, licenses, technical assistance and indeed new business.

The mere decision to sell these product lines did not render them valueless overnight. The commercial and technological features of each and every product line remained intact. I should note that ELSI was selling and shipping products to customers right up until the date it was unlawfully requisitioned by the Respondent.

The distinction between sale of ELSI as one or more businesses, and the sale of ELSI's tangible assets as a defunct company – as it was at the end of the bankruptcy proceeding — is stark. A sterile sale of the assets of such a defunct company would basically recover the value of each asset as a separate item, and not the value of all of the assets or business lines in the aggregate. Raytheon and Machlett took specific steps to insure that ELSI's product lines would be sold as businesses, rather than in a piecemeal fashion.

The Respondent expresses only vague and conclusory doubts as to the sale of ELSI's product lines, but offers no documented evidence of the saleability of ELSI as a whole or by product line. I must, therefore, briefly review the evidence on the record with respect to ELSI's product lines.

Cathode ray tubes. First, the cathode ray tube line, that is, the television tube line. Mr. Clare delivered powerful testimony with regard to the saleability of the cathode ray tube line. With its up–to–date technology, this line, started under license from an American company, constituted more than one half of all of ELSI's sales. ELSI was using licensed, up–to–date technology to produce implosion–proof tubes. The Respondent itself recognizes in its Counter–Memorial that the quality of the television tubes was « quite good » (Counter–Memorial, Annex 44, p. 2).

In the two years preceding the requisition, ELSI cleared out a large amount of bad inventory and improved yield by establishing a reclaim section to rework flawed tubes. The manufacturing output was improved by the industrial engineering provided by the experts sent from Lexington. As a result of all of the improvements instituted by the ELSI management team, production and sales increased from a prior level of 30,000–35,000 tubes per month to 50,000 tubes per month in December of 1967. These qualities earned ELSI a substantial share of the market in both Southern and Northern Europe. ELSI's picture tubes account for a full 20 per cent of the Italian market; 40 per cent of ELSI's output was exported to countries such as Germany, France and Holland (C 3/CR 89/2, pp. 280–281).

I should point out that ELSI bought no glass tubes from Russia as was asserted by the Respondent (C 3/CR 89/5, p. 373). Tubes were purchased only from Germany and France — another of the Respondent's many inaccuracies.

The future for these products was excellent. There was a substantial market in Europe for black–and–white television tubes, both for original and replacement tubes. Colour television

transmission in Italy did not even start until about the end of 1976, so the black-and-whilel ine had a good 10-year life of potential sales and profit (C 3/CR 89/2, p. 281).

ELSI, however, had taken steps to position itself for the advent of colour television in the European market. ELSI established a colour television laboratory in Palermo at a cost of a quarter of a million dollars. ELSI management, through Raytheon, had already begun negotiations with RCA with regard to a license for colour television tubes (C 3/CR 89/2, p. 281).

The television tube line could easily have been sold as a part of ELSI as a whole, or as an independent business. The line was housed in a separate building, which represented nearly half of the total plant.

X-ray tubes. Second, the X-ray tube line. X-ray tubes were made with technical know-how from Machlett Laboratories. The tubes, made in Palermo, were modern, current technology tubes. As Mr. Clare described, ELSI was the only manufacturer in Italy of X-ray tubes.

There was also a market in telephone switching equipment to which the technology in the X-ray tube line could be applied. In telephone switching equipment of that era, items known as reed relays were being introduced. Their manufacture required glass sealing, control of the vacuum inside, and control of clean metals for the contacts. The technology and know-how in the ELSI X-ray tube line would have been ideally suited for the production of reed relays (C 3/CR 89/2, p. 281).

ELSI management was confident that the X-ray tube line was a readily saleable line. If for any reason it was not, however, Mr. Clare has testified that a Swiss company, Comet, majority owned by Machlett, would have purchased the line. Raytheon would have made certain that this purchase was effected. Comet would have either left the line in Sicily as an EEC manufacturing source or moved the line to another location (C 3/CR 89/2, p. 281).

Citing a brief and conclusory affidavit in its Counter-Memorial, Respondent's *only* allegation with respect to the X-ray line in its oral pleadings is that « the machinery was very old and the processing was carried out at great risk to its operators ». Respondent selectively edits the conclusion in this same affidavit that the X-ray tubes manufactured by ELSI were « quite good » (Counter-Memorial, Annex 44, p. 2). Finally, in its oral pleading, Respondent made no response to Mr. Clare's compelling testimony concerning the technology of the line and the quality of the products and its prospects for sale.

Semi conductors. It has not been disputed that prior to 1967 the semi conductor line was manufacturing germanium transistors which had become obsolete. Mr. Clare and his management team stopped the germanium manufacture and sold off the inventory of raw material and product with the help of Raytheon Semi Conductors.

Raytheon's wholly-owned subsidiary, Transistor A.G. (TAG) in Zurich, implemented a similar transition from germanium to silicon. After the transition, TAG developed new silicon products — rectifiers, high voltage stacks, and controlled rectifiers — all of which had a strong and growing market.

The know-how for these new products was being transferred to ELSI, which began to manufacture silicon rectifiers and high voltage stacks. Raytheon and Machlett intended ELSI to become the EEC source for these products, with TAG as the EFTA source. A European sales executive, provided by Raytheon, served both companies.

TAG grew strongly and profitably based on these new products and for many years has taken 50 per cent of the German market in these product areas, in direct competition with Siemens, AEG and BBC. Because of the close working relationship between TAG and ELSI, it can be stated with certainty that if a purchaser could not have been found for the semi conductor line, TAG would have taken it over.

The Respondent's only specific assertion with respect to the semi-conductor line is that it utilized germanium technology which had been obsolescent for many years (C 3/CR 89/5, p. 373). The Respondent's assertion completely ignores Mr. Clare's specific testimony that he and his management team had converted the line from manufacturing germanium products to manufacturing silicon products many months prior to the requisition (C 3/CR 89/2, p. 282).

Microwave tubes. In its oral pleadings, the Respondent made no mention of the microwave tube line whatsoever. ELSI was manufacturing high technology, low–noise power devices for the Hawk missile system. As both Mr. Adams and Mr. Clare testified, the quality of these tubes was unmatched worldwide and was backed by Raytheon license and know–how (C 3/CR 89/1, p. 260; C 3/CR 89/2, p. 281). This line also produced magnetron tubes, the power sources for big radars, and they could have produced the magnetron tube used in microwave ovens. As both Mr. Adams and Mr. Clare testified, microwave ovens, based on the commercial, technological and manufacturing know–how of the wholly–owned Raytheon subsidiary, Amana, would have provided a gold mine of business for any purchaser of the line.

Surge arresters. Mr. Clare also testified to the viability of the small surge arrester line, which the Respondent again did not even mention in its oral statement. This was a highly profitable line capable of supporting significant new sales into the STET–PTT area. Thus, there is substantial documented evidence on the record, product line by product line, that demonstrates the unique qualities of each that made them readily saleable.

The Respondent declared in its oral presentation that the orderly liquidation plan was sheer fiction — or a «legend» to use the Respondent's own words (C 3/CR 89/8, p. 455). I would hardly refer to the record before this Court as fiction or legend. The team designated to sell the assets in liquidation identified three possible alternatives. The first possibility — and the first step the management team would pursue — was to sell ELSI as a total entity. The most obvious purchaser for ELSI as a whole was an IRI company. The second alternative was to sell the television tube plant and the other product lines as two separate businesses. The third likely scenario was sale of the individual product lines.

The liquidation team planned to approach ELSI's major competitors and major distributors for each product line. They would also target companies seeking to add to their own production and companies that might seek to expand or diversify their product lines.

After the decision of the shareholders on 28 March 1968, the liquidation plan was put into motion. Dismissal notices were sent to the employees and Raytheon transferred 150 million lire to start the payment of small creditors. The management working groups assembled to implement the liquidation prepared to contact potential purchasers with the aim of locking in commitments from purchasers within two to three months.

The Respondent expresses scepticism as to why contacts with potential purchasers had not yet been made (C 3/CR 89/6, p. 402). As previously stated, Raytheon and Machlett delayed the orderly liquidation for as long as possible to give the negotiations with the Respondent the maximum chance of success. There is no evidence of specific contacts with purchasers only because the Respondent's unlawful requisition intervened only three days after Raytheon and Machlett voted to proceed with the orderly liquidation. The Respondent cannot now exploit the unavailability of specific contacts, as it effectively prevented such contacts from being made with the intervening requisition. However, even after the requisition, Raytheon received unsolicited inquiries from companies in the United States, Japan and Greece (Counter–Memorial, Unnumbered Documents II–24 to II–28; C 3/CR 89/2, p. 283). Inquiries such as these, and those made directly to the bankruptcy trustee — which came in even without the efforts Raytheon had planned to make — underscore the immediate marketability and saleability of ELSI's product lines.

Judge Schwebel has asked whether it would have made sense for Raytheon and Machlett to have sold ELSI at an earlier point in time (C 3/CR 89/2, p. 275). The answer, in an economic sense, is yes. The reason Raytheon and Machlett waited as long as they did to commence the orderly liquidation was to allow the Respondent every possibility to become involved in ELSI and thereby avert the orderly liquidation. It was only when no concrete agreement had materialized, and the 4 billion lire investment was nearly depleted, that they reluctantly decided to proceed with the orderly liquidation.

John Clare accepted Mr. Highet's statement that the company at this point was « belly–up ». This does not mean that ELSI was bankrupt or even insolvent under Italian law, but merely that the prior year investment was nearly gone and the time had come when a liquidation was necessary.

Thus, there was a specific plan for a liquidation, financially backed by Raytheon, that was destined to recover maximum value for ELSI's assets. Mr. Adams and Mr. Clare have both testified that in their business judgment in the orderly liquidation that was planned, ELSI's assets would have brought at least the value shown for those assets on ELSI's books. Mr. Lawrence has also provided you with his expert opinion that sale of ELSI's assets would have recovered 17,132.7 billion lire. This amount would have been sufficient to discharge all of ELSI's obligations, including Raytheon's current accounts with ELSI.

The Respondent has presented a second calculation of ELSI's value which, on examination is surprisingly similar to ours. Mr. Lawrence will deal with these calculations in detail this afternoon. I would only note at this point that the Respondent makes virtually no reference to the judicial valuation of the fixed assets in the bankruptcy proceeding — Mr. Puglisi's valuation.

The record further demonstrates that if, for any reason, the sale of ELSI's assets had not realized sufficient funds to pay all creditors in full, several alternatives were available to Raytheon and Machlett — alternatives which could never be implemented because Respondent's precipitous and unlawful requisition intervened.

This brings me to the second of the three central issues which continue to separate the Parties: whether ELSI was obligated as a matter of Italian law to be placed into bankruptcy at some point prior to the requisition. As Professor Bonelli has demonstrated in some detail,

The PRESIDENT: I am sorry to interrupt you. Perhaps this is a good time to have our break?

Ms. CHANDLER: Mr. President, I have only about another three minutes before a natural break in the presentation.

The PRESIDENT: You can continue then.

Ms. CHANDLER: Thank you. As Mr. Bisconti will confirm in a moment, no provision of Italian law obligated ELSI to file for bankruptcy at any point prior to the requisition.

The Respondent asserts that when a company faces great losses or even financial disaster, the consequence is that Italian law does not permit any sort of liquidation other than the bankruptcy procedure. Professor Bonelli has demonstrated the contrary: that under Italian law a company may proceed with an orderly liquidation under one of several procedures under Italian law — and is not obligated to file a petition in bankruptcy — even if its liabilities may appear to exceed its assets. One possibility was that Raytheon and Machlett could have deferred their own credits to ELSI. Another possibility was that Raytheon and Machlett could have settled some or all of ELSI's debts. For example, Raytheon and Machlett were committed to paying off the small creditors and the secured loans in full, negotiating the settlement of other unsecured loans, and paying the balance of the guaranteed loans. Professor Bonelli has demonstrated that in Italy settlements with creditors are not only legally possible, but desirable. Creditors in Italy and elsewhere have an economic incentive to settle their credits in a negotiated settlement, rather than accept little or nothing in a protracted bankruptcy proceeding. In addition, creditors typically agree to settle their credits in light of the requirement that a bankruptcy trustee cancel all payments which were made within one year of the declaration of bankruptcy (C 3/CR 89/2, p. 291).

Willingness of the unsecured, unguaranteed creditor banks to settle is further evidenced by events that transpired in the fall of 1968, when the Italian Government actively pursued negotiated settlements with the banks as part of its efforts to acquire ELSI's assets. All but one of the seven creditor banks agreed to accept 30 to 40 per cent of their unsecured claims. One bank decided that it would accept 50 per cent (Memorial, p. 16). These negotiations were never completed because of the decision by the Italian Government to purchase ELSI's assets in the bankruptcy process (Memorial, p. 16).

The Respondent does not take issue with Professor Bonelli's detailed statement of Italian law, and announces instead that it is «irrelevant» (C 3/CR 89/6, p. 400). Curiously, the Respondent then devotes most of its argument to United States bankruptcy law. ELSI, however, was governed by Italian law, not US law, and US law is therefore completely irrelevant to the proceedings before this Court. Mr. President, I will therefore ask Mr. Bisconti to discuss ELSI's rights and obligations under Italian law.

The PRESIDENT: Judge Schwebel would like to put some questions to Ms Chandler.

Judge SCHWEBEL: I should like to ask you, as counsel, the following: it was stated that ELSI had in fact applied for *Mezzogiorno* benefits. Can the Applicant provide documentary support for this statement?

Another question, of a more general kind, is this: could the Applicant tell the Court, or supply to the Court, figures on the total sales and profits of Raytheon and its subsidiaries worldwide for the years 1967 and 1968? And in that regard it would be helpful, if it is feasible, to indicate where among the electronic manufacturers of the world in those years Raytheon ranked. Thank you.

The PRESIDENT: I would also like to put two questions.

In the course of the pleading of the Italian delegation, they have maintained that Raytheon charged ELSI for the patents, licences, and technical assistance given; and they say that ELSI had to pay a lot of money to Raytheon for this assistance. In your statement, Ms. Chandler, you said that Raytheon had decided, in the liquidation, to provide these licenses, these patents and this technical assistance to the new buyer of the whole business or the buyer of the product lines. My question is: was Raytheon going to charge the new buyers the same amount as they had previously charged ELSI?

The second question is the following, on another matter. I wanted to put this question before but it went out of my mind. On 28 March dismissal letters were sent to some 800 workers, if I remember correctly. How much was the amount of money, in Italian lire, that ELSI would have had to pay, according to the labour law of Italy, for the dismissal of these workers? Thank you very much. You do not need to reply now.

Ms. CHANDLER: Mr. President, judge Schwebel: we will look into these questions and provide you with our answers.

The PRESIDENT: Thank you very much.

The Court adjourned from 11.30 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. Ms. Chandler. You have been working during the break?

Ms. CHANDLER: That is right. Mr. President, in just one moment I would like to ask Mr. Bisconti to discuss ELSI's rights and obligations under Italian law. Mr. Bisconti will demonstrate the shareholders' entitlement to place ELSI in orderly liquidation as a matter of Italian law, he will respond to the Respondent's statements with regard to Italian bankruptcy law, and he will demonstrate the legality and feasibility of creditor settlements in Italy. Mr. Bisconti is the senior partner in the law firm of Studio Legale Bisconti with offices in Rome, Milan, London, and New York. He is a member of the Italian Bar Association, an Honorary Member of the American Bar Association, and a Fellow of the American Bar Foundation. In September 1988, in Buenos Aires, Mr. Bisconti was elected the Vice–President of the International Bar Association. Mr. Bisconti was counsel to Raytheon during the orderly liquidation plan, the intervening requisition, and the ensuing bankruptcy. He is therefore thoroughly familiar with Italian law as it relates specifically to the plan to liquidate ELSI's assets, with the intervening illegal requisition, and with the decision to place ELSI in bankruptcy. I now ask the Court to invite Mr. Bisconti to come forward.

The PRESIDENT: I call upon Mr. Bisconti, please.

Mr. BISCONTI: Mr. President and distinguished Members of the Court, it is a distinct honour and privilege for me to appear before the International Court of Justice in this case on behalf of the Applicant, the Government of the United States.

I have been asked to address the question whether the stockholders of ELSI could have legally carried out an orderly liquidation of the ELSI assets at the end of March 1968. I have also been asked to respond to arguments raised by the Respondent that ELSI was obligated under Italian law to file a petition in bankruptcy prior to the requisition.

With regard to the first of these two issues, there can be no question that Raytheon and Machlett, as stockholders in ELSI, had a right under Italian law to proceed with an orderly liquidation of assets for whatever reason they deemed fit.

As counsel to the stockholders and to ELSI's Board of Directors at the time, it was my responsibility to see that there be an orderly liquidation of ELSI in full compliance with the law. One of the most important factors in the pre-requisition period, which assured the effectivity of the orderly liquidation and made bankruptcy an unthinkable event, was the fact that ELSI had the backing of its stockholders. As Mr. Clare has testified and as I know from my own personal knowledge in the aforementioned capacity as counsel, the stockholders had guaranteed the cash flow necessary to make the orderly liquidation work. This should be distinguished from making more funds available to ELSI for continued operations. The record will show that ELSI's parent corporations had stated in early 1967, and had repeated to the Respondent throughout the remainder of 1967 and the early part of 1968, that they would not fund ELSI's operations beyond the period such operations could be carried by the 4 billion lire they had invested in 1967. As the record will show, the stockholders had already transferred funds for the purpose of paying off the small creditors. It makes no sense to speak of a subsidiary of financially stable parent corporations in the same way one speaks of an entirely independent corporation. As long as the parents back the subsidiary, it may accomplisy an orderly liquidation in situations which would be much more difficult for a corporation not having such backing. With the backing of Raytheon and Machlett, ELSI was assured of the funds and the cash flow and whatever other assistance, financial or otherwise, might have been needed to effect an orderly liquidation.

In addition to the funds and the cash flow, ELSI also needed to make an advantageous sale of its assets and to reach a settlement with its creditors. Mr. Lawrence, an eminent evaluation expert, has testified that the realizable value of ELSI's assets was over 17 billion lire. If a sale for this price could have been achieved, all the creditors could have been paid in full. An agreement would have been necessary with the large unsecured creditors to await the outcome of the sale for full payment. Under the circumstances, had a freely operated sale of assets been assured, it would appear entirely reasonable for the few large creditors to await the results of the sale, and in such circumstances they could have been counted on to assist ELSI in making an advantageous sale of its assets to a new owner, or several new owners, of the various business lines. The record shows that ELSI initiated this process on 1 April 1968 meeting with the creditor banks but that the process was brusquely interrupted by the requisition.

The PRESIDENT: Something about.

Mr. FERRARI BRAVO: Mr. President, a small point of order. It seems to me that, at least in the first part of his statement, Mr. Bisconti appears to be giving evidence from his own personal experience. So I would suggest that the Applicant qualify him as a witness so that he can come forward for cross examination, if necessary on Thursday, on this testimony which is being offered only at the rebuttal stage. Thank you, Mr. President.

The PRESIDENT: I was looking over the rules precisely on this point. I have also the impression, Mr. Bisconti, that, at the beginning of your statement, you made some assertion of facts, something that you had known when you were assisting as a lawyer to ELSI. Therefore, I think that if the American delegation has no objection to this, I think that for this part of the statement I will take you as a witness, because you are testifying on something that you know from your own personal knowledge. Therefore you can continue with your statement now; at the end of it, I will ask you to take the declaration made by witnesses and you will be submitted to cross-examination by the Italian side. You can continue, Mr. Bisconti.

Mr. BISCONTI: Thank you, Mr. President. This brings me to my second point. Respondent alleges that Italian law should have prevented the orderly liquidation and that ELSI should instead have filed a petition in bankruptcy at some point prior to the requisition. It is my considered opinion that ELSI had no obligation under Italian law to file a petition in bankruptcy at any point prior to the requisition. I have studied the affidavit and oral statement of Professor Franco Bonelli and agree that he has correctly stated the Italian law as it applies to this case. I

have also reviewed the affidavit of Professor Jaeger annexed to Respondent's Counter-Memorial and the oral statements of Professors Libonati and Bonell and respectfully disagree with their conclusions.

First, Professor Libonati finds that ELSI had an obligation to file a petition in bankruptcy derived from Article 5 of the Italian Bankruptcy Law. He concludes that a company is required to file a petition in bankruptcy if it is in default of payments due or if there are other external facts which would demonstrate that it is no longer in a position to satisfy its own obligations in a regular manner. ELSI was not in a such a position prior to the requisition and Respondent has not and cannot document a single bill that was due prior to the requisition that ELSI was unable to pay. Even Respondent's own expert, Mr. Hayward, is incapable of stating that ELSI was in fact insolvent and concedes that ELSI was merely on the « verge of insolvency ». From this ensues the conclusion that prior the requisition, Article 217 of the Italian Bankruptcy Law was totally inapplicable to ELSI.

Respondent also asserts that ELSI was bankrupt by virtue of Articles 2447 and 2448 of the Italian Civil Code. It is true that ELSI would have been considered dissolved as a matter of law if its capital were depleted below the statutory minimum amount. At the relevant time the statutory minimum was 1 million lire. As the United States Memorial demonstrates, ELSI's capital, as reflected in the statutory accounts prepared in accordance with Italian law, even after taking into account losses, was always well above the statutory minimum. I should also note that Respondent takes no issue with Professor Bonelli's conclusion that ELSI was under no obligation to file a petition in bankruptcy under Article 2446 of the Italian Civil Code.

Respondent further queries whether at some point during the planned liquidation ELSI would have been obligated to file a petition in bankruptcy under Italian law, particularly with regard to the 800 million lire payment to Banca del Lavoro in late April of 1968. The answer is no. Raytheon and Machlett had made the commitment to support fully an orderly liquidation, including the payment of small creditors and any other notes and bills that came due during the period before proceeds from the sale of ELSI's assets could be obtained. With this backing, ELSI would not have had any obligation to file a petition in bankruptcy.

Respondent makes much of its conclusion that ELSI's liabilities in March of 1968 exceeded its assets. I do not agree with Respondent's conclusion. Raytheon, Machlett and ELSI's Board of Directors — and I as their counsel — had every confidence that ELSI's assets could be sold for book value and all creditors in any event of the course of an orderly liquidation would have been paid in full.

Professor Bonell declares in his statement that ELSI nearly committed a crime of so-called abusive recourse to credit under Article 218 of the Italian Bankruptcy Law by accepting the stockholders financial backing in order to satisfy small creditors. I greatly respect Professor Bonell and have read with great interest several of his writings and books, noting in particular the thoroughness of his documentation in the footnotes. I am utterly surprised that Professor Bonell refers to Article 218 in such an incomplete manner. Article 218 punishes as a crime the fact of an « entrepreneur exercising a commercial activity who has recourse or continues to have recourse to credit concealing his economic situation » (my translation).

One need not be a scholar in bankruptcy or criminal law to conclude that there is no recourse to credit in accepting a contribution from stockholders who are fully aware of the company's financial conditions.

I am equally surprised that Professor Bonell — to whom I wish to express again my high esteem and respect — refers in a significantly incomplete manner to Article 160 of the Italian Bankruptcy Law. Under said Article, as one of the alternative conditions to be admitted to the procedure of judicial settlement, the debtor must show the court that he can offer serious guarantees — « real » or « personal » — that he is able to satisfy the unsecured creditors with at least 40 per cent of their claims, within six months from the homologation of the settlement or, in the case of a more extended period, that such guarantees cover interest at the legal rate for the excess period. Having the backing of the stockholders, ELSI could have easily satisfied the conditions of Article 160.

As to the repeated allegations by Respondent that ELSI or its directors had violated provisions of the criminal law, I beg leave of this highest Court to state most emphatically that by filing a petition in bankruptcy ELSI not only opened its books to the Court, but submitted to the Court's scrutiny all its activity as it may have been relevant. An excerpt of the judgment declaring the bankruptcy must be sent by the Court to the public prosecutor to enable him to exercise a criminal action under Articles 17 and 238 of the Bankruptcy Law. Under Article 33 of the Bankruptcy Law, the curator is required to submit to the court a report covering also the responsibility of the debtor in the bankruptcy under the criminal laws. Had the court had any doubt about possible breaches of the criminal law by ELSI's directors, or had the curator in bankruptcy had any doubts as to the directors' responsibility under the criminal provisions of the Italian Bankruptcy Law, these would have been reflected in criminal charges against ELSI's directors. No such charges were ever made.

Moreover, during 17 years of extenuating litigation brought in Italy by the banks against Raytheon and Machlett, the behaviour of the stockholders and of ELSI's board were under the eyes of the Italian courts. Not only no criminal charges were ever made or intimated, but Raytheon and Machlett were fully vindicated by the Italian courts.

But let us assume for one moment that Respondent were correct. As Professor Bonelli has demonstrated — and I fully agree — under Italian law a company is entitled to proceed with an orderly liquidation of its assets even if its liabilities may appear to be greater than its assets. Professor Bonelli described several alternatives available to a company in this position. One very real possibility available to ELSI was settlement with creditors, either by private or judicial settlements. As Professor Bonelli correctly concluded, any one of these alternatives would have placed ELSI and its creditors in a far more favourable position than did the sale of ELSI's assets in bankruptcy.

Both Professor Bonelli and Professor Jaeger (two leading experts in Italian commercial and bankruptcy law) agree that creditors in Italy have substantial economic incentives to settle their credits in an orderly liquidation rather than receive little or nothing in a protracted bankruptcy process. It is a notorious fact, and it has been my experience as a practicing lawyer, that creditors in Italy are willing to settle credits for much less than face value.

It is critical to note that Professor Bonell did not dispute any of the alternatives described by Professor Bonelli, nor did he dispute the principle stated by Professor Bonelli and Respondent's own counsel, Professor Jaeger, that creditors have substantial economic incentives to settle their debts. Professor Bonell's argument in this regard is that « there is no evidence whatsoever that, prior to the requisition, the banks were willing to accept the proposal of a 30 to 50 per cent payment ». Respondent has not presented any credible evidence why ELSI's creditors would not have been willing to settle their loans. There is no evidence of bank negotiations at the time of the requisition because, at the time, the stockholders were fully confident that ELSI's assets would have recovered book value, and there was no need at the time to start any such negotiations. What the stockholders and ELSI's board were seeking at the time was an understanding with the banks on the manner and timing of an orderly liquidation. Bank settlements would have remained as a very viable alternative for ELSI, but only an alternative.

However, the requisition of ELSI's assets prevented any of the alternatives described by Professor Bonelli from becoming reality. The requisition prevented ELSI from proceeding with an orderly sale of assets, prevented ELSI from completing work in process, and even prevented ELSI, had it so chosen, from proceeding with creditor settlements. If Respondent does not find satisfactory documentation of creditor settlements on the record of this case, it is precisely because Respondent's illegal requisition of ELSI's assets made any legitimate alternative impossible. Thank you, Mr. President.

The PRESIDENT: Thank you very much. As I said before, we interpret the first part of your statement, Mr. Bisconti, as expressing things that you know as a lawyer for the firm, and facts that you know as a lawyer for the firm: therefore, as you know, the Italian delegation has asked that you be treated as a witness. I have decided to consider you, if the American delegation does not object, as a witness as regards the first part of your statement. Therefore I have to ask you

to take the solemn declaration under Article 64 of the Statute. Could you put it in the past tense please.

Mr. BISCONTI: I solemnly declare, Mr. President, upon my honour and conscience, that I have spoken the truth, the whole truth and nothing but the truth.

The PRESIDENT: Thank you very much, Mr. Bisconti. Does the Italian delegation wish to put some questions now — only on the part of the statement relating to facts?

Mr. FERRARI BRAVO: It is difficult to consult a big delegation. I am sorry, Mr. President, but I think perhaps this afternoon, if it is convenient to the Court.

The PRESIDENT: You can do so at the beginning of the afternoon, but judge Sir Robert Jennings would like to put a question to you now, Mr. Bisconti.

Judge JENNINGS: I have a simple question of fact — I am not sure whether it is addressed to Professor Bisconti or to the United States delegation; probably the United States delegation will decide how the question should be answered and when. It is simply this: did ELSI succeed in selling any of its assets in pursuance of the orderly liquidation before the requisition intervened in the process, or, indeed, did it manage to sell any of its assets after the requisition, and before the bankruptcy?

The PRESIDENT: If you want to reply in the afternoon, Mr. Matheson, you may. Judge Schwebel, do you wish to put a question to Mr. Bisconti?

Judge SCHWEBEL: Please. Did I understand Mr. Bisconti to say that ELSI's plan to pay off small creditors in full was lawful under Italian law, and that there was no merit to the contention that such payment would have been an unlawful preference? That is my first question.

My second is this: I understood Mr. Bisconti to maintain that the fact that an instalment on a bank loan was due in late April of some 800 million lire, — I believe the figure — did not of itself indicate that bankruptcy at that juncture was inevitable, because the stockholders of ELSI were prepared to meet such a loan if doing so was pursuant to a sale of assets which would have realized, by the proceeds of the sale, funds which presumably would have repaid the stockholders for advancing funds to meet the loan payment. Now I had earlier understood, from argument of the Applicant, that the stockholders had transferred a sum of money sufficient to pay small creditors. Had any steps been taken by the stockholders, which evidenced the further intention of the stockholders to act in the fashion I have just referred to with respect to the loan payment due in late April?

The PRESIDENT: You may reply, Mr. Bisconti.

Mr. BISCONTI: If I may, Mr. President, I will reply in the early afternoon. Thank you.

The PRESIDENT: Thank you very much. Are there any other questions from the Bench? No. Therefore I relieve you. Thank you very much.

Mr. BISCONTI: Thank you, Mr. President.

The PRESIDENT: I now call upon Ms. Chandler again.

Ms. CHANDLER: Mr. President, the Respondent's final line of argument is that even if the requisition did prevent the orderly liquidation, the requisition caused no damage because ELSI would have gone bankrupt anyway. As Mr. Bisconti has shown, ELSI would not have filed the petition in bankruptcy had the Respondent not illegally requisitioned ELSI's assets. The Respondent does not dispute that the requisition prevented the sale of ELSI's assets, that the requisition prevented ELSI from resuming limited operations, and that the requisition effectively prevented settlement with creditors. In this posture, orderly liquidation was simply out of the question. Without cash available to meet bills as they came due, the only practical alternative open to ELSI was bankruptcy. The requisition barred ELSI from closing the plant in an orderly liquidation. After its imposition, the only way to dispose of ELSI's assets was through the protracted bankruptcy process.

The Respondent, by contrast, argues that ELSI was insolvent or at least on the « verge of insolvency ». In considering this contention, it is worth bearing in mind at the outset the testimony that was presented last week by the Respondent's accounting expert, Mr. Hayward. The issues raised by Mr. Hayward will be dealt with by Mr. Lawrence this afternoon, but at this point I wish to focus the Court's attention on one significant point.

In response to questions, Mr. Hayward stated that he believed ELSI was « on the verge of insolvency » on 31 March 1968. He went on to explain that he meant that ELSI was on the verge of a situation where it could not pay its liabilities as they would fall due. But he made clear that even this would not prevent ELSI from continuing to do business. As Mr. Hayward put it, « until one has gone to the court and actually declared that the company is insolvent, *the company can still continue business — which I think was the case of ELSI* » (C 3/CR 89/7, p. 435, [italics added]).

As we have shown, the « business » that would be proceeded — if the requisition had not intervened — was the business of the orderly liquidation, which ELSI was actively planning in March of 1968. That liquidation would have worked; Raytheon stood behind it and would have made certain that it worked. The liquidation would have realized for ELSI an amount at least equal to the book value of ELSI's assets.

The Respondent has made much of the prediction by John Clare, in a meeting with Italian officials, that ELSI's funds would run out in early March. This statement reflected the depletion of the 4 billion lire investment from the prior year. It cannot be concluded that funds were not available from Raytheon to successfully complete the orderly liquidation.

ELSI was not insolvent. At the time of the requisition, ELSI had paid every single bill that had come due, including the March 1968 payroll. The Respondent asserts (C 3/CR 89/5, p. 359) that the salaries of the ELSI workers were paid by the Sicilian Region in March 1968 because ELSI could not make its March payroll. This is simply wrong. The Respondent's complaint concerning notice and payment given to the workers in March of 1968 is entirely unfounded.

And ELSI would have remained fully solvent through the orderly liquidation period. During the liquidation period, ELSI would have generated funds of its own by establishing an aggressive programme to collect the 2,400 million lire in accounts receivable and the 400 million lire in notes and accrued receivables. They would have also sold the finished goods of 1,800 million lire to existing customers and others. These proceeds would have been used to pay the following:

- wages and benefits of 30 million lire per month for the 130 retained workers;
- severance pay of 510 million lire to terminated employees;
- 283 million lire in accounts payable to those other than Raytheon;
- 1,000 million lire of other accrued liabilities; and
- all current but greatly reduced operating expenses (including telephone bills, utility bills, and the like).

During this period they would have negotiated with the creditor banks for extension of guaranteed debt and for new arrangements on unguaranteed debt. All interest charges, however, would have been paid on time.

Most important of all: if, for any reasons, the collections were insufficient to meet the case requirements during the period, funds would have been provided by Raytheon. In addition, all salaries and expenses of the Raytheon personnel handling the liquidation would have been paid by Raytheon.

Raytheon's commitment to advance all funds needed to provide the necessary liquidity for the orderly liquidation had been shown in the affidavits of Mr. Clare, Mr. Schene and Mr. Scopelliti (Memorial, Annexe 13, para. 14; Memorial, Annexe 15, para. 53; Memorial, Annexe 17, para. 14; Reply, p. 129) and in these oral proceedings (C 3/CR 89/2, pp. 279–280). This very critical aspect of the orderly liquidation plan has been completely overlooked by the Respondent both in its written pleadings and in its oral statements last week.

In arguing that ELSI was insolvent and would have gone into bankruptcy in any event, the Respondent has also suggested that ELSI was being exploited by Raytheon — squeezed like a lemon, to use the Respondent's phrase. It is difficult to see the relevance of this argument because even if it were true, Raytheon and Machlett were still entitled under Italian law to liquidate ELSI's assets. The Respondent's accusations, however, cannot pass without comment.

The Respondent repeatedly asserted that ELSI always made only losses, and twice set forth the figures — year by year, from 1963 to 1968 (C 3/CR 89/5, p. 374). ELSI's losses as such have never been in dispute. That was exactly why Raytheon ultimately determined to liquidate the Company. But in considering ELSI's financial situation, it is important for the Court to have a picture that is complete and accurate. For that purpose, the figures cited by the Respondent are ill–suited, for they do not tell the whole story.

The loss figures that have been cited are drawn from Schedule B3 of the Affidavit of Mr. Arthur Schene, which is contained in Annex 13 of our Memorial. Those figures represented net loss. A close examination of that schedule reveals, however, that ELSI actually generated an operating profit in 1964, 1965 and 1966. The net losses resulted only after the interest expenses were taken into account.

The substantial interest expenses, which are reflected in the schedule and which turned profits into losses, resulted from a deliberate choice made by Raytheon with respect to the financing of the company. Specifically, Raytheon had to decide whether to finance ELSI with large amounts of equity, which would have required borrowing in the United States, or whether to finance it primarily with secured and guaranteed bank debt in Italy. Raytheon chose the latter approach, for two very good reasons. First, interest rates were not significantly different; in fact, certain interest rates in Italy were lower. Second, the approach chosen avoided the impact of foreign exhange rate adjustments on Raytheon's income statement. In deciding to finance ELSI with Italian debt rather than equity, Raytheon was following a worldwide practice common among companies with foreign investments.

Moveover, ELSI's apparently poorer financial position in 1967 actually reflected very legitimate steps taken by ELSI management to take a more conservative view of ELSI's assets. These included:

– a 100 per cent screening of all customer accounts receivable which resulted in the deletion from the books on 30 September 1967 of 600 million lire of sales which had been erroneously recorded in prior years;

– a review of all inventory which made certain, for example, that old style cathode ray tubes and germanium semi–conductors were valued at minimum recoverable value or no value;

– finally, starting in 1963, a full annual charge for depreciation was recorded on all fixed assets.

In view of the continually increasing conservatism resulting in the out–of–period adjustments referred to above, the average annual operating loss may reflect a more accurate summation of ELSI's operating performances during that five–year period.

In any event, the operating loss in the fiscal year ended 30 September 1967 is totally distorted and gives the erroneous illusion of significantly increasing losses towards the end of ELSI's operations.

Moreover, there were other factors unrelated to ELSI's management and assets which distorted the final six–month period of ELSI's financial life. There were the series of earthquakes which devastated Palermo. These earthquakes polluted the water supply and caused an epidemic of spinal meningitis. These occurrences, which are common knowledge, disrupted ELSI's operations during this period and temporarily increased its losses. In addition, no new products had been found to re–employ the workers who were enrolled in the training program. Their lay–off caused a series of random, unannounced walkouts of employees further disrupting operations and temporarily increasing ELSI's product costs. All of these disruptions were temporary and one–time occurrences and should not be interpreted as having any permanent deleterious effect on the value of ELSI assets.

The Respondent's glib characterization of ELSI as a lemon is thus unfounded in fact and cannot withstand a genuine analysis of the events that transpired in the year before the requisition.

To evidence its position that Raytheon and Machlett were « squeezing » — or exploiting — ELSI, the Respondent relies exclusively on the so-called Mercadante Report. The data in the Report of Dr. Mercadante is replete with errors and statistical distortions. I will limit my remarks today to three of the more illustrative issues mentioned in the Mercadante Report: royalties, management fees, and technical consultancy fees.

From 1960 through 1967, royalty rates averaged less than 3 per cent of sales, but almost none of the royalty payments that accrued were actually ever paid.

Exhibit C to Mr. Deitcher's Affidavit, which is contained at Annex 14 of our Memorial, shows clearly that a total of almost US$500,000 in royalties — the vast bulk — remained unpaid on 31 March 1968. This amount was included in the « open accounts » that Raytheon never recovered because of the bankruptcy.

Next, management fees. During the period after 1962, ELSI was assessed by Raytheon a normal management fee, to cover costs, that averaged about 1 per cent of sales. But again, most of these fees were accrued but never paid. Mr. Deitcher's exhibit shows management fees for Raytheon and Raytheon Service Company totalling US$521,753 — again the vast bulk — remaining unpaid on 31 March 1968. Together with the other open accounts, they were lost as a result of the bankruptcy.

The expenses for technical consultancies, to which Dr. Mercadante also referred, represented reimbursement of out-of-pocket costs for the services of Raytheon's technical specialists who worked on ELSI's problems. The story here is exactly the same. As Mr. Deitcher's exhibit reveals, most of the « specialist's billings » — an amount of US$143,763 — remained unpaid on 31 March 1968. They were never received by Raytheon. Thus, to suggest that ELSI was a lemon that was being squeezed by Raytheon is to present a picture that is wholly distorted.

One final point. The Respondent contends that an orderly liquidation was impossible because the workers « had been in and out of occupying the plant for some weeks » (C 3/CR 89/8, p. 456). Contrary to the Respondent's assertion, the Judgment of the Court of Palermo does not establish that the occupation began on 13 March 1968 and continued through to the date of the requisition. Rather it is after the requisition that the local police did nothing to prevent ELSI's former employees from occupying the plant. The Respondent itself gives great weight to a document that states that the requisition began on 1 April (C 3/CR 89/6, pp. 387-388). We will discuss the legal arguments set forth by the Respondent in our discussion of the Treaty section. At this point, I will simply note the Respondent cannot plead the various provisions of its internal law to contravene its Treaty obligations. Thus, despite all of the Respondent's attempts to portray ELSI as a poor subsidiary bilked by its greedy parents, nothing could be further from the truth. ELSI's financial picture was improving substantially and ELSI or its product lines would have been a positive additional asset to many potential buyers. Backed by ample Raytheon financial resources there is nothing to suggest that ELSI was or would become insolvent at any point during the orderly liquidation.

I would like now to turn to the issue of compensation. As we have demonstrated, the Respondent should make reparation for all of the financial losses flowing from its wrongful acts and omissions, including the illegal requisition. These losses include the loss of Raytheon and Machlett's financial investment, the loss of Raytheon's open accounts, the payments by Raytheon of the guaranteed loans, and payments by Raytheon of various legal and related expenses. Of course, even if the Court were to find that the requisition were not the cause of the bankruptcy, a position with which we firmly disagree, Raytheon and Machlett suffered direct and substantial losses arising from the other acts and omissions by the Respondent.

I will address the key issue of valuation shortly. Before I do, however, I would like to focus briefly on two other aspects of compensation raised by the Respondent last week: reimbursement of legal expenses and interest.

The Respondent has contested our inclusion of legal and related expenses in the claim for compensation. As we have shown, however, the legal costs that we claim in this case arose as a direct and foreseeable consequence of the unlawful acts and omissions by the Respondent. None of these expenses would have been necessary if ELSI had been permitted to proceed with the orderly liquidation; the proceeds of the liquidation would have been sufficient to pay ELSI's creditors in full. These expenses became inevitable, however, once the Respondent intervened with the requisition, which predictably drove ELSI into bankruptcy (*case of Cerruti*, summarized in MOORE, *Arbitrations*, Vol. 2, pp. 2121 *et seq.* [Government of Colombia required to pay litigation costs incurred in by Cerruti in defending against creditor actions]).

The Respondent's reference to the practice of the Iran–US Claims Tribunal on the issue of costs is beside the point. Costs awarded by the Tribunal are those related to the arbitration proceedings, and in awarding such costs the Tribunal operates within the framework of its own rules (see especially Art. 38 of the Tribunal Rules). In this case, by contrast, the United States seeks no compensation for the costs of the proceedings before this Court. The expenses for which we do seek compensation are all expenses for which reparation should be made in accordance with fundamental principles of international law. We have proven that the Respondent has engaged in wrongful acts and omissions which gave rise to those expenses. As the Permanent Court stated in the *Chorzow Factory case*, the reparation which is due « must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed » (*Chorzow Factory, Merits, PCIJ, Series A, N. 17*, p. 47 [1928]). It is on the basis of that principle that Raytheon and Machlett should be reimbursed for the legal and related expenses we have described.

Let me turn briefly to the question of interest. In that connection, only one contention of the Respondent merits attention, The Respondent cited the *Wimbledon case* (*SS « Wimbledon », PCIJ, Series A, N. 1*, [1923]) for the proposition that an award of interest should accrue from the date of judgment. This does not, however, represent the general rule in the present state of the law. Professor Lillich, while noting some exceptions, states the general practice in the following terms:

> « Interest generally has been held to commence on the date of taking in expropriation claims, and on the date of wrongful interference or nonperformance (when the respondent State is a party) in contract claims ....
>
> International arbitral tribunals allowing interest ... generally assess it from the date the claim arose, i.e., the date property is taken, contracts breached, or other deprivations occur ». (LILLICH, « Interest in the Law of International Claims », *Essays in Honor of Voitto Saario and Toivo Saino* 51, 55–56 [1982]).

In this case, interest should accrue, on a compound basis, from the date of the injury until the date of payment of the award. This is what is required to compensate fully for the loss of use of the funds that should have been paid to Raytheon and Machlett many years ago.

I turn, finally, to the issue of valuation. While the Respondent has argued that the requisition caused no loss, it has not contested the basic methodology we have proposed for the calculation of damages. The Respondent has produced its own accounting expert, Mr. Hayward, who has provided the Court with an alternative value for ELSI. Mr. Hayward drew the Court's attention to ELSI's financial statements of 30 September 1967, and he noted certain adjustments reflected in those statements. He concluded that the book value we had proposed was incorrect and that the book value should properly be reflected at a corrected figure of 12,822.6 million lire.

The chief difference between Mr. Hayward's figure of 12.8 billion lire and Mr. Lawrence's figure of 17 billion lire is the amount of 3.5 billion lire attributed by Mr. Lawrence to the intangible value of ELSI's assets that could have been realized in an orderly liquidation. Mr. Lawrence will discuss this matter further, but for present purposes, the point I wish to stress for the Court is the fact that the gap between Mr. Hayward and Mr. Lawrence is remarkably narrow. Even the Respondent's own accounting expert has made clear in his testimony his view that the figure

of 12.8 billion lire represented the real substance of ELSI as an economic enterprise. Mr. Hayward's words merit quotation:

> « Many companies in Italy, France and Spain, at that time, had two books of accounts. One was the official books of account for fiscal monetary exchange reasons, and the other was the proprietor's set of accounts which reflected the true economic substance of an enterprise. *It is my view that the audited balance sheet which was presented to Raytheon is the equivalent of the proprietor's set of accounts in this context, and does truly represent the substance of the economic enterprise* ». (C 3/CR 89/7, p. 432, [italics added]).

We presented to the Court last week a detailed explanation of the compensation we have claimed in this case. In order to ascertain the general financial losses suffered by Raytheon and Machlett, we compared the position they would have been in had they been permitted to proceed with the orderly liquidation with the position in which they actually found themselves as a result of the requisition and bankruptcy. In financial terms, the difference between those two positions amounted to 7,322.4 million lire, or US$11,739,200, and that is the figure that represents the United States claim for reparation for this category of injury. It will be recalled that we also considered what the losses of Raytheon and Machlett would have been if only the « quick-sale value » of ELSI's assets had been realized in an orderly liquidation. In that case, we showed that Raytheon and Machlett would still have been better off, as compared with what actually happened in the bankruptcy, by a margin of 3,137.8 million lire, or US$5,031,000.

Even if we were to accept Mr. Hayward's proposed value — which we do not — Raytheon and Machlett would have fared substantially better than they did as a result of the sale in bankruptcy. If the Court will bear with me for one brief moment, I will summarize the distribution of funds based on Mr. Hayward's hypothesis. Recovery of 12,822.6 million lire would have been sufficient to pay all preferred creditors in the amount of 1,036.8 million lire. It would have been sufficient to pay all secured creditors in full, in the amount of 3,819.5 million lire. The amount would also have been sufficient to pay the administrative and liquidation costs of 370 million lire.

The funds remaining would then have been used to pay the claims of the unsecured creditors. As we have indicated previously, Raytheon and Machlett had planned to pay the small creditors' claims in full in the amount of 520.6 million lire. This would have left balances due to the other unsecured creditors of 10,915.6 million lire and available funds of 7,075.7 million lire which would have permitted a pro rata distribution of 64.82 per cent to the remaining creditors. The banks with unguaranteed loans would have received 2,632.0 million lire, the guaranteed bank loans 3,702.5 million lire, and Raytheon itself 741.4 million lire. Under this scenario, Raytheon would have had to pay the balance of the guaranteed bank loans and interest in the amount of 2,009.2 million lire. Raytheon would also have had to write off the uncollected balance of 402.4 million lire of its accounts receivable. All of this would have resulted in a cost to Raytheon of 2,411.6 million lire. Thus, even if the liquidation had brought in only the book value proposed by the Respondent's own accounting expert, Raytheon and Machlett would still have been significantly better off than they were in the actual bankruptcy — indeed, by a margin of 4,519.8 million lire, or US$7,173,000. Of course, Mr. Hayward's proposed value should be rejected because it makes no provision whatsoever for the very real value of ELSI's intangible assets.

The Court now has before it, and must decided between two figures supplied by the Respondent's accounting expert and our own valuation expert, with the principal difference between them relating to the value of ELSI's intangible assets. It is in this light that we invite the Court this afternoon to consider the testimony to be provided by Mr. Lawrence. Mr. President, this concludes my statement. Our remaining presentation will last over an hour, so I suggest that this may be an appropriate time for a break.

The PRESIDENT: Yes. Thank you, Ms. Chandler. Mr. Matheson.

Mr. MATHESON: Mr. President, as Ms. Chandler said, our presentations for this afternoon will take something over an hour. Perhaps in light of the number of questions we have been given this morning, would it be possible to do either of two things? Either to begin this after-

noon's session a little later than 3 o'clock, say at 4 o'clock, or else to provide the answers to the questions in writing tomorrow morning – whichever the Court prefers.

The PRESIDENT: I think that it would be better if we begin at 4 o'clock this afternoon. You have the floor, Mr. Ferrari Bravo.

Mr. FERRARI BRAVO: Mr. President, just to facilitate the proceedings I shall not wait till the afternoon to say that we have no objection to the document introduced this morning by the United States. We have just a curiosity. As this document is a list of clients without heading, perhaps the Applicant would tell the Court what is its source? Where does it come from? Thank you, Mr. President.

The PRESIDENT: Thank you. Okay, in this case, in the afternoon you will be provided with the source of the document. I think that judge Schwebel would like to put a question. Judge Schwebel.

Judge SCHWEBEL: Thank you, Mr. President. I should like to put this question following upon Ms. Chandler's argument: is it the contention of the United States that since ELSI actually operated at a profit — but for its obligations to pay loans to it — buyers could have been found for ELSI or for its product lines since they could have been purchased free of this debt burden, a burden to be lifted by settlement with the banks and by payment by ELSI's stockholders on those loans pending settlement — is that a correct formulation of what the United States is contending on this point? Thank you.

The PRESIDENT: Thank you very much. Judge Oda also would like to put a question.

Judge ODA: Thank you, Mr. President. As I wanted to ask the United States Agent a question quite similar to what judge Schwebel asked early in this morning's session in connection with the exhaustion of local remedies, I would like to add just a supplementary question to the United States Agent for clarification. The question is whether the attorney of Raytheon–ELSI, deliberately made no reference to the FCN Treaty before the District Court of Palermo in 1969, the Court of Appeals of Palermo in 1973 and the Supreme Court of Appeals in 1974, in the belief that the FCN Treaty, as a non–self–executing treaty, need not be mentioned or relied upon before the Italian domestic courts; or, on the contrary, was he simply unaware that international law, or more particularly the FCN Treaty, might be relevant. Thank you, Mr. President.

The PRESIDENT: So, this afternoon we are going to begin at 4 o'clock and will start with the cross–examination of Mr. Bisconti by the Italian delegation on the facts that have been put forward by him at the beginning of his statement this morning. Then we shall proceed with Mr. Lawrence, as an expert, and then I understand that Mr. Matheson is going to close the American presentation. Thank you very much.

The Court rose at 12.50 p.m.

C 3/CR 89/10
Monday 27 February 1989, at 4 p. m.

Mr. BISCONTI – Mr. HIGHET – Mr. MATHESON

The PRESIDENT: Please be seated. Is the Italian delegation ready to cross-examine Mr. Bisconti on his statement of fact from this morning?

Mr. FERRARI BRAVO: Yes, Mr. President. We are ready and the cross-examination, which I hope will not last very long, will be conducted by Mr. Highet, assisted by Mr. Libonati.

The PRESIDENT: I want to stress again that the cross-examination will have to be on the points of fact. Therefore I call Mr. Bisconti, please.

Mr. BISCONTI: Mr. President and distinguished Members of the Court: may I ask for your permission to make a statement? It is a statement of principles and I consider it very important — indeed essential.

As an individual lawyer, as an active member of the organized Bar, as past Chairman of the Committee of Professional Ethics of the International Bar Association, I have a rooted conviction that it is not appropriate, it is not desirable — and should be avoided — that lawyers be witnesses in proceedings affecting, directly or indirectly, their client's interests. For this reason, had the Applicant asked me to be a witness here — even though I may possess knowledge of facts which might be considered useful to Applicant's case — I would not have agreed to do so.

I have today submitted to this Court a statement regarding certain aspects of Italian law. Therein I stated knowledge of certain facts on my part that formed the basis in part — but an essential part — of the opinion I expressed today and of the opinion I expressed to the shareholders of ELSI in March 1968. These statements of fact did not purport to be — neither directly nor surreptitiously — evidence, in any sense of the word. However, without these facts being stated, the opinions I gave would not be understandable or supportable. A lawyer's opinion cannot be given in a vacuum.

In over 35 years of practice I have believed, and continue to believe profoundly and withou qualification, in the independence of the lawyer and of the legal profession. Independence int all its aspects is the essence of the legal profession. Independence is the only true justification of the continuing existence of the legal profession. Privilege — a lawyer's privilege and not only the client's privilege — is one facet of the lawyer's independence. The rules of conduct that apply to me as a member of the Italian Bar apply to me wherever I am. This I believe is a widely-recognized principle and it is also reflected in the draft Code of Ethics that the CCBE has recently adopted. A lawyer should not waive, and should not lightly, waive his privilege. He has an obligation to the public not to do so.

I respectfully submit that Respondent, in asking that I be heard as a witness, did not take into due account the rules of the Italian Bar. I respectfully submit that without a waiver of privilege this highest Court could not today dispose or consent that I be examined as a witness. However, after weighing carefully my obligations to the Bar, as well as my obligations to this Court — in order that there be no doubts in the Court's mind — I have asked and have obtained Raytheon Company's waiver of privilege and hereby declare that I waive my lawyer's privilege, and consent to being examined as to facts that have been stated in the oral statement that I delivered this morning.

Mr. President and distinguished Members of the Court, thank you for allowing me to make this statement of principles.

The PRESIDENT: The Court takes note of your statement, Mr. Bisconti, and we thank you very much for your co-operation in waiving the privilege that you have mentioned. Therefore,

I think in order to be practical on this question, we will begin with our cross-examination. Thank you very much. Mr. Highet.

Mr. HIGHET: Thank you, Mr. President, Members of the Court. Avvocato Bisconti, let me say as a preliminary matter that we are fully aware of the dual position in which you find yourself and appreciate certainly the concerns which you have just advised the Court and ourselves of by your statement, and I will do my very best not to trespass in any sense upon a sense of professional honour or commitment that you may feel. And, Mr. President, if I may say, I have three lines of questions for Avvocato Bisconti and each of these, to the very best of our ability, has been constructed on the basis of questions of fact as to which Mr. Bisconti testified this morning, not on his legal argumentation or legal conclusions derived from it. So, without more, with your permission Sir, let me enter the first line of questioning. I will make this as brief as I can. It probably will not be as brief as I hope but I will do my best, Sir.

This morning you testified that, as you knew from your own personal knowledge, « the stockholders had guaranteed the cash flow necessary to make the orderly liquidation work » (C 3/CR 89/9, p. 481). Then, you also testified that « As long as the parents back the subsidiary, it may accomplish an orderly liquidation in situations which would be much more difficult for a corporation not having such a backing » (p. 481). And you continued to say that « With the backing of Raytheon and Machlett, ELSI was assured of the funds and the cash flow and whatever other assistance, financial or otherwise, might have been needed to effect an orderly liquidation » (p. 481). In a part which admittedly was a different one of your statement but still did contain, I submit to you, Avvocato Bisconti, statements or conclusions of fact: you testified (p. 482) that « Raytheon and Machlett had made the commitment to support fully » — I take it that it is a fact that they had made the commitment to support fully — « an orderly liquidation, including the payment of small creditors and any other notes and bills that came due during the period before proceeds from the sale of ELSI's assets could be obtained ». And you added again, right there, that « With this backing, ELSI would not have had any obligation to file a petition in bankruptcy » (*ibid.*). Finally, (p. 483) you said one sentence: « Having the backing of the stockholders, ELSI could have easily satisfied the conditions of Article 160 ».

You therefore referred, Avvocato Bisconti, in your testimony, to a « guarantee » to « backing » (*ibid.*), to « assurance » (*ibid.*), to « commitment » (p. 481) and once again, to « backing » (p. 483). Let me go back (p. 481) to the quotation which I read before: « with the backing of Raytheon and Machlett, ELSI was assured » — was assured — « of the funds and the cash flow and whatever other assistance, financial or otherwise, might have been needed to effect an orderly liquidation ».

My first question is: would you say that this testimony can be read to mean that without the backing of Raytheon there could have been no such assurance?

Mr. BISCONTI: Mr. President, may I respectfully submit that counsel is asking me not to testify on fact, but to express a judgment, in the way that the question is formulated. I will state the facts as known to me.

The person in charge of the liquidation of ELSI in the period was Mr. Joseph Oppenheim — the late Joseph Oppenheim — a Vice-President of Raytheon Company and who had been elected to be Chairman of ELSI. I had, from some time in March 1968 or April, over several months — in that critical period — daily contacts with Mr. Joseph Oppenheim. Mr. Joseph Oppenheim was reporting directly to Mr. Thomas Phillips. More than once I was on the telephone, with Mr. Joseph Oppenheim, to Mr. Thomas Phillips — then President of Raytheon Company. Mr. Joseph Oppneheim (we were discussing plans for an orderly liquidation) had relayed to me, and assured me, that Raytheon would give the backing, be behind with funds and other assistance — let me use the expression « us » — in carrying out the plan of an orderly liquidation.

This statement by Mr. Oppenheim was without qualifications. I do not believe lawyers must make acts of faith, especially when they are asked to take the responsibility of advising clients in a difficult situation. I heard the statement from Mr. Phillips himself, at the time and after the sad events of the requisition and so on. On the 16 May 1968, in this very city, I met with Mr. Thomas Phillips to discuss the situation as it had developed and at that meeting Mr.

Phillips, expressing great regret and sorrow and perhaps even rage at what had happened, reconfirmed what he had told Mr. Oppenheim, what I had heard, that Raytheon would have given all necessary financial support in order to enable us to carry out an orderly liquidation.

Mr. HIGHET: Mr. President, if I may, I would like to put the question again. I asked you, Avvocato Bisconti, you testified this morning, you said with the backing of Raytheon and Machlett, ELSI was assured of the funds and the cash flow. My question can be answered yes or no. Would you say that this testimony means that without that backing there could have been no such assurance?

Mr. BISCONTI: That backing was an essential part of our liquidation plan.

Mr. HIGHET: So you would agree that without that type of assurance, that you referred to in your statement this morning, ELSI could not definitively plan on paying her debts?

Mr. BISCONTI: I am sorry I cannot make that statement, we are entering the range of the world of hypotheses. I would have to make any number of possible hypotheses.

Mr. HIGHET: Avvocato Bisconti, your statement this morning was that, with the backing of Raytheon and Machlett, ELSI was assured of the « funds and... whatever *might* have been needed to effect an orderly liquidation », and surely this is in the future conditional, and this is therefore a hypothesis. My question to you is limited to the scope, type, tenor and qualification of your testimony. My question is: would it be fair to say that without this backing ELSI would have had a difficult time, if not an impossible time, paying its debts?

Mr. BISCONTI: I am saying that I believe I am expressing a judgment and not testifying as to a fact. ELSI or any company, as I have said in my statement, would have had a difficult time without this backing. In fact it is in writing there.

Mr. HIGHET: All right, let me carry you further, if I may, Mr. President. This morning you also testified that (C 3/CR 89/9, p. 481) « as I know from my own personal knowledge ... the stockholders had guaranteed the cash flow necessary to make the orderly liquidation work ». Would you agree, Avvocato Bisconti, that this testimony is to the effect that, without the guarantee of such cash flow by the shareholders, orderly liquidation would not work?

Mr. BISCONTI: Without this assurance or guarantee, however you wish to call it, by the stockholders, that orderly liquidation would have been very difficult.

Mr. HIGHET: Very well. Thank you. Let me turn if I may, Mr. President, to my second line of questions. I referred earlier to your statements this morning of a « guarantee », a « backing », an « assurance » and a « commitment », and I gave the citations. Now, Avvocato Bisconti, are you aware or do you know, today, or did you then know, whether any of these ideas: guarantees, backing, assurance or commitment were expressed? Now were these ideas expressed?

Mr. BISCONTI: They were expressed to us.

Mr. HIGHET: May I ask you who us was?

Mr. BISCONTI: I am going on to, if I may, since I am speaking about knowledge given to me by Mr. Oppenheim and by Mr. Thomas Phillips, President of the Raytheon Company.

Mr. HIGHET: Do you know if these ideas, and I am using the word « ideas » to avoid having to repeat this every time, Mr. President, were these ideas communicated to anyone outside the group you have just mentioned? Including, of course, Mr. Adams and his senior Raytheon officials.

Mr. BISCONTI: I would have to assume that at a very high level in the company these commitments/assurances were equally known, I do not know how far down the line, but I would assume that it was perhaps limited at a certain level of the company.

Mr. HIGHET: Would you say — do you have any knowledge as to — whether these ideas were communicated to the Italian national Government prior to 31 March 1968?

Mr. BISCONTI: I have no knowledge of that.

Mr. HIGHET: Do you think that they were?

Mr. BISCONTI: I don't know, I have no knowledge, I don't know even of the circumstances in which they might have been communicated since, as I read on the record the ongoing discussions with the Italian Government were not keyed on how to effect a liquidation of ELSI, but how to find another solution to make ELSI a viable company or enterprise maintening employment.

Mr. HIGHET: But the assurance of which I believe you agred with me a few minutes ago, the assurance of the backing of Raytheon and ELSI, but for which an orderly liquidation would be at least difficult to conceive of, that assurance was not conveyed to anybody before 1 April or 31 March in the Regional Government? Do you know if it was?

Mr. BISCONTI: I don't know.

Mr. HIGHET: Do you think it was?

Mr. BISCONTI: I repeat I see no reason why. I had a meeting, I believe, on 30 March, with the representative of the Regional Government, called by the Regional Government on the assurance that now they would join Raytheon and ELSI and so on, I remember we were asked to go there to finalize the shareholders agreement and other agreements; the context of that meeting, which lasted until late that evening, was not liquidation. It was not liquidation at all.

Mr. HIGHET: It was not liquidation?

Mr. BISCONTI: It was whether there was a possibility to proceed in another direction. Certainly there was no reason to speak about liquidation.

Mr. HIGHET: So there would have been no discussion that you recollect at that time or at any other meeting shortly before that, with the local authorities, the Mayor of Palermo's office, the regional authorities, the national authorities or any authorities of the Italian Government that Raytheon and Machlett would stand behind ELSI in the case of an orderly liquidation?

Mr. BISCONTI: I have no knowledge of any such thing. May I add, on 1 April, I participated at a meeting with the Italian creditor banks at Banca Nazionale del Lavoro at which we started outlining to them our plans for an orderly liquidation, including the proposed payment to small creditors and how we would go about this and so on. That would have been the appropriate place to talk about this, and we would have, had we not been told that very afternoon, and we heard its as a rumour during that meeting, that the Mayor of Palermo had requisitioned ELSI's plant.

Mr. HIGHET: It was a few days before that, was it not — it was the preceding Friday — that to your recollection the dismissal notices were in fact mailed, or early Saturday morning, is that correct?

Mr. BISCONTI: It was some days before, I do not remember the exact date.

Mr. HIGHET: The third line of questioning, Mr. President. This ties into your testimony this morning. In your Affidavit which was submitted as Annex 26 to the United States Memorial, the Affidavit of 11 December 1986, let me refresh your recollection. You stated that « beginning in the Spring of 1968 I was involved with ELSI on behalf of Raytheon on a more or less daily basis ». And, in para 2 at p. 4 of that Affidavit, you indicated that « beginning in March 1968, you had been consulted by Raytheon officials regarding the possible liquidation of ELSI ». And you added « you had been advised at that time that ELSI's shareholders had made a business judgment, that unless they found an Italian partner, or made other satisfactory arrangements for ELSI's future, that they were not prepared to infuse any more capital into the company ».

One more reference to refresh your recollection before I put my questions. In the affidavit of Mr. Adams, which was Annex 9 to the Memorial para. 32, pp. 9 to 10, Mr. Adams stated

that « we could not justify to our stockholders the investment of additional funds in ELSI ». And under cross-examination on 14 February, Mr. Adams also testified:

> « The clear decision that Raytheon management made was that we would put no more money in, and as we began to approach the date at which the money would run out ... we began to consider what to do ... » (C 3/CR 89/2, p. 271).

In your testimony this morning, you indicated that the guarantee of « cash flow necessary to make the orderly liquidation work » should be « distinguished from making more funds available to ELSI for continued operations » (p. 481). How would that distinction have been made clear, Avvocato Bisconti? The distinction between the guarantee of « cash flow necessary to make orderly liquidation work » from « making more funds available to ELSI for continued operations »? You drew the distinction, I just wish you would explain it a bit more.

Mr. BISCONTI: I respectfully submit that the distinction is clear in the words that were used, and the purpose of one would have been to continue the operations of ELSI regardless of the form; the more normal form is to infuse equity, capital, it can be otherwise. The purpose of the funds, the backing, or whatever, that we had been assured we would have from Raytheon was for the purpose of having a liquidation of the Company, of not feeling the pressure in time — in the method — of liquidation. I respectfully submit that the purpose of one or the other are so clearly separable that ...

Mr. HIGHET: Do you believe that this quite obvious separation — or a clear separation — was also obvious to persons outside Raytheon, say, members of the regional government, the local authorities, the Mayor of Palermo, the labour force, the labour unions?

Mr. BISCONTI: I do not know and I do not see any reason why they should even consider the difference or whether the matter should be known to them, or be of any interest to them.

Mr. HIGHET: One last question. I refer to Exhibit B, to Annex 15, which is John Clare's Affidavit. It is the Exhibit to that, and some minutes of a meeting amongst Messrs. Adams, Clare, Hillyer and Profomo and the Honorable Vincenzo Carollo, on 21 February 1968. The typewritten version records, and I would like to read two sentences to refresh your recollection of the documentary record, the following:

> « C.F.A. [Mr. Adams] stated that while our interests do coincide with those of the Region, as a private company, we do have obligations to our stockholders. While we can continue to provide ELSI with management and technology, he [that is, Mr. Adams] reaffirmed the Raytheon intention of not investing further money in Raytheon ELSI » (Memorial, Annex 15, p. 2).

Would you think, Avvocato Bisconti, that this might have conveyed the impression to Mr. Carollo that Raytheon was not going to invest any more money in ELSI?

Mr. BISCONTI: I should conclude from hearing the text that you have courteously read to me, Counsel, that this should have made clear to the Honorable Carollo that Raytheon was not going to invest any money, capital funds, however one may wish to call them, to continue the operations of ELSI.

Mr. HIGHET: But, referring to you words this morning, Avvocato Bisconti, would you be surprised to be told that Mr. Carollo would have concluded that Raytheon would still have guaranteed the cash flow necessary to make the orderly liquidation work?

Mr. BISCONTI: I am not in a position to express any such judgment, guess, or whatever; I'm sorry.

Mr. HIGHET: Thank you very much. Mr. President, we have no further questions of the witness.

The PRESIDENT: Thank you very much, gentlemen, to both of you. I now call on Mr. Lawrence. Mr. Matheson, do you wish to take the floor?

Mr. MATHESON: That is correct. Mr. Lawrence is returning and I believe he has already made the declaration as an expert.

The PRESIDENT: Mr. Lawrence, please.

Mr. LAWRENCE: Mr. President, distinguished Members of the Court. The question was raised by the Agent for Italy concerning the listing of customer accounts receivable at 22 April 1968, which was placed before the Court this morning. This document has been taken from Raytheon's files. It was prepared under the direction of Mr. Dominic A. Nett (then Controller of ELSI), who had responsibility for the Company's accounting records up to the time of the bankruptcy.

At p. 2 of Mr. Nett's Affidavit (Annex 30 to the Memorial), he states that, together with Raytheon and ELSI personnel, he performed « shipping, billing, collection and payment functions » until 24 April 1968.

Note 10 *to the* 1967 *financial statements.*

1. It has been suggested by the Respondent that Note 10 to the financial statements of ELSI made up to 30 September 1967 implies that ELSI should have been placed in bankruptcy before the time when its plant was requisitioned by the Respondent. In my view, this is incorrect. Page 3 of the 1967 financial statements shows three columns of figures in Italian lire with the right-hand column converted into US dollars. The first of the lire columns is the book value as it appears in the official accounts of ELSI drawn up in accordance with Italian legal requirements. The middle column shows the adjustments that were required to be made to bring the figures in the official books into line with United States generally accepted accounting principles, which was the basis required by Raytheon. The adjusted figures are shown in the final lire column.

2. It was perfectly normal experience for clients of Coopers & Lybrand Italy, which were subsidiaries of foreign holding companies, to prepare balance sheets summarized in this way. The Institute of Chartered Accountants in England and Wales has published a book entitled *European Financial Reporting — Italy*, which was written by my partner Mr. M.I. Stillwell, in conjunction with the Italian firm of Coopers & Lybrand. This book is, of course, in the public domain. It records that:

> « the official accounts of an Italian company must be prepared and submitted in compliance with tax regulations. It is therefore common in the case of Italian subsidiaries of UK groups for such accounts to differ from the accounts prepared for submission to the parent company in compliance with the group accounting policies ». (p. 40, para. 9).

The same would, of course, be true for subsidiaries of United States groups.

3. Whether the capital of an Italian company fell below the legal minimum provided by Articles 2447 and 2448 of the Italian Civil Code was a matter to be determined by reference to the official accounts of the company drawn up in accordance with Italian legal requirements. Those official accounts showed that ELSI, at 30 September 1967, still had stockholder's equity of 1,318.7 million lire and a taxed reserve of 862.4 million lire which, under Italian law, was a legally distributable reserve (*ibid.*, p. 91, para. 69).

4. United States generally accepted accounting principles and the accounting policies of Raytheon required provisions to be made on a more prudent basis than was either required under Italian law or permissible for Italian tax purposes. I have reviewed with Mr. Stillwell the composition of the items in the column headed « Company's adjustments ». He has confirmed that these were all typical of the type of adjustment that was made for items that the Italian tax authorities treated as not deductible for tax purposes. Such items were therefore retained in the official Italian accounts at a value higher than would have been appropriate in accounts pre-

pared under United States generally accepted accounting principles. This is consistent with my own experience of the Italian subsidiaries of United Kingdom companies with which I have been concerned.

5. Note 10 carried no implication that the provisions of Articles 2447 and 2448 of the Italian Civil Code were applicable at 30 September 1967. It merely drew attention to a situation that might arise at some time in the future. If the auditors had been of the view that those provisions were of immediate applications, the note would have made this clear.

Going concern values.

6. When counsel for the Respondent cross-examined me after my previous evidence in this case he said, in introducing a question, that I had several times referred to the fact that my figures were based on the assumption that the balance sheet related to a going concern. This was simply not true, as reference to the transcript will show. He went on to put to me a hypothetical question in which he asked me whether I could imagine a qualification in an audit report relating to a company's being and remaining a going concern. I would like to make it clear that, in answering this question in the affirmative, I was dealing only with the hypothesis that had been put to me, without reference to the specific circumstances of this case. In addressing valuation, the issue is not whether ELSI was a going concern on 31 March 1968, on 30 September 1967, or on any other date, and my evidence relies on no such premise. The issue is to determine what value could have been realized upon a disposal of ELSI's assets, and that is exactly the exercise that I carried out for the purpose of my evidence. If a company is in liquidation, it does not follow that its book values are irrecoverable, nor does it follow that it cannot be disposed of as one or more businesses.

Fixed assets.

7. In considering the fixed assets of the company, I relied not only on the evidence of Raytheon officials who were familiar with the operations of ELSI at the relevant time but also upon the independent appraisal of Professor Puglisi, carried out on the instructions of the curator in bankruptcy. I would remind the Court that this appraisal was carried out after the plant had been closed for nearly six months and that even then he regarded it as appropriate to consider « the current market value of ELSI as a whole, if sold to a third party which intends to operate the facility without substantially changing the nature of its products or mode of manufacture » (Unnumbered documents submitted by Italy, Vol. III, p. 91). Clearly Professor Puglisi would not have adopted such a basis if he had not regarded it as realistic. Professor Puglisi's appraisal took into account the effects of obsolescence and the physical condition of the assets. The evidence set out in the affidavits of Mr. Cavalli, Mr. Ravalico and Mr. Cammerata is quite inconsistent with the views arrived at by Professor Puglisi. The differences may to some extent be attributable to the fact that their affidavits were produced some 20 years later whereas Professor Puglisi's appraisal is a contemporaneous document.

8. Allowing for differences between the position at 31 March 1968 and the time of Professor Puglisi's appraisal, that appraisal substantially supports the recoverability of book value at 31 March 1968. His views of the values attributable to the fixed assets are consistent with the evidence regarding the substantial expenditure on new fixed assets in the previous few years (Memorial, Annex 13, p. 3).

Inventories.

Turning to the company's inventories, my evidence has been that the book value of inventories could reasonably have been expected to be recoverable on the footing that, in an orderly

liquidation, it would have been possible to dispose of ELSI's business either as a single operation or as a series of product lines to purchasers who would continue to manufacture the Company's products. This is a similar assumption to that made by Professor Puglisi in valuing the fixed assets and its reasonableness is confirmed by the evidence of Mr. Clare (C 3/CR 89/2, pp. 280–283). Clearly a forced sale in bankruptcy of the inventories of a company that has been closed for over 16 months must produce a very low value for that company's inventories, a value far lower than would be obtained in a properly conducted liquidation.

Accounts receivable.

10. The net book value of accounts receivable was clearly regarded by Coopers & Lybrand, Milan, as recoverable at 30 September 1967 notwithstanding the apparently low level of the bad debt provision. Mr. Clare's evidence shows that the reason why that provision was so low was that a major exercise had been carried out to write off bad debts in the previous two years, leaving in the books only those that were regarded as good (C 3/CR 89/2, p. 283). Professor Libonati has referred to the suggestion in Dr. Mercadante's Report that a debt of 246 million lire due from Noya Alfred Enachtemer was irrecoverable (C 3/CR 89/5, p. 380). I have seen a document, a copy of which has now been made available to the Court and to the Respondent, listing the accounts receivable from customers on 22 April 1968, just before ELSI was placed into bankruptcy. This list includes, in the middle of the second page, a balance described as « Noya Alfred Enachtemer » from which an amount of 11.5 million lire is shown as due. There is no other balance that bears any resemblance to the name referred to by Dr. Mercadante. It therefore appears to me that he was mistaken in suggesting that a balance of 246 million lire formed part of ELSI's customer accounts receivable.

11. I would also remind the Court of the evidence given by Mr. Clare to the effect that Raytheon were so confident of the value of the accounts receivable that they would have been prepared to guarantee the full book value of them (C 3/CR 89/2, p. 279). It may also be worth noting that even the quick sale value, which was a deliberately pessimistic assessment of what might have been achieved in the planned liquidation, shows that the full value of accounts receivable from customers was expected to be recovered.

Evidence of Mr. Hayward.

12. Mr. Hayward presented to the Court last week a summary of the adjustments which he considered needed to be made to the book value at 31 March 1968 to arrive at the figure of 12,822.6 million lire which, in his view, represented the substance of the economic enterprise. Most of these adjustments were also made by me for the purpose of my evidence in arriving at the realizable value of the tangible assets which I put at 13,632.7 million lire. There are three exceptions to this. One is an adjustment by Mr. Hayward for an amount of 453.3 million lire which was an additional provision against the value of inventories regarded by the auditors as necessary to comply with United States generally accepted accounting principles. This reflected a difference of view between the Company and its auditors about net realizable value. I understand that, in preparing its accounts, ELSI calculated the provision necessary to reduce the book value to net realizable value by considering each product group separately. In effect the question that they were seeking to answer was « Will the inventory of this product group, taken as a whole, realize at least its aggregate book value ? » The auditors on the other hand considered each separate line in the inventory of each product group and considered the question « Will this item, considered on its own, realize at least its book value ? »

13. Whilst I believe the question considered by the auditors to be a normal approach in calculating such provisions for the purposes of United States generally accepted accounting principles, it undoubtedly does have the effect that the net figure arrived at after deducting those

provisions will be lower than the net realizable value of the inventory taken as a whole. I conclude that such a further adjustment is inappropriate in considering whether the net book value of ELSI's inventories at 31 March 1968, taken as a whole, could be realized.

14. The second adjustment made by Mr. Hayward with an amount significantly different from that made by me refers to a price adjustment of 251.6 million lire on the sale of klystrons. The auditors said that they had been unable to see evidence of an agreement which had been reached between ELSI and the relevant military authorities. This is not to say that no such agreement was reached but merely records the difficulty of evidencing it at the time of the audit. To make some allowance for the possibility that this item might not be fully recoverable, I rounded the book value of 251.6 million lire down to 200 million lire.

15. The third main difference between my evidence and that of Mr. Hayward in relation to tangible assets concerns my inclusion of 300 million lire in respect of grants expected to be received under the *Mezzogiorno* legislation. My inclusion of this amount is consistent with the evidence submitted on behalf of the Applicant.

16. The principal difference between me and Mr. Hayward in our assessment of what might have been recoverable concerns the expectation that an amount of at least 3,500 million lire could be recovered in respect of intangible assets. I have pointed out in my previous statement that the company's financial statements included various intangible balances totalling 1,721.1 million lire to which no specific separable value could be attributed. Mr. Hayward has interpreted the adjustment made to eliminate the book value of intangible balances in order to comply with United States generally accepted accounting principles as implying that no value could be attached to ELSI's intangible assets. This does not follow. The accounting treatment of intangible assets is entirely irrelevant to a determination of their realizable value.

17. It was of course inevitable after the plant had been closed for 16 months that the actual sale concluded by the curator in bankruptcy could obtain no value for the Company's intangible assets. The actual outcome of the bankruptcy could hardly have been worse. Enormous damage must have been done to the realizable values by the effects of the requisition of the plant, leaving its assets idle for 16 months, subject to deterioration, depreciation and pilferage. This resulted in the dissipation of the value of the intangible assets that made up the goodwill of the business, including its customer connections, its supplier relationships, its market share and its manufacturing know-how. On the basis of the evidence of Raytheon's officials who were familiar with ELSI's operations and activities at the time, it is my view that an orderly liquidation in which the business was sold as an entity or as a number of product lines to purchasers who would obtain the benefit of its intangible assets was a realistic expectation and I confirm the evidence that I gave in my previous statement that I would expect a value of at least 3,500 million lire to be achievable.

18. The achievement of the values that I have arrived at relies on the premise that there would have been an orderly liquidation. In approaching the valuation on this basis I have in mind the evidence before the Court that Raytheon would have supported ELSI to enable an orderly liquidation to be achieved. This expectation was entirely consistent with my own experience.

19. During my 35 years in the accounting profession, I have had considerable experience of international groups of companies, including many groups controlled by United States parent companies. I have known many of those groups liquidate or dispose of overseas operations from which they wished to withdraw, but in all of my experience I have never known any of them to allow an overseas subsidiary to go into bankruptcy unless it was forced down that route by external factors totally beyond its control.

20. My firm has extensive experience in the administration of receiverships and liquidations and it is invariably the preferred method of maximizing the values realized in such administrations that the business of a company should be sold as a complete operation or, failing that, as

a number of self-contained operations. The breaking up of a business and the sale of its assets by public auction is a last resort and will almost inevitably produce the worst possible result. Mr. President, distinguished Members of the Court, that concludes my evidence.

The PRESIDENT: Thank you very much, Mr. Lawrence. Does the Italian delegation want to examine the expert now?

Mr. FERRARI BRAVO: Mr. President, first of all I should note that the interesting statement just delivered by Mr. Lawrence seems to me to have gone far beyond what one expected to listen from an expert witness, some sort of « *plaidoyer* ». But anyway he has offered tetimony this afternoon relating to the interpretation of the 30 September 1967 audited financial statements of ELSI, and in particular Note 10 thereto. This again, this testimony or statement, went much beyond the direct testimony offered by the same Mr. Lawrence in the first round.

Now, I think we regretfully feel that we should be afforded the opportunity to consider Mr. Lawrence's evidence today with our financial adviser, Mr. Hayward, who is not present today in Court as he is out of town, actually in Paris. This is not because of lack of respect to the Court, but for the simple reason that we had no notice that Mr. Lawrence would be called for further testimony today until this morning, when Mr. Hayward had already left The Hague. So I would be prepared to notify the Registry by noon on Wednesday whether we might find it necessary to call Mr. Lawrence for cross-examination on Thursday; but we are not in a position now to put any question to the expert. Thank you, Mr. President.

The PRESIDENT: So, the Agent of Italy wants to consult his financial expert before examining Mr. Lawrence. As you know, the Court is very flexible about the procedure and therefore if, in this case, you can have the advice before Thursday, that will help the Court very much. Therefore I relieve Mr. Lawrence for today, but he will have to be at the disposal of the Court for a meeting, in principle on Thursday, to be cross-examined. Yes, Mr. Matheson.

Mr. MATHESON: Excuse me, Mr. President. I understand that it will be difficult for Mr. Lawrence to come back on Thursday. I would like to make the following suggestion: obviously the debate here is not between Mr. Lawrence and counsel for Respondent, but between Mr. Lawrence and Mr. Hayward, the two experts on these issues. May I suggest that if there are points in Mr. Lawrence's statement that they wish to rebut, they simply ask Mr. Hayward to appear, as we have done in our rebuttal. In this respect I must say that I have to disagree with what has just been said by the Agent to the Respondent: what Mr. Lawrence had to say was in rebuttal of what had been said by Mr. Hayward. That is the function of this statement and it was perfectly proper. Thank you.

The PRESIDENT: Excuse me. I don't follow the purpose of your intervention.

Mr. MATHESON: It was to say that it would be difficult for Mr. Lawrence to appear on Thursday, but perhaps the same function could be served by Mr. Hayward appearing on Respondent's behalf to make whatever points they wish to rebut about Mr. Lawrence's presentation today.

The PRESIDENT: I see. In these circumstances I think that the best thing would be, after this sitting, to get in touch with the two Agents and then to settle when the two experts can be before the Court, in order to give the best assistance to the Court. So, after this sitting, the Registrar will meet with the two Agents, and then we will work out a schedule which permits the two experts to be before the Court at the same time, in order to help us. Are you in agreement?

Mr. MATHESON: I think we first need to know whether it is necessary to have the experts present simultaneously. I believe Respondent is going to study what Mr. Lawrence has said and then we can perhaps discuss that question.

The PRESIDENT: Well I think for the Court it would be a very good opportunity to have both experts before it, so therefore after the sitting there will be a meeting of the two Agents with the Registrar to work on this point. Thank you very much. Mr. Matheson.

Mr. MATHESON: Thank you, Mr. President. I would like to mention first that we have prepared written answers to all the questions which we have been asked by the Court, and they are ready for submission. They are on stack, so it may be that the Court would accept the written submission in lieu of reading them all out, but of course we are quite prepared to answer any questions that Members of the Court may have about our answers.

The PRESIDENT: Mr. Matheson, you have the right to submit your replies in writing, and by doing so you have saved the Court's time. We will accept your replies in writing. They will be transmitted to the other Party.

Mr. MATHESON: Thank you, Sir.

I come now to the question of the violations of the FCN Treaty alleged by the United States. In a few moments I will deal with the arguments made by Respondent last week concerning the specific provisions of the Treaty. Before doing that, however, it seems useful to make a few points concerning what Respondent has said about the Treaty regime in general.

First, the Respondent objects to our assertion that the primary object of the post-war FCN treaties was to improve and strengthen the protection of foreign investment (C 3/CR 89/3, p. 311) and notes that various types of other provisions exist in these treaties. Whether the protection of investment is *the* primary objective or only *one* of the objectives of these treaties, it is still clear that the provisions of the 1948 Treaty which deal with the ownership rights of foreign companies in enterprises and property must be interpreted in the light of this objective. I believe, in fact, that the two Parties share a community of interest on this point.

This objective of the 1948 Treaty to protect investment is not diminished, as the Respondent from time to time suggests, by the fact that the Parties signed a Supplement to the 1948 Treaty in 1951. The preamble of the Supplement itself states that the parties are, and I quote:

> « desirous of giving added encouragement to investments of the one country in useful undertakings in the other country, and being cognizant of the contribution which may be made towards this end by amplification of the principles of equitable treatment set forth in the Treaty ».

In other words, the Parties clearly saw the Supplement as adding to and amplifying the fundamental protections for investments already contained in the 1948 Treaty, and not as creating a new regime for protection of investment where before there was nothing. In any event, there is no doubt that the objective of protecting investment is a central purpose of the Supplement, which constitutes an integral part of the Treaty (Supplement, Art. IX).

Second, the Respondent questions the propriety of attributing to the Respondent certain of the acts and omissions on which the claim of the United States is based. The Respondent has not and cannot deny that the acts of the Mayor of Palermo, the Prefect of Palermo, the local police and its Government Ministers are all attributable to the Respondent. Likewise, the actions of the Bankruptcy Judge, a public official exercising public functions under the sanction of Italian law, are clearly actions attributable to the Respondent under established rules of State responsibility. The United States does not allege, as the Respondent seems to suggest, that the actions of potential purchasers of ELSI assets in declining to attend the bankruptcy auctions are attributable as such to the Respondent. Rather, we attribute to the Respondent the actions of Italian authorities and instrumentalities which had the effect of discouraging the participation of other bidders, and this includes the actions of the bankruptcy authorities in structuring the auctions.

Moreover, the actions of IRI and its subsidiary ELTEL are also attributable to the Respondent, since IRI is not only owned and controlled by the Respondent but is an arm and agent of the Respondent. A basic criterion for attributing conduct of a State-owned enterprise to the State is whether that enterprise serves State purposes, thus becoming a part of the State's apparatus (G.A. CHRISTENSON, « The Doctrine of Attribution in State Responsibility », *International Law of State Responsibility for Injuries to Aliens*, p. 333 ([R. Lillich, ed. 1983]). As we have shown, this was clearly the case with respect to the actions of IRI and ELTEL in acquiring the plant and assets of ELSI.

Third, the Respondent argues generally that its acts did not rise to the level of « interference with management and control » or « expropriation » or loss of « protection and security » (C 3/CR 89/7, pp. 412, 415, 417, 418). Yet the acts of requisitioning the plant and then not overturning that requisition in a reasonable time stripped Raytheon and Machlett of their ability to place ELSI through an orderly liquidation, a right to which they were entitled under the Treaty. The occupation of the plant prevented any chance of showing the plant and assets to prospective buyers. The flaws in the bankruptcy proceedings ultimately resulted in acquisition of ELSI by the Respondent for well below what it was worth. These acts were not mere ephemeral exercises of police power, as Respondent suggests; they were serious and irreversible intrusions into the essential rights and interests of Raytheon and Machlett in the control and disposition of ELSI. It is not enough for the Respondent to state that the requisition was « only for six months »; given the circumstances surrounding ELSI as of 1 April 1968, the effect of the requisition was immediate and definitive.

Fourth, the Respondent argues generally that these acts were directed against ELSI, an Italian corporation, and not against Raytheon and Machlett. The Respondent maintains that only in limited circumstances, where specific language allows one to « lift the corporate veil », should these acts be considered to have been taken against Raytheon and Machlett (C 3/CR 89/7, p. 413).

This argument is incorrect and, at best, it is one of form over substance. The *true* effect of these acts struck at rights of US nationals specifically protected by the Treaty; the ability to manage and control companies and enterprises, the ability to dispose of property, the right to receive compensation in the event of a taking of property, and the protection and security of that property. These are rights granted directly by the Treaty to Raytheon and Machlett, and are not merely the derivative claims of shareholders to rights granted to ELSI. Therefore, there is no need to « lift the corporate veil » as the Respondent claims.

More generally, the Respondent argues that there is in effect a general presumption in international law against protection of the foreign shareholders of locally incorporated enterprises and that there is therefore a presumption against interpreting specific treaty provisions to provide such protections (C 3/CR 89/7, p. 413). Whatever the merits of this argument with respect to international law generally, it is certainly incorrect with respect to the interpretation of a treaty which is designed specifically to provide protection for foreign investments.

As with all treaties, each specific provision must be interpreted in accordance with the ordinary meaning of its terms, in their context and in light of the treaty's object and purpose, and recourse may be had to supplementary means of interpretation to confirm this meaning. In the case of the FCN Treaty, there is no basis whatsoever for any presumption that foreign shareholders are not protected by the particular provisions at issue in this case. On the contrary, as we have shown, the Treaty language and its ratification history clearly show a positive intention to protect the interests of foreign shareholders in locally incorporated subsidiaries. As Professor Gardner explained, one of the major features and purposes of this new Treaty was to protect foreign investment through local enterprises which had become a major vehicle for foreign investment (C 3/CR 89/3, pp. 311–316).

Let me turn now to the specific provisions of the Treaty which the United States alleges to have been violated.

Management and control.

First, the United States alleges that the Respondent violated its obligations under Articles III and VII of the 1948 Treaty and Article I of the Supplement to protect US corporations from interference with management and control of their enterprises in Italy. The specific acts and omissions that caused these violations were the requisition of ELSI on 1 April 1968 and the delay in overturning that requisition. There is no dispute that these acts and omissions occurred: the order of requisition by the Mayor of Palermo on 1 April 1968 is on file with the Court and its authenticity is not challenged; this is also the case with respect to ELSI's petition of 11 April

to the Mayor of Palermo to lift the requisition, ELSI's formal appeal of the requisition order to the Prefect of Palermo on 19 April, and the ruling of the Prefect on 22 August 1969. Accordingly, there is no issue as to whether the facts upon which the United States bases this allegation have been established. The question is only whether these facts constitute a violation of the Treaty.

Let me stress this point–in light of the arguments made repeatedly by the Respondent last week. The requisition constituted, in and of itself, a violation of the above–mentioned provisions of the Treaty. And this is the case regardless of whether or not there was any collusion between various entities of the Italian Government to produce this result, and regardless of whether there was any causal chain between the requisition and any of the other acts or omissions which the United States alleges to be Treaty violations. The same is true with respect to the subsequent delay in overturning the requisition, which constituted a separate violation.

Further, this violation of the Treaty occurred when the requisition order was issued on 1 April 1968, regardless of the financial state of ELSI at that point. We have shown that ELSI was not insolvent or bankrupt as of that date, and had no obligation to file in bankruptcy.

But even if one were to take a different view of Italian law, the Italian authorities, which were fully aware of ELSI's financial circumstances, had taken no action whatsoever to institute bankruptcy proceedings. Therefore, Raytheon and Machlett enjoyed full rights of management and control as of 1 April 1968 under Italian law and under the Treaty. It is only the requisition which obliterated the exercise of those rights.

In his oral presentation, Professor Gardner explained at some length why the Respondent's actions constituted violations of the Treaty. To summarize his explanation very briefly, these actions violated the requirement of Article III, paragraph 2, of the 1948 Treaty that nationals and corporations of either party be permitted to organize, control and manage corporations of the other party to engage in commercial, manufacturing and other activities. These actions violated the requirement of Article I of the Supplement that the nationals and corporations of either party not be subjected within the territory of the other part to arbitrary or discriminatory measures, resulting particularly in preventing their effective control and management of enterprises which they have been permitted to establish or acquire.

These actions also violated the requirement in Article VII, paragraph 1 (a), of the 1948 Treaty that the nationals and corporations of either party be permitted to acquire, own and dispose of immovable property or interests therein in the territory of the other party.

Now, the Respondent argues that Article III, paragraph 2, of the 1948 Treaty grants US corporations merely the « faculty » or the formal right to organize, manage and control Italian corporations (C 3/CR 89/7, pp. 414–415) but gives no ongoing or « operational » protection to the parent corporation from any interference with those rights (C 3/CR 89/8, p. 459). Such an interpretation would be contrary to both the ordinary meaning and evident purpose of this provision.

The language itself states that the foreign parent is not only entitled to organize a local corporation, but also to control and manage it, words which necessarily imply a continuing right to direct the enterprise and dispose of its assets. Limiting the rights of the foreign shareholder to the basic formal rights of organization would deprive foreign investors of the entire purpose of their investment, and would therefore defeat one of the basic objects of the Treaty. We therefore contend that the Respndent's interpretation is untenable.

On the other hand, the Respondent apparently accepts that Article I of the Supplement does protect the right of the foreign parent to exercise continuing effective control over their enterprises in Italy (C 3/CR 89/8, p. 459). Here, however, the Respondent argues that the requisition — although admittedly unlawful under Italian law — was not an arbitrary measure and therefore could not give rise to a violation of Article I. Specifically, it was argued that this action was not « arbitrary » because the Mayor of Palermo was acting under the colour of Italian law — that is, his authority to requisition property in certain circumstances — even though the exercise of the requisition power in the ELSI case exceeded his authority (C 3/CR 89/7, pp. 422–423).

With all due respect, such an interpretation would eviscerate the protections of Article I, and would be wholly contrary to its clear meaning and purpose. If the Respondent's argument

were correct, then no misuse of a governmental power would be considered « arbitrary » so long as the official in question had that power in some other circumstances under Italian law.

No doubt there are Italian officials who have the power of arrest, or the power of taxation, or the power of deportation; but could there be any doubt that the exercise of these powers for political reasons unconnected with the legitimate public purposes for which they are granted would be « arbitrary »? Would there be any doubt that such actions would violate Article I of the Supplement if used to prevent United States corporations from exercising effective control and management of their enterprises in Italy? By the same token, the unlawful requisition was also a clear violation of the FCN Treaty.

No legitimate public purpose was served by the requisition. In its written answer of 22 February to a question asked by judge Schwebel, the Respondent conceded that the requisition was not a precondition for the payment by Italian authorities of the salaries of the ELSI workforce.

Further, as was pointed out in Judge Schwebel's question on 23 February, the Prefect of Palermo, in upholding ELSI's appeal against the requisition order, held that « the order is destitute of any juridical cause which may justify it or make it enforceable ». The Prefect observed that the order neither caused activity at the plant to be resumed nor created more favourable conditions in the company. He stated that the requisition did not in any way avoid the public disturbances which were the asserted basis for the order. Instead, the Prefect held that the order was issued under the pressure created by the local press, and that its only purpose was to deal with that public relations problem.

In other words, the Prefect held that the Mayor's order was not based on any legitimate public consideration, but was simply designed to relieve local political pressure. If this does not fit within the meaning of the prohibition on « arbitrary » actions in the Supplement, it is hard to see what content that provision could have.

Finally, the Respondent argues that the requisition was not arbitrary because there was a right of appeal under Italian law, and the action could not be considered arbitrary until officially pronounced as such under Italian law (C 3/CR 89/7, p. 423). This line of argument is clearly incorrect and contrary to the whole purpose of the provision. Article I is a prohibition on certain actions, not simply a requirement for procedural review. Further, such an interpretation would mean that there would be no Treaty constraints on arbitrary action so long as a theoretical right of ultimate appeal existed. The current case illustrates the total inadequacy of such an approach — the rights of appeal offered by Italian law resulted in a 16-month waiting period before a decision was reached, by which time ELSI had long since been forced into bankruptcy and the whole purpose of the Treaty protections had been defeated.

Impairment of investment rights.

Next, the United States alleges that these same actions violated the separate requirement in Article I (*b*) of the Supplement that corporations of one party not be subjected to arbitrary or discriminatory measures within the territory of the other party which impair legally acquired rights and interests in enterprises which they have been permitted to establish or acquire. This provision is quite broad, in that the text defines such investments as funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques, or otherwise.

The Respondent advances the same argument that I have just rebutted regarding Article I (*a*) of the Supplement and repeats that the acts of the Respondent were not arbitrary or discriminatory (C 3/CR 89/7, p. 424). For the reasons I have just stated, this argument is simply untenable.

Taking of property.

Next, the United States alleges that the requisition and the delay in overturning it constitute violations of the Treaty provisions against the taking of property interests without just compensa-

tion. Again, to summarize briefly Professor Gardner's more lengthy argument (C 3/CR 89/3, pp. 321–326), these actions violate the provision of Article V, paragraph 2, of the 1948 Treaty that the property of corporations of either party not be taken without the prompt payment of just and effective compensation. They also violate the requirements of paragraph 1 of the Protocol, that the provisions of Article V, paragraph 2, providing for the payment of compensation, shall extend to interests held directly or indirectly by corporations of either party in property which is taken within the territory of the other party.

The application of these provisions to this case are clear. The requisition of ELSI's plant and assets was an unreasonable interference in their disposal and a taking of property. The failure to overturn the requisition and the acquisition of ELSI through the flawed bankruptcy proceedings allowed the Respondent to acquire ELSI at far less than ELSI's true value.

Now, the Respondent grasps at alleged differences in the meaning of the English and Italian texts of Article V, paragraph 2, and the Protocol to deny that a Treaty violation occurred. Article 33, paragraph 4, of the Vienna Convention states that where there is a difference in meaning between authentic texts which is not resolved by Articles 31 and 32, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted. Where we disagree is in the Respondent's conclusion that a significant difference in meaning actually exists between these texts, and that such a difference must be resolved in accordance with the more restrictive of the two texts.

In fact, as Professor Gardner demonstrated (C 3/CR 89/3, p. 324), there is no real difference between the English and Italian versions. A careful review of these terms, in light of their object and purpose, results in the interpretation that they protect property from any unreasonable interference in its use, whether this be characterized as a « direct taking », « indirect taking » or « expropriation ».

Notwithstanding the Respondent's creative argument to the contrary (C 3/CR 89/7, pp. 419-420), the Protocol clearly relates back to the entirety of Article V, paragraph 2, and was devised to extend Article V, paragraph 2, to exactly the type of rights or interests at issue in this case (Memorial, p. 44). If there remains any ambiguity in meaning, Article 32 of the Vienna Convention calls for reference to supplementary means of interpretation, which the United States has shown of suport in our interpretation, whether this is considered as « functional interpretation » or an interpretation based on the intention of the parties (C 3/CR 89/7, p. 411).

The Respondent continues to see significance in the fact that the requisition of ELSI's plant and assets allegedly would not be considered a taking of property or an expropriation under Italian law. The question, however, is not one of Italian law, but whether under the terms of this Treaty a taking or expropriation has occurred. The United States in its pleadings (Memorial, pp. 44–47; C 3/CR 89/3, pp. 321–322) has provided ample evidence that under international law the acts and omissions of the Respondent in this case constitute a taking or expropriation of property.

Protection and security.

Finally, the United States alleges that the Respondent violated the Treaty provisions on protection and security by tolerating the occupation of ELSI's plant. Specifically, the Respondent's inaction violated the requirement of Article V, paragraphs 1 and 3, of the 1948 Treaty that corporations of either party receive the most constant protection and security for their property required by international law. The Respondent argues that a company cannot be the object of a property right of its shareholders (C 3/CR 89/7). This would come as quite a shock to shareholders around the world — particularly those with 100 per cent ownership in a company. This is an untenable proposition, and cannot reflect the intention of the Parties who specifically intended to protect the rights of foreign parents in their local subsidiaries.

The fact of the occupation is not disputed and is established in the affidavit of ELSI's Director of Planning (Memorial, Annex 21). Once again, the failure to provide protection against this occupation constitutes a violation of the duty owed by the authorities of the Res-

pondent, whether or not there was any collusion between Italian authorities at various levels, and whether or not there was any causal chain connecting it to other acts and omissions complained of by the United States.

The Respondent asserts, however, that the occupation actually began prior to the requisition, and points to an Italian court's statement that some workers had occupied the plant premises for a couple of days in mid-March (C 3/CR 89/6, pp. 387-388). The Respondent apparently asserts that by not calling upon the local police for assistance, ELSI acquiesced in the occupation of the plant.

In fact, prior to the requisition of the plant, the local Carabinieri were called in, they did keep order, they did not permit the workers to occupy the plant premises (Memorial, Annex 21, para. 20). During this period, there were some strikes and sit-ins of temporary duration, but the police prevented the workers from occupying the plant or barring access to the plant by management. After the requisition of 1 April, however, the local police did nothing to prevent ELSI's former employees from occupying the plant grounds, nor from entering the plant after ELSI had been forced to declare bankruptcy. ELSI representatives were confronted several times by these workers (Memorial, Annex 21, paras. 20-23).

But even if the Respondent were to show that the workers occupied all or parts of the plant and the premises up until 1 April, this would not justify a continued occupation after the local government had wrested control of the plant from ELSI. Once the requisition occurred and the keys to the plant were handed over to the Respondent, the Respondent was in control of the plant and had a responsibility to prevent the former ELSI workers from occupying the plant and obstructing the orderly disposition of its assets.

Conclusion.

Mr. President, you have now heard the United States rebuttal of the primary arguments made by the Respondent in its oral presentations. At this point I would like to offer an overall summary of the case as it has emerged during these proceedings.

As you have seen, ELSI's shareholders faced the necessity of taking hard decisions in early 1968 due to ELSI's inability to become a self-sufficient enterprise. They concluded, as they had a right to do under Italian law and under the Treaty, that they could not justify further capital contributions or loan guarantees to ELSI beyond the 4 billion lire which they had advanced to maintain it through the first quarter of 1968. They made every effort over a considerable period of time to make it possible for Italian authorities to participate in ELSI if they wished to make the financial contributions necessary to accomplish this.

Now, no one suggests that the Government of Italy had some legal obligation to participate in ELSI on this basis. But by the same token, in the absence of such action, Raytheon and Machlett had the right under Italian law and under the Treaty to liquidate ELSI in an orderly manner. This is the option that ELSI's shareholders reluctantly chose.

This decision was not, as the Respondent has suggested, an irresponsible action taken in disregard of ELSI's creditors, its workforce and the community in which ELSI operated. As we have already shown in considerable detail, Raytheon had already made the financial commitments necessary to ensure that ELSI's obligations would be paid as they came due, including the payroll of the workforce and the full amounts owed to the small creditors and the secured and preferred creditors.

Contrary to the Respondent's repeated allegations, Raytheon did not throw ELSI's workers onto the street without notice or compensation, but agreed to pay them full salary throughout the required notice period. Was there then any purpose in keeping them idle at the plant during this period, rather than being able to seek new employment?

Contrary to the Respondent's assertions, the ELSI plant had not been seized by its workers prior to the requisition. As we have shown, the worker's demonstrations were outside the plant and did not cause major disruptions inside the plant or in access to the plant by ELSI's management.

The orderly liquidation planned by Raytheon would have made the most productive use of ELSI's assets, and would have preserved for the economy and workers the maximum possible benefit from viable product lines and business operations. We have demonstrated in considerable detail the product lines that could and would have been sold as viable enterprises, and we have given other examples of how this process works as a sensible and normal adjustment of business relationships in such a situation. This would in turn have allowed the greatest possible satisfaction of all of ELSI's creditors — according to our calculations of ELSI's value, 100 per cent; and even according to the calculations of the Respondent's expert, 100 per cent to the secured and preferred creditors and as much as 65 per cent to the unsecured creditors — which is a perfectly normal result in such liquidation circumstances.

The Respondent has asserted that ELSI should have been placed in bankruptcy long before the requisition, and would shortly have fallen into banktuptcy in any event. We have shown in considerable detail that this is simply not the case. There was no requirement under Italian law that ELSI be placed in bankruptcy under the circumstances prevailing before the requisition, or under the circumnstances that would have prevailed had the requisition not been ordered. Contrary to the Respondent's assertions, ELSI was making payment of its obligations as they came due, and would have continued to do so but for the requisition.

Now, let us compare this situation with what actually occurred as a result of the Respondent's actions. The requisition solved none of the problems of ELSI or its Italian creditors or the local community. It did not save ELSI — it quickly destroyed it. Its product lines and assets could no longer be transferred to other buyers who would make productive use of them. Production was not resumed at the plant and the workforce was not rehired.

The interests of the creditors were devastated. The Italian small creditors were not paid promptly, as had been planned by Raytheon. They and the unsecured creditors received essentially nothing, instead of the substancial or full recovery they would have received under the liquidation plan. The Italian Government acquired ELSI's plant through ELTEL almost a year later, but even there it was a ghost of its former self by that time.

And all of this is without reference to the losses suffered by Raytheon and Machlett as a result of the liquidation, which we have established in detail. These losses included the loss of recovery of a portion of their investment in ELSI. They included the necessity of paying in full loans to ELSI that had been guaranteed by Raytheon, or which would otherwise have been satisfied from the sale of ELSI's product lines and other assets at their true value. They included the non–payment to Raytheon of debts due to it from ELSI which would have come from the proceeds of these sales. They included the expenses of Raytheon in connection with the bankruptcy, the defense against lawsuits by ELSI's creditors, and the presentation of the claim to the Respondent. They included the real and substantial cost of the loss of use of these sums during the intervening decades, represented by compound interest from the date of the Respondent's actions.

The Respondent has characterized these events as an attempt by Raytheon to drain ELSI of all it could extract, to dump ELSI's problems on the Italian Government and the Palermo community, and to wash its hands of the whole affair. With all due respect, this explanation simply makes no sense.

Prior to the requisition, as we have shown, Raytheon was not making money on ELSI's operations — it was losing money. It had advanced 4 billion lire to sustain ELSI's operations for the year prior to the liquidation. It had already arranged to pay ELSI's small creditors. It had made firm commitments to pay ELSI's workforce and to provide any assistance necessary to meet other obligations as they came due. Far from bleeding ELSI, it was continuing to expend money on ELSI's behalf.

Why was Raytheon doing this? Precisely because it knew that its losses — and the losses of all the other parties involved — would be far greater under bankruptcy than under orderly liquidation. It had a very strong financial incentive to sustain the liquidation process and to avoid a simple collapse into bankruptcy.

Under these circumstances, what sense does it make to conclude that Raytheon was just trying to find a convenient excuse for dumping ELSI into the lap of the Respondent, and chose

the requisition order as the convenient excuse? Raytheon paid a heavy price for the requisition, and so did all of those who had done business with ELSI. It was far from a welcome event or a convenient scapegoat.

Let us look carefully again at the precise legal case which the United States has brought before this Court. We have alleged that certain specific actions and omissions of Italian authorities violated the Treaty. Each act or omission alleged is a separate and independent violation. In no case is it an element of the violation that Italian authorities and entities at various levels conspired to produce the result. In no case is it an element of the violation that all of these events were linked one to another in a single causal chain.

For example, let us look at the requisition order. It clearly interfered in a fundamental way with the management and control of ELSI by Raytheon and Machlett, and also with their rights and interests in ELSI. In fact, it totally obliterated their ability to dispose of ELSI and to direct its operations during the critical period in the spring of 1968.

The requisition was plainly unlawful under Italian law — this is not disputed. It was also, by any reasonable definition of the term, arbitrary. As the Italian authorities specifically held, the requisition had no lawful justification whatsoever, no purpose other than to mitigate local political pressure. How can such an action be termed anything other than arbitrary? Therefore, the requisition order was plainly a violation of Articles III and VII of the 1948 Treaty and Article I of the Supplement.

The same is true of the failure to overturn the order until long after its fatal results had occurred. It is not necessary to impute or prove any particular motivation to the Italian authorities charged with processing and deciding on the appeal of the requisition. The plain fact is that the 16–month delay prolonged the effect of the requisition well past the time at which ELSI was forced into bankruptcy, past the time at which its product lines and assets might have been profitably sold, and even past the time at which ELTEL acquired the plant and assets for far less than their true value. As we have shown, this period of delay was completely unreasonable under the circumstances, and wholly out of line with the comparable practice of Italian authorities in similar cases.

We have also shown that the requisition and subsequent sale of ELSI's assets to ELTEL through the bankruptcy process constituted a taking of the property of its shareholders without the prompt payment of just and effective compensation. And this was in plain violation of Article V of the 1948 Treaty. We have demonstrated in considerable detail that the amounts realized in the bankruptcy process fell far short of the real value of ELSI's assets — and this is true whether one accepts the calculations of our valuation expert or the Respondent's accountancy expert. As we have shown, this occurred (among other reasons) because the terms of the bankruptcy sale excluded sales of product lines — which were by far the most attractive possibilities to potential buyers, and because it had already publicly been announced by Italian authorities that ELTEL would acquire the plant. Under these circumstances none of the buyers to whom Raytheon might have sold ELSI's assets had any reason whatsoever to appear at the auctions.

The terms of the auctions, the announcement of the Government's intent to take over ELSI, the creation of ELTEL for this prupose, ELTEL's possession of ELSI's plant at the time of the auctions, the amount realized in the final sale in bankruptcy — these are all facts, well documented in the record and not disputed. They establish a violation of the Treaty. No allegations or proof of conspiracy or causal chains are necessary in any way.

Now, the Respondent insists that, even if all this were true, the claim of the United States is inadmissible before this Court because of an alleged failure to exhaust local remedies. We have shown that, for the Respondent to succeed with this objection, it must demonstrate each one of a series of propositions concerning the law and the circumstances of this case. The Respondent has failed to demonstrate any of them. It has not demonstrated that the local remedies rule should apply in this case at all. It has failed to show why the extensive efforts undertaken before Italian administrative and judicial authorities to find appropriate relief were not sufficient. It has in particular not explained why any further actions were necessary after the highest courts of Italy had specifically rejected precisely the same contentions that form the core of the present dispute.

The Respondent has failed to demonstrate why it is proper for it to maintain this objection now, after many years of remaining quiet in the face of the assertion by the United States that local remedies had been exhausted and that recourse to international settlement was therefore necessary. The Respondent's objection would be a triumph of formalism. It would be a denial of the recourse to this Court which the Parties had specifically agreed to in the Treaty, all in the name of exhausting local remedies which could never have provided an adequate means for the United States to vindicate the full scope of its rights and interests under the Treaty.

The Respondent suggested in its final presentation last week that the United States had brought this dispute to the Court because of pressure brought to bear by a large and influential national, notwithstanding the alleged inadequacy of this case. Mr. President, and distinguished Members of the Court, I can give you personal assurance that this was most certainly not the case.

Of course, we wanted to vindicate the rights of our nationals and we certainly thought that these particular nationals had not been fairly or lawfully treated. But in deciding to bring this matter before this Court, we were focusing on broader interests of the United States. We were concerned about the integrity and effectiveness of the protections for foreign investment contained in this and other FCN treaties, and we wanted to be certain that no precedents were set for inadequate interpretation and application of these protections. We believed that a judgment of this Court would be by far the strongest reaffirmation of these provisions. Above all, we wanted to demonstrate in a visible and concrete way our continuing commitment to the critical role of this Court in the adjudication of legal disputes between States.

In short, the United States comes before you on its own behalf, in the hope that this case can be an important step — at a difficult time — in the advancement of the cause of peaceful settlement of international problems. We ask you to take and decide the merits of this case. We ask you to give the Parties a just result as you best see it.

Mr. President, and Members of the Court, I confirm the final submissions of the United States in this case as they were stated in our initial oral presentations, and as they have been submitted in writing today. And I know that I speak for all of the members of the United States team when I say that we thank you all for the honor of appearing before you, for your consideration of our case and for your kindness to all of us. Mr. President, this concludes the presentation of the United States in these proceedings. And I thank you, Sir.

The PRESIDENT: On behalf of the Chamber I thank you very much for the assistance received from the American delegation. We shall continue on Thursday morning at 10 o'clock to hear the second round of pleadings of the Italian delegation. Thank you very much.

The Court rose at 5.50 p.m.

C 3/CR 89/11
Thursday 2 March 1989, at 10 a. m.

Mr. FERRARI BRAVO, Mr. HIGHET, Mr. LIBONATI, Mr. CARAMAZZA, Mr. CAPOTORTI

The PRESIDENT: Please be seated. I have received a few minutes ago a letter from the Agent of Italy with the written replies to the questions put by Members of the Court. I understand that the Registrar has transmitted a copy of these replies to the United States delegation. One of the replies has annexed to it some new documents. I would ask the Agent of the United States, if possible, to read these documents and then to let me know at the beginning of this afternoon's session if he has any objection to the production of these documents.

We begin now with the second pleading of the Italian delegation. Je donne la parole à l'agent de l'Italie, Monsieur Ferrari Bravo.

Mr. FERRARI BRAVO: Thank you, Mr. President. Before I begin, I have just passed to my distinguished American colleague two small typing corrections on page 30 of our written replies. There are two mistakes in figures — I am sorry but figures are always a big problem in typing — in the middle of page 30, there is a figure 4.7 million. This should read 407.8 instead of 4.7. And three lines below there is 1053 million; that should read 1.653 million. I hope the Registry will take care of this. That is all, thank you. I apologize for this.

Mr. President, distinguished Members of the Court, we come now to the end of our pleading and it is the turn of Italy to rebut the other Party's argument. Our rebuttal will be structured as follows: first, Mr. Highet will describe the changes in direction that have occurred in Applicant's case including the abandonment of the theory of conspiracy, the assertion of a fragmented case and the emergence of the bail out commitment by Raytheon. Then, Professor Libonati will illustrate the fortunes and prospects of ELSI as a manufacturer in the electronics field and Mr. Caramazza will return to the acts of the Italian authorities which allegedly cause the bank ruptcy of ELSI. The United States contentions on the interpretation of the relevant international instruments will then be rebutted by Professor Capotorti, followed by Professor Gaja on the problem of prior exhaustion of local remedies. And, finally, I shall make some remarks of a more general nature and, of course, I shall present to the Court the final submissions of the Italian Government. Therefore, Mr. President, I would like you to request that Mr. Highet take the floor. Thank you.

The PRESIDENT: I give the floor to Mr. Highet.

Mr. HIGHET: Thank you, Mr. President. Mr. President, Members of the Court, oral proceedings under the Rules are, as you of course know, supposed to be « directed to the issues that still divide the parties[1] ». One hopes that this process will help the Parties to streamline and to refine their cases, to make the job of the Court somewhat easier.

But in these proceedings, in this case, there really has not been a « streamlining » of Applicant's case. It has been radically altered since the beginning of the oral proceedings themselves. And there has not been a refinement of Applicant's case, there has been a significant abandonment of major portions of that case since Respondent's first round of arguments only two and a half weeks ago. In addition, two wholly new lines of argument have been invented and introduced in Applicant's closing arguments. It has been a very interesting three weeks.

It is also noticeable, Mr. President, that the submissions of the United States have also suffered a sea-change. They no longer specify — even generally — the *acts and omissions that could give rise to* the violations asserted in their paragraph 1.

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(1) Rules, Article 60, para. 1.

Now, it is no exaggeration then that Applicant's case has suffered a drastic revision. The conspiracy theory has been dropped, or said to have been dropped. Causation or logical nexus is dismissed out of hand. The claimed injuries themselves, in this case, have been reworded so that they are smaller separate components rather than a unified whole. And now the submissions have also followed suit. They have been altered to seek evanescent declaratory relief and almost as if it were to avoid using the words « Raytheon and Machlett » lest attention be drawn to their possible failure to pursue local remedies.

The part of Applicant's case, Mr. President, that has been wholly jettisoned from the proceedings is of course the « conspiracy » theory. However, this was certainly a major component up until the beginning of the second round of pleadings, when it met a sudden and premature demise.

In my pleading to the Court on 20 February I took considerable pains to illustrate this element of Applicant's case and devoted, as you will remember, no fewer than ten pages of argument to citing chapter and verse throughout the pleadings of where the conspiracy, the concerted action, occurred in Applicant's pleadings (2).

But Applicant in the rebuttal arguments has not really dealt with this point at all (3). Applicant will *just not admit* that its previous case against Italy was really based, it really was based, on a series of interlocking acts by Italian Government officials acting in concert (4). It was clearly and emphatically described this way, as a « *series of concerted actions* », in the Memorial (5) — as a « *national government plan* » by my friend, Mr. Matheson, in the first round (6) — or as « the Respondent's *plan to take over ELSI* through its State-owned conglomerate », by Professor Richard Gardner (7).

Now I am — I reassure the Court — not going to go through Applicant's written and oral pleadings again. The record speaks for itself. But it is very important to keep this in mind, because it colours the approach that really should be taken to Applicant's case — also and to its submissions.

Now the remaning case has shrunk in size and it has also been split up into little bits. Now we predicted this quite accurately, last week (8). We said this was going to happened and how and behold it has. The complaint of the United States in this case is now shrunken, it *shrunk down to only four actions*, or incidents, and that we are asked to consider each one of these separately and as if unrelated to the others.

And they were set forth by Mr. Matheson on Monday as follows:

> « They are: first, the unlawful requisition of ELSI's plant and assets; second, allowing ELSI's workers to occupy the plant; third, the unreasonable delay in ruling on the lawfulness of the requisition; and fourth, the flaws in the bankruptcy process which resulted in the acquisition of ELSI's assets for less than fair value (9) ».

True, Professor Gardner also listed these four specific acts (10). Yet even he was unable to avoid linking two, at least two, out of the four « specific acts » cited, the asserted « unreasonable delay » and interference with the bankruptcy proceedings, to the strong suggestion of an overall composite plan of which at least those two components, the delay and the interference, formed composite parts (11). He was quite naturally impelled by the logic of the US case, and this was

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(2) C 3/CR 89/8 of 23 February 1989 at pp. 438-441 14-23.
(3) See C 3/CR 89/9 of 27 February 1989 at pp. 465-466.
(4) See, e.g., Ms. Chandler at C 3/CR 89/3 of 15 February 1989, p. 317, 3rd. alinea.
(5) P. 102. See C 3/CR 89/8 of 23 February 1989 at p. 439 [Italics added.]
(6) C 3/CR 89/1 of 13 February 1989 at p. 252; see also C 3/CR 89/8 of 23 February 1989 at p. 442 [Italics added.]
(7) C 3/CR 89/3 of 15 February 1989 at p. 315; see also C 3/CR 89/8 of 23 February 1989 at pl 442 [Italics added.]
(8) C 3/CR 89/8 of 23 February 1989 at p. 439 [Emphasis added.]
(9) C 3/CR 89/9 of 27 February 1989 at p. 465.
(10) C 3/CR 89/3 of 15 February 1989 at p. 313.
(11) C 3/CR 89/3 of 15 February 1989 at pp. 314-315.

in their first round, Mr. President, when he said: « *Through the ensuing bankruptcy process the Respondent's plan to take over ELSI, through its own State-owned conglomerate, was brought to fruition* [12] ». It is a plan.

In his crescendo of the conclusion of his argument in the first round, Professor Gardner put the whole picture together for us. And he also, in my submission, gave the whole show away, when he connected the « specific acts » as follows:

> « Beginning with the unlawful requisition, the Respondent *embarked on a course of activity that resulted in the acquisition of the bulk of ELSI's assets for far less than market value.* The Respondent *stripped Raytheon and Machlett* of their ability to dispose of ELSI's palnt and assets promptly in an orderly fashion, *took over the plant, delayed providing a decision* on the legality of its actions, *forced ELSI to go into bankruptcy* since it could not pay its bills, and then *obtained ELSI's assets in a piecemeal fashion* during the bankruptcy process for far lower than they were worth at the time of seizure by the Respondent [13] ».

Now in fact, what Professor Gardner was doing was not really stating four « specific acts » as separate issues or separate injuries; he was engaged in breaking them down as separate components of an alleged conspiracy to relate each one analytically to one section or another of the US case or of the Treaty or Supplement [14].

Moreover, Applicant has also apparently not *understood* the whole issue which supports or underlies the other horn of the dilemma that I mentioned in the first round.

That dilemma still besets Applicant's case and it was not resolved by its rebuttal this Monday. Last week, I said that Applicant has now « conceded that it can no longer rely on establishing that connection of will or purpose » sufficient to link the disparate actors and elements in the case together, and I then added:

> « *That is the dilemma. The only other way in which these actions or omissions can be linked one to the next is by a disciplined and cogent chain of causation* — one that admits of no rupture — one that will satisfy the traditional and respected requirements of the international law of State responsability [15] ».

Mr. President, this dilemma is still — unhappily for Applicant — alive and well, and its horns are very sharp indeed [16].

It is a commonplace that an action or omission must be connected to the damage asserted for there to be an injury in international law [17]. Yet Applicant brushes this aside, as if it were merely descriptive, or superfluous. It states that it « is most certainly not the case ... that » these acts must be « tied together in a so-called ' casual link ' [18] », and Applicant also stated (quite categorically too) that:

> « The case of the United States *in no way depends on proving that these actions constitute a sequence of events bound together by a common plot or causal chain*, however often the Respondent may insist that this is so [19] ».

Which is just what we are doing right now.

Yet the case that Italy has had to answer, from the filing of the Memorial through Applicant's second round of pleading, that is the case that was in existence from 15 May 1987 until 27 February 1989 (almost 21 months) has really depended overtly on the idea, expressed and implied,

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[12] C 3/CR 89/3 of 15 February 1989 at p. 315 [Emphasis added.]
[13] C 3/CR 89/3 of 15 February 1989 at p. 322-323 [Emphasis added.]
[14] See for example C 3/CR 89/3 of 15 February 1989 at pp. 313-317.
[15] C 3/CR 89/8 of 23 February 1989 at p. 437 [Emphasis added.]
[16] C 3/CR 89/3 of 15 February 1989 at pp. 309-310; C 3/CR 89/8 of 23 February 1989 at pp. 437 and 443.
[17] See C 3/CR 89/8 of 23 February 1989 at pp. 437-438.
[18] C 3/CR 89/9 of 27 February 1989 at p. 466.
[19] Ibid. at p. 466 [Emphasis added.]

of a conspiracy or unified action. And once one removes that, once one takes it out of the picture — either by abandonment or refusal to admit that it ever existed — how then are the various incidents in the scenario before the Court going to be linked? As our Agent stated last week:

> « Has the United States requested the Court for relief ... based on the conduct of or publicity for the first bankruptcy auction ... [o]r the second, or the third? No. Has the United States specified the claim for relief based on the actual sale to ELTEL? No » ([20]).

In fact, the Court must simply throw out at least three of the four alleged « specific acts » or « actions » as soon as they are considered « in and of themselves ». For example, Mr. President: the occupation of the plant by the workers — the second alleged « specific act » — has no damage related to it when it is taken by itself. It has to be linked to something else. One must be able to prove convincingly that, as a direct result of the occupation of the workers, Raytheon–ELSI was unable to shop around, for example, to obtain interested purchasers in an « orderly liquidation ».

Now, if Applicant is talking about the occupation by workers *before 1 April*, then it has to prove precisely what the effects were on the increasing discomfiture of ELSI. And we would suggest that even if some proof existed — and there is not a shred of evidence in the record — ELSI's long-standing financial problems still dwarfed any occupation by the workers. One would also like to ask the Applicant what was done about the occupation. Who did what, to whom, and who said what, to whom, when and how is it recorded? We do not know. Mr. President, one cannot establish or base a serious international claim just by stating the problem, which is what Applicant has done.

If one is talking about occupation by workers after 1 April, then of course there are similar questions to be asked. There is no exact evidence of any sort as to what the result of that occupation was. More critically, there is no evidence as to what the necessary effect was of the occupation taken as a « case » in itself. Was it discouragement of buyers? Was it pilferage? Was it damage? What in fact was it? Applicant has not said. But it must be specified, at least to a minimum level of proficiency, to stand on its own as an international claim under a treaty.

The third « specific act » — is the « unreasonable delay » in ruling — and that is really in the same category. If the requisition was lawful, the delay — even if inconvenient or even if unreasonable — was harmless. And if the requisition was unlawful, then unless Applicant can carry the burden of proof that there was direct and substantive consequences to the delay, there still is no *iniuria*. The « delay » is, by its very nature, such a conjectural element, in this case, that it can hardly support the burden of proof. The direct and substantive consequences have not been convincingly proven — far less specifically indicated.

And the same is true, Mr. President, of the fourth « specific act »: the asserted « flaws in the bankruptcy process ». These are only actionable, one would think, if one could prove that they were really attributable to an official Italian act. And moreover, one must prove concretely that the results of the bankruptcy sales were poor, or were in fact inferior to what would have been the result under an « orderly liquidation ».

The only « specific act » that really remains then is the first: the assertedly unlawful requisition. But in order to prove that this is a violation of the Treaty or Supplement, Applicant has again to prove that, *but for* this requisition, damage would not have occurred to Raytheon and Machlett. Otherwise, this would be a case of *iniuria sine damnum*. And this might well comport with Applicant's new theory that it is now seeking a « declaratory judgement », but it does not comport with much else in the last two years of these proceedings.

The requisition also raises some other difficulties when it is dealt with all by itself, particularly in the context of Article I of the Supplement. It would behoove Applicant, or it would have behooved Applicant, to have proved, and here again by a *preponderance of convincing evidence*, that the Mayor of Palermo and the other local officials were either *really seeking to injure* ELSI and its shareholders Raytheon and Machlett, *or were acting with such a reckless disregard*

([20]) C 3/CR 89/5 of 20 February 1989, p. 362.

for the consequences, with such a high degree of negligence, that the equivalent of unlawful intent can be attributed to them under normal standards of interpretation. They have either got to try to hurt ELSI and its shareholders or they are so negligent and disregardful of the consequences that Italy could be held liable. And Respondent says that this has not been done or shown. The evidence is all over the place. One inference can be drawn one way; another in another.

But this is a case brought by application, and Applicant therefore still has the burden of proof and the burden of persuasion. The result is that, if a judge cannot make up his mind whether there really was such an intent or not, then the benefit of the doubt must, in law, be given to the defendant, to the Respondent, because the plaintiff has not proved his case by a *preponderance* of evidence.

If there are reasonable or substantial doubts—or even better, if there is confusion or a total lack of clarity in the situation — it is too bad but the burden still has not been carried.

Now if Applicant denies *both* the conspiracy *and* the need to link and follow cause and effect, then it really has nothing left but independent fragments of a case, and these do not comprise an answerable claim upon which relief may be granted.

This is what our Agent meant last week, Mr. President, when he stated that «the case of the United States begins to dissolve at its far end ». Three out of four « specific acts » have dissolved before our eyes. As to the *last* remaining « act » or « action » — the requisition — it is nevertheless essential that Applicant sustain the burden of proof on this issue and not leave it more or less in equipoise. To have it not resolved *clearly one way or the other* must mean a victory for the Respondent on that point.

I should stress, of course, Mr. President, that Applicant *cannot avoid* the logical imperatives of its dilemma. In his closing arguments on Monday, Mr. Matheson slipped right back into the natural reflex of accepting the interconnection of « separate acts ». He said that:

> « *the acts of requisitioning* the plant *and then not overturning* that requisition in a reasonable time *stripped Raytheon and Machlett of their ability to place ELSI through an orderly liquidation* ... The occupation of the plant *prevented any chance of showing the plant and assets to prospective buyers*. The flaws in the bankruptcy proceedings *ultimately resulted in the acquisition of ELSI* by the Respondent for well below what it was worth [21] ».

There was precious little recognition, it seems, in Applicant's arguments on Monday of the problem of satisfying the burdens of proof and persuasion [22]. It is particularly important that the burden of proof on the *illegality of the requisition* be established by a preponderance of the evidence, and not merely left, as I have just said, in a state of equipoise.

Yet Applicant has virtually nothing to say on this vital issue. Instead, only a relatively bland paragraph from Sandifer was read aloud and the subject was quickly abandoned, with the invitation to the Court « *to judge for itself* whether we have failed to substantiate any of the elements of our case [23] » — an invitation that Respondent would warmly support. Only it is *Applicant*, and not *Respondent*, that has the burden of proof on each of these issues. And, as I have just said, Applicant seems to be somewhat unconcerned about where that burden has come to rest.

A wholly new case has *also* emerged, or at least a good part of a new case. It can be referred to for convenience as the new idea of the « Raytheon bail-out » of ELSI.

This idea is that Raytheon had always been committed to keep ELSI out of bankruptcy, and the hands of its creditors, until the end of the so-called « orderly liquidation » and, to this end, that Raytheon had made a « commitment to advance all funds needed to provide necessary liquidity for the orderly liquidation ... ».

Applicant in its closing arguments stated that « [t]his very critical aspect of the orderly liquidation plan has been *completely overlooked by Respondent* ... [24] ». Well it was *easily* overlooked.

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[21] C 3/CR 89/10 of 27 February 1989, p. 502 [Emphasis added.]
[22] C 3/CR 89/5 of 20 February 1989, pp. 360, 363; C 3/CR 89/8 of 23 February 1989, p. 443.
[23] C 3/CR 89/9 of 27 February 1989, at p. 467 [Emphasis added.]
[24] C 3/CR 89/9 of 27 February 1989 at p. 485 [Emphasis added.]

It was mentioned in one unqualified statement in the Schene Affidavit (written 20 years later) to the effect that « Raytheon *also indicated* that it would furnish any additional moneys necessary to maintain the requisite cash flow for an orderly liquidation [25] ».

An it was only really mentioned in the written pleadings one other time, squarely, in one passage of the Reply, to the effect that « Raytheon also made the commitment to advance any funds to provide the necessary liquidity for the orderly liquidation [26] ». But *to whom* was this « commitment » made? It is not said. *By what* was it evidenced? We do not know. When did it happen? We are not sure.

Avvocato Bisconti in his direct evidence, Monday, referred to a « guarantee »; as you will recall, he referred to a « backing », he referred to « assurance », to a « commitment », and then once again to a « backing [27] ». And yet he was unable to inform the Court how or whether those « ideas » had ever been communicated to anyone outside the top echelons of Raytheon executives [28].

There is no evidence in the record, other than self-serving statements, that Raytheon was prepared or willing to make payments to anyone that it was not strictly and tightly legally obligated to make. In the words of Mr. Adams: « we do have obligations to our stockholders [29] ». Indeed, Raytheon has always strongly maintained before the Italian courts, in the non-guaranteed loans cases, that it had no obligation whatever to ELSI's creditors unless it had actually executed a legally binding guarantee or provided other legally sufficient security.

This new fact — in Applicant's words, that Raytheon had the « intention to provide the financial support necessary to avoid any insolvency problems during the liquidation [30] » — is now produced as the keystone of a rational and orderly liquidation proceeding. Great stress is suddenly laid on it. Yet it was only mentioned once in testimony in Applicant's first round, when Mr. Clare said (consistent, by the way, with the Schene Affidavit) that « Raytheon had *guaranteed to* me that *they would guarantee* the case flow necessary to made the liquidation work [31] ».

Raytheon or Applicant now comes and says that Raytheon would have paid ELSI's indebtedness throughout the procedure of « orderly liquidation ». The idea of the bail-out suddenly shows up all over the place. Now described as an « *essential element* of the liquidation plan [32] »; as a series of « possibilities » by which Raytheon and Machlett could have benefitted ELSI [33]; and as a « commitment [34] » or as a « backing [35] ».

The Applicant's Deputy-Agent in his summing-up went so far as to state that:

> « ... *Raytheon had already made the financial commitments necessary* to ensure that ELSI's obligations would be paid as they came due, *including the payroll of the workforce and the full amounts owed to the small creditors and the secured and preferred creditors* [36] » and « [Raytheon] ... *had made firm commitments to pay ELSI's workforce and to provide any assistance necessary to meet other obligations as they came due* ... [37] ».

Mr. President, the specific references are in my written pleading.

In answer to questions from you, Mr. President, Applicant also stated that if the reserve for the workforce « proved inadequate ... Raytheon *would have increased its funding of the liqui-*

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[25] Memorial, Annex 15, para. 53, as cited in C 3/CR 89/9 of 27 February 1989, p. 485 [Emphasis added.
[26] Reply, p. 16.
[27] C 3/CR 89/9 of 27 February 1989, pp. 481, 482 and 483. See also C 3/CR 89/10 of 27 February 1989 at p. 492.
[28] *Ibid.*, C 3/CR 89/10 of 27 February 1989, p. 494.
[29] Memorial, Annex 15, p. 2.
[30] C 3/CR 89/9 of 27 February 1989 at p. 466.
[31] C 3/CR 89/2 of 14 February 1989, p. 279 [Emphasis added.]
[32] C 3/CR 89/9 of 27 February 1989 at p. 475 [Emphasis added.]
[33] *Ibid.*, p. 479.
[34] *Ibid.*, p. 482.
[35] *Ibid.*, p. 482.
[36] C 3/CR 89/10 of 27 February 1989, p. 506 [Emphasis added.]
[37] *Ibid.*, pp. 507-508 [Emphasis added.]

dation programme to take care of any shortfall ». And similarly, Applicant stated that « Raytheon and Machlett ... *were committed to providing sufficient funds* necessary for ELSI to meet its oblitions during the orderly liquidation », and that « Raytheon and Machlett *were committed to supplying necessary funds* to accomplish the orderly liquidation without the necessity of placing ELSI in bankruptcy ».

A new case has therefore blossomed during the oral proceedings. It has suddenly sprung up like a mushroom from almost complete obscurity. *Why did we not really hear about this before?* The two or three references to the « bail–out proposal » were meagre and ambiguous: at best, they seemed to be no more than self–serving statements. Above all, we cannot find any *contemporaneous* evidence.

Applicant must have realized full well that its claim cannot succed unless it convinces the Court of this « bail–out proposal », for the simple reason that it has now become quite clear what terrible financial shape ELSI was really in — even in worse shape than we had believed when the oral proceedings began. Perhaps it was the discovery of the 30 September 1967 financial statements that did it. They certainly have showed us a lot.

But it was *only after these financial statements were produced* and only *after Respondent had spoken in Court* — Professor Libonati had addressed them — that the « bail–out proposal » assumed its present prominence and its position of glory. And now it can be described repeatedly as being a « guarantee », a « backing » or an « assurance »; it is now a « commitment », an « *essential element* of the liquidation plan ».

What proof is there of it? Mr. President, I do not wish to belabour this point, but it is worth noting. The only proof of the so–called commitment, or the « bail–out proposal », is in the asseverations of interested parties and in the statements of counsel. That is not much proof, Mr. President. There never is a single indication of where this « commitment », « backing », or « guarantee » was expressed, where it was recorded, and how. There is no indication that it ever got out beyond the inner circles of high Raytheon management. That is to say, until it becomes essential to assert it in these proceedings, because of the other things that have occurred in these proceedings.

Now it is a matter of giving weight to the evidence, and I do not have to quote Professor Sandifer to acknowledge that the Court will, at the end of the day, know exactly what weight to give to these statements, and to what end.

Moreover, it cannot be supported in this case by « common sense » alone. It is of course true that it would have made sense for Raytheon to have such a policy — obviously it would have been. It is also true that it would surely accompany any *bona fide* effort to work things out and effect an orderly liquidation. But this conclusion assumes that, at the very least, Raytheon had not made a dreadful mess of things; it assumes that Raytheon would suddenly have started to get it right, instead of wrong; and it assumes that Raytheon was always acting openly and in a spirit of genuine co–operation.

Now Respondent does not stand here today before this Court and say that this was not the case. What we do say is that if the Court is going to give the Applicant the benefit of the doubt on this point, then surely the Court must also give the Respondent the benefit of the doubt on an opposite point: the *bona fide* or justification for the requisition.

Yet we are surely denied the benefit of the doubt. Indeed, Applicant has even hinted that *Respondent* had even « *precipitat[ed] the conditions that led to the « social unrest »* » that would have justified the requisition (38). It has stated that « the planned closing was not a *bona fide* public emergency, nor was the requisition a *bona fide* public response (39) ». Even as recently as in its closing arguments, Applicant has also stated that « The requisition order had ... *no purpose other* than to mitigate local political pressures (40) ».

Mr. President, this statement is untrue on its face; the requisition order had at least two other perfectly serious and genuine motives, as the Court knows full well. It is an understatement

(38) Reply, p. 147.
(39) Memorial, p. 36.
(40) C 3/CR 89/10 of 27 February 1989 at p. 508 [Emphasis added.]

to suggest that it does seem to be a denial of the benefit of the doubt to Respondent, on its motives and its intentions, in this critically important area.

Yet it seems only fair to Respondent that if Applicant's « bail–out proposal » is to be taken seriously and given weight by the Court, at the very end of these oral proceedings, then equivalent weight should be given to Respondent's assertions about the requisition. *Those* assertions have been made since the Memorial; they have been repeated loud, they have been repeated consistently and often. Within the four corners of this litigation there should be an equality of credibility between the Parties. And there should, at least, be equipoise.

Mr. President, *if there was indeed such a « bail–out proposal », why wasn't it communicated at least to the Italian public authorities, in time to avert the incidents of the requisition and its aftermath?*

Raytheon may well have had an intention of continued support for ELSI, but it never communicated it to anybody. Raytheon certainly did not convey the idea to the key people it was dealing with: ELSI's workers or employees, to the unsecured creditors, to the banks. Indeed, in the critical days in March, Raytheon gave precisely the opposite impression to the local and national officials concerned. And this emerged on Monday in the cross–examination of Avvocato Bisconti.

There is not a single piece of evidence of which we are aware to the contrary. This, Mr. President, is an important point that I cannot stress too highly today.

In fact, it was always just the reverse. In the 1974 Claim, for example, which is in evidence, it was stated that « in view of ELSI's enormous losses of the past, Raytheon and Machlett found it *impossible to invest additional amounts* in ELSI (41) ».

Later it stated that « consistent with its earlier announced position, Raytheon was *not prepared to provide any further financial support to ELSI either by way of capital, loans, advances, or guarantees* (42) ». The 1974 Claim also rejected the possibility that « Raytheon would have to shoulder *all of the responsibility for ELSI's debts including interest* (43) ».

At the famous meeting with Mr. Carollo on 20 February 1968 — which we will all recall — Mr. Adams opened the meeting by saying that Raytheon « *will not put up any more cash* », and then he said to Mr. Carollo that « Raytheon *cannot provide ... immediate cash help* », and finally he said that « While we can continue to provide ELSI with management and technology, *we cannot provide money*, without which ELSI will shortly disappear (44) ». This is what he said.

In Mr. Adams's written communication to Mr. Carollo on the following day, he stated very clearly that « Raytheon Company *will not undertake to supply further financial contributions* to ELSI (45) ».

Avvocato Bisconti, on Monday on cross–examination, confirmed the clear impression that Mr. Adams must have given to Mr. Carollo, when he said that « this should have made clear to the Honourable Carollo that Raytheon was *not going to invest any money, capital funds, however one may wish to call them*, to continue the operations of ELSI (46) ». Where does this leave us, Mr. President?

The impression was obviously given to all outside Raytheon's immediate corporate family that Raytheon was cutting off ELSI. « *We run out of money and shut the plant* », in the terse phrase used by Mr. Clare's time–table (47). Raytheon and Applicant would now have us believe — they would have the Court believe — that there would have been some form of « firm commitment » to pay ELSI's workers during the liquidation period. Yet the fact is the opposite: the Regional Sicilian authorities were stuck with the bill, first, with the March payroll that had not been met, and then with the payrolls for the next six months.

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(41) 1974 Claim, p. 15; Unnumbered Documents submitted by Italy, Vol. I, p. 21 [Emphasis added.]
(42) 1974 Claim, p. 35; Unnumbered Documents, p. 41 [Emphasis added.]
(43) 1974 Claim, p. 41; Unnumbered Document, p. 47 [Emphasis added.]
(44) Minutes of meeting (1974 version), pp. 1–3; id., p. 416–17 [Emphasis added.]
(45) Minutes of Meeting (1974 version) p. 2; Unnumbered Documents submitted by Italy, Vol. I, p. 425 [Emphasis added.]
(46) C 3/CR 89/10 of 27 February 1989, p. 495 [Emphasis added.]
(47) Minutes of Meeting (1974 version), p. 3; Unnumbered Documents submitted by Italy, p. 417.

The willingness of Raytheon and Machlett to stand behind ELSI may be convenient for the pleading of the case by Applicant, but in the context of what actually happened, it really is a will-o'-the-wisp. Now you see it: now you don't. We see it now, or think that we do, but nobody outside the charmed circle of senior Raytheon people seemed to see it in 1968.

Does it not therefore seem — 20 years later — that the Mayor of Palermo might have been genuinely concerned that Raytheon was really cutting out and letting ELSI turn in the wind? *Of course it does.* And even though he might have been mistaken, or even though he might have been ill-informed, the Mayor of Palermo and thus Italy hersfelf did not necessarily act in *bad faith* or in such a manner as to constitute an « arbitrary » or even « discriminatory » act under the Supplement.

And a second, related, point emerges: does not this all go a long way to show that Raytheon's executives probably managed to bungle the entire situation in March and April of 1968? Dealing with an extremely sensitive context involving human welfare, involving public concern in a generally high stress economic and political context, surely there is an element of contributory negligence here. Now I have used before the expression « assumption of the risk ([48]) ». At least it certainly levels out the equities in this situation to an equipoise.

In situations where a treaty violation is asserted, and the facts are buried in two decades of contrary memories, surely there has to be, Mr. President, an analogue of the application of « equitable principles » so well-known to this Court in other contexts? Here the Court must also look at the « relevant circumstances » in order to determine whether a line of strict equidistance between the positions of the Applicant and the Respondent would not produce an equitable result in this particulare case.

Rather than seeking to prove that Italy violated a treaty commitment, the case should now be put in its true perspective and viewed as one where *mistakes may have been very well made on all sides*, but where those mistakes fall short of creating a cause of action under the Treaty. In short, the ELSI case is a history of a complicated business disaster for which there is no clear remedy in international law.

Once Applicant had conceded that there is no « conspiracy», or that the front end of its case is not connected to the back end by a similar chain of causation, Mr. President, the entire structure collapses. There is no « case » left. What is left is the sad and confused history of mixed motives, bad judgment, inadequate communication, complex misunderstandings, unfortunate statements, failures of agreement, adverse circumstances, poor business acumen, errors in planning, and just plain bad luck.

It is a contemporary business tragedy, a commercial disaster. But it is not actionable under the Treaty of Friendship, Commerce and Navigation any more than events stemming from the October 1987 stock market collapse, or adverse currency fluctuations, or general business disasters are by themselves actionable.

ELSI was indeed a business tragedy — Respondent does not deny that. But it was not a plot. It was not a coherent whole. Applicant concedes that. We say it. An Applicant cannot succeed in this Court by resiling from its initial case and then seeking to qualify separate and individual components. It is like pointing to a pile of lumber, or separate planks, and saying that is the same thing as a house.

Why did it not occur to Raytheon's executives that if they kept this information about what has now become the « bail-out proposal » to themselves, and if they failed to communicate it to anyone in the local or regional or national government, then the impression they were giving was one that could be guaranteed to stimulate the *worst* impressions as to their intentions? I invite you, Mr. President and Members of the Court, to go back through the Annexes to Mr. Clare's Affidavit (N. 15) to the US Memorial with this point in mind.

Is it fair, now, in the last hours of its case, for Applicant to assert vehemently that Raytheon « *had made firm commitments* to pay ELSI's workforce and to provide any assistance necessary to meet other obligations as they came due ([49]) »? These commitments were not known to the

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([48]) In the cross-examination of John Clare, C 3/CR 89/2 of 14 February 1989, p. 287.
([49]) In the cross-examination of John Clare, p. 287 [Emphasis added.]

Italian Government at the time, they were never really mentioned in the pleadings and affidavits, they are not supported by evidence: not by a letter, comminication, contract, agreement, writing, telex, cable, memorandum or any other document whatever communicated to anybody anywhere in the world outside Raytheon, or even outside of a small circle within Raytheon.

These « commitments » were never communicated to the Court other than by pleading. Where is there any first-hand evidence of their existence? Why should Applicant, goaded perhaps by the financial disclosures last week, now be able to turn around at the last minute and say well, we never gave anyone cause to requisition the plant. It was arbitrary, and even in bad faith. There was no justification whatever. Why, we at Raytheon had undertaken to pay everything until the orderly liquidation came to a successful end, as indeed it would have.

Now, it is not as easy as all that. It is not as rational, it is not as crystal-clear as that. The plain fact of the matter, Mr. President, is that this situation would be entirely different if the « commitment » had been expressed in some manner capable of verification today, and particularly so if it had been meaningfully communicated outside Raytheon before the requisition. It is really a matter of common sense. It turns out that what was communicated was a very different message indeed, and it was communicated in 800 separate envelopes.

In short, it is reasonable to conclude that Raytheon and Machlett brought the disaster on themselves: not merely by bad management of ELSI in the preceding years; not merely by creating a horrendous deficit situation; and not merely by close and hard dealing with the concerned Italian authorities right up to the last minute. Raytheon did all of those things.

As a result, *Raytheon itself* ruptured the chain of cause and effect. *Raytheon itself* was a contributing factor. But for the actions of *Raytheon itself* we cannot say that the tragedy of ELSI would ever have occurred. But for the positions taken by *Raytheon itself* we cannot say that the Mayor of Palermo would have ordered the requisition.

Raytheon itself was at least then sufficiently entangled in the chain of cause and effect so as to shift the burden of proof in this case back where it belongs — to the espousing Government, to the United States.

The Applicant has not sustained that burden.

The Court can therefore, in our submission, not permit Italy to be found liable for violating a treaty, when Applicant has failed to show that it was not *Raytheon itself* that had a critical influence on the matters underlying these proceedings.

By bringing this affair down on its own head, like Samson in the temple, Raytheon may have achieved a kind of fame. It certainly did acquire the ability to request its Government to press a claim that it then perceived as being its own, and that it would not otherwise have had.

But in the course of so doing, Raytheon and, with respect, Applicant itself, have neglected the first principles of international litigation. They have advanced a case without the requisite proof — one that must, at the very least, remain in a state of unconvincing balance. It follows that it must, at the very least, be decided in Respondent's favour.

Mr. President, this concludes my statement on behalf of Italy, and Mr. President and Members of the Court, thank you for the consideration you have given to my pleadings

The PRESIDENT: Thank you very much, Mr. Highet. I give the floor to Professor Libonati.

Professor LIBONATI: Mr. President, distinguished Members of the Court, my intervention will relate to four major points in the ascertainment of the facts connected with the ELSI case.

1. The submission has been prepared in collaboration with Professor Bonell and with our financial adviser, Mr. Hayward.

These points are:

a) the state of insolvency of ELSI long before 31 March 1968, and the state of insolvency of ELSI in the admissions of its own officers;

b) the tale of the ordinary liquidation;

c) the story of extrapolation of the 31 March 1968 values;

d) the incoherences in the Applicant's assumptions when related to the facts.

2. First point. – ELSI submitted its accounts to Coopers & Lybrand for audit as a necessary procedure for Coopers & Lybrand's examination of Raytheon's group accounts.

We must assume that Coopers & Lybrand raised a whole series of potential adjustments, some of which were accepted by the ELSI management, and others which were not.

A. The adjustments posted by ELSI — see second column on p. 3 of the Coopers & Lybrand Report — brought 2,200 million lire in further losses. The audited loss for the year ended 30 September 1967, amounted thus to 4,882.8 million lire, resulting in a shareholders' deficit (with capital, reserves, etc., already lost) of 881 million. ELSI was therefore insolvent.

In this connection it must be pointed out at once — and I shall return to this matter later — that Italian commercial law requires that the official accounts of Italian companies submitted to shareholders and other parties should be prepared with « *chiarezza* » and « *precisione* », clarity and exactness. Moreover a fundamental concept of Italian accounting — see the criteria of evaluation established in Article 2425 of the Italian Civil Code — is « prudence ». Accordingly, the adjustments made by Coopers & Lybrand in following the accounting policy of Raytheon should also have been reflected in the official accounts of the company, and neither Italian law nor Italian tax regulations would have prevented this « prudent » basis of accounting, Contrary to what one would believe from Mr. Lawrence in his testimony of Monday.

Accordingly, the shareholders should either have reconstituted the capital, or the company, as a result of the undisputed deficit, should have been declared bankrupt.

The Italian Civil Code, which deals with the rules applicable to companies with a share capital, imposes a minimum capital for such companies (*società per azioni*): formerly 1 million lire, presently 200 million lire. As soon as the capital of a company has fallen below this minimum as a result of losses, its shareholders must either reconstitute the capital or must put the company into liquidation (I recall in this respect the observation of the Respondent in its reply to President Ruda's first question).

For the shareholders to be entitled to decide to liquidate, however, the company must still be solvent — i.e., not in a shareholders deficit situation. This is to say, a company which has shareholders' equity below the legal minimum, is a company which must be recapitalized or put into liquidation, but which, since it is still solvent, is not required to file for bankruptcy.

When, however, the total losses of the company exceed the total capital and reserves, then there is a stockholders' deficit and the company has no means of meeting its obligations in a regular manner . The company is « insolvent » and, in terms of Article 5 of the Bankruptcy law, must be declared bankrupt.

According to the audited 30 September 1967 financials, ELSI was in deficit and insolvent. It should thus have been declared bankrupt, since its shareholders did not decide to reconstitute the capital.

Italian courts have repeatedly decided that there is no support for the opinion according to which insolvency and bankruptcy of a businessman cannot be declared it the failure has not been shown by non–payment of liabilities. On the contrary, the situation of insolvency subsists and can be declared by the Tribunal even if there has been no suspension in payments of amounts due. This is exactly ELSI's case.

B. According to Coopers & Lybrand the losses were however greater than the ones expressed in the Company's adjusted accounts (column 3), and the Company's deficit was much greater than 881 million (an amount already sufficient to make ELSI insolvent and obliged to file a petition for its bankruptcy).

This can be seen clearly in the Report deposited with the Court by the Applicant on Friday, 17 February 1989. The auditors in fact observed that:

– the inventories were overvalued (see Coopers & Librand Report, p. 2 sub 2) by	L. 453,300,000
– the fixed assets stated in the balance sheet included revenue expenditure disallowed by the Italian revenue authorities, therefore an amount not related to fixed assets. Thus, it was necessary to subtract.....	L. 463,600,000
resulting in a total of major losses of	L. 916,900.000

ELSI's losses at 30 September 1967 were thus, according to the auditors, 916.9 million lire greater than what was stated in the adjusted accounts.

The total loss for the year ended 30 September 1967, really amounted to 5,799.3 million lire.

This means that — in the opinion of Coopers & Lybrand — the ELSI stockholders' deficit, at 30 September 1967, amounted to 1,798.2 million lire. And, on 31 March 1968 the deficit had increased by a further 1,068.7 million lire.

Further, the auditors also expressed an inability to satisfy themselves on the value attributed to price adjustments on the supply of klystrons in the amount of 251.6 million lire (see n. 2, point a). ELSI's losses were thus probably even higher than 5,799.3 million lire and ELSI's deficit was even higher than 1,798.2 million lire: ELSI's insolvency was even surer.

3. But — Mr. Lawrence tells us, as noted earlier in my submission — we cannot make reference to the adjusted accounts. The adjusted accounts were drawn up according to American accounting criteria. In Italy one would adopt different criteria, on a less prudent basis.

According to Mr. Lawrence there are two truths. One, the real and prudent one, which is told to the American parent company; and another, obviously based on an incomplete valuation of the facts, good for the creditors and Italian authorities. However, Article 2423, paragraph 2, of the Italian Civil Code states — as I have said earlier — that:

> « the balance sheet and the profit and loss account must demonstrate clearly and accurately (' *con chiarezza e precisione* ') the company's position with regard to its assets and liabilities and the profits made or losses sustained ».

The Italian courts have repeatedly applied, in decisions concerning balance sheet presentation, the principle of « truth » as a principle of public order. The Italian courts have further held that every evaluation must be made with « prudence »: the very concept that is followed in the adjusted accounts of ELSI presented to the shareholders for their group counting purposes.

Further, all of the adjustments proposed in column 2 of the audited accounts should have been reflected in the « official » accounts. Italian law indeed requires that the adjustments should be booked in order that the « official » accounts express clearly and accurately the financial position of the company.

There is no doubt, therefore, that ELSI, as an Italian company, had to tell the truth, i.e., the « real » truth, to its Italian creditors as well. Any prudent director would have noticed at once that the values suggested by Coopers & Lybrand corresponded with the true position, and that, by not immediately presenting a petition in bankruptcy, ELSI's economic and financial disaster would only have been aggravated, as indeed it was. The directors knew for example that ELSI's accumulated operating cash flow deficit from 1 October 1962 through 31 March 1968 amounted to a negative position of 14,309.7 million lire (see Arthur Schene's Affidavit, Annex 13 to the Memorial); the directors knew that ELSI's product line contribution was negative for the years ended 30 September 1967 by 976.3 million lire (Audited accounts as at 30 September 1967); the directors knew that ELSI's current liabilities exceeded its current assets at 30 September 1967 by 1,400.2 million lire, according to the « prudent » accounting of Coopers & Lybrand. This means that to pay all the current liabilities further funds were needed.

One cannot therefore imagine for a moment that the legal minimum provided by Articles 2447 and 2448 of the Italian Civil Code was a matter to be determined by reference to the official accounts of ELSI, which we know did not present a true and fair view of the financial position. And it strains belied to affirm that a state of insolvency well–known to the parent company, well–known to the directors, had to be concealed from creditors, from the Italian authorities, and indeed from every other authority.

Mr. President, I think I have half an hour more.

The PRESIDENT: Well if you have half an hour we can go on until you finish and then we will take our break.

Mr. LIBONATI: Thank you very much.

4. The consequence is very simple, and it is of the utmost importance in this case.

If ELSI was in a state of insolvency on 30 September 1967; if ELSI's state of insolvency was aggravated, as we know is sure, on 31 March 1968; then there is absolutely no point in discussing the effects of the order of requisition of 1 April 1968, on the later bankruptcy.

It stands to reason that the order of requisition of 1 April 1968 cannot be the cause of the situation that already existed for many months.

5. Now I come to my second point, the « very curious case of the balance sheet extrapolated from a balance sheet of six months before ».

Mr. Lawrence (see C 3/CR 89/4, p. 337) has accepted that ELSI's management extrapolated and prepared the balance sheet of 31 March 1968, using the balance sheet of 30 September 1967, as a premise. Mr. Lawrence has also stated that his firm did not carry out an audit in March 1968.

The procedure followed was most peculiar. « The balance sheet at 31 March 1968, was prepared on a basis consistent with the valuations in the Coopers & Lybrand Audit Report of 30 September 1967, using actual ELSI accounting records through 31 December 1967 and a conservative extrapolation to 31 March 1968 » (see Mr. Schene's Affidavit, Annex 13 to the Memorial). This means:

– that there were no accouting records for ELSI for three months, from 1 January 1968 to 31 March 1968;

– and that the balance sheet was prepared on hypotheses and estimates which did not respect the concept of « prudency ».

It also means that no account was taken of the audited adjustments included in the audited financials at 30 September 1967.

Mr. Lawrence's conclusions are based on the assumption that (C 3/CR 89/10, p. 499) « The achievement of the values that I have arrived at relies on the premise that there would have been an orderly liquidation ». This basis requires time to find a willing buyer or buyers for the business or the business lines.

The fact that ELSI had lost 8,451.5 million lire over the years; that ELSI's product line contribution was negative in the sole year 1967 to the tune of 976.3 million lire; that in the six months ended 31 march 1968 ELSI lost 1,068.7 million lire; that ELSI had « fired » — as Mr. Clare says — 800 workmen on 31 March 1968; that ELSI had closed the plant; that ELSI was not a continuing business, neither in an operational nor in a financial context; all this appears to have no effect whatsoever on the unwavering, but totally unsupported, convictions of the Applicant.

6. But there is more. – There has been a debate about a valuation on a going concern basis or a valuation on some other basis.

Mr. Lawrence in his testimony of Monday (C 3/CR 89/10, p. 496) stated clearly that, in addressing the question of valuation, the issue was not whether ELSI was a going concern on 31 March 1968, on 30 September 1967, or on any other date, and that his evidence relied on no such premise.

However, if we look to Mr. Lawrence's earlier testimony of 16 February 1989 (C 3/CR 89/4, p. 335) we know clearly that his valuation was based on the sale of ELSI's business, and for that reason, according to Mr. Lawrence, there was « a real prospect that intangible assets would have realized a substantial value ».

Mr. Lawrence also explains that the goodwill of the business included the benefit of the continuing business connections, and indeed we understand that due to the well–trained and technically competent workforce (which had been dismissed on 31 March) and the strong technical base (despite the huge losses accumulated over the years) there were particular features which should have commanded a substantial premium for goodwill.

Moreover, in discussing the fixed assets, Mr. Lawrence recalls the appraisal carried out by Mr. Puglisi, appointed by the Tribunal of Palermo as a technical consultant to the bank-

ruptcy. Mr. Lawrence says that in his opinion « the Puglisi appraisal ... provides an appropriate basis for estimating the realizable value of its fixed assets » (C 3/CR 89/4, p. 338).

Mr. Puglisi describes his approach to the appraisal exercise as follows:

« This report ... is designed to determine the current market value of ELSI as a whole; if sold to a third party which intends to operate the facility without substantially changing the nature of its products or mode of manufacture. All valuation criteria applied must, therefore, be seen in the light of this concept ». (Unnumbered Documents, Vol. III, p. 91).

Therefore, Mr. Puglisi considered ELSI's facilities as a going concern. This can also be seen from what Mr. Puglisi says in connection with the criteria for the appraisal of machines and equipment:

« The consultant further maintains that, in view of the intended purpose of this survey, the appraisal of the machines, equipment and tools must also take into account that the said equipment and machines are for use in production lines, in testing and quality control ». (Unnumbered Documents, Vol. III, pp. 91–92).

I still quote from the Appraisal of Mr. Puglisi:

« In fact, the resale value would come out different if the equipment would be sold to third parties not as a complete system but individually, as separate components without functional interrelation ». (Unnumbered Documents, Vol. III, p. 92).

The conclusion is that Mr. Lawrence has assumed that the assets of ELSI could be disposed of on a going concern basis, and on such premise — whatever he says — he has taken his valuation and, indeed, given value to goodwill.

But that was not the situation of ELSI.

No names of prospective buyers have been presented by the Applicant. Mr. Adams admitted to recalling no confidential discussions with prospective buyers (C 3/CR 89/2, p. 267). The plant was closed. The workmen were dismissed. There is thus no real support for the contentions of Mr. Lawrence. And the Respondent does not need to say more.

7. Let us move on to my third point.

The Applicant is adamant on the idea of an orderly liquidation. « As the record amply demonstrates, there was an orderly liquidation plan and the orderly liquidation plan would have worked » (C 3/CR 89/9, p. 479). «Raytheon and Machlett formulated a specific plan for the execution of the liquidation » (*ibid.*, p. 34).

Mr. President, it is not true.

The Applicant should read the witnesses' depositions with greater attention. Mr. Clare — (see C 3/CR 89/2, p. 278) — clearly stated that plans for an orderly liquidation «were not in place » at the time of the Board meeting at which it was decided to liquidate ELSI, i.e. 18 March 1968.

And this, Mr. President, is obvious.

In Italy, as in many other countries, voluntary liquidation follows a specific procedure. It must be decided on by an extraordinary shareholders meeting; it must be carried out through a special organ, the « *liquidatore* », appointed by the shareholders or, if they fail to do so, by the Tribunal (see Art. 2450, Italian Civil Code). In the case of ELSI, there was a Board meeting on 18 March 1968, and a shareholders' meeting on 28 March 1968, but no « liquidation » was decided, and no « *liquidatore* » was appointed.

Thus, it is obvious that the « fantastic » orderly liquidation is based on an equally « illusory» liquidation plan.

What is significant is that in the minutes of the Board meeting and of the shareholders' meeting the word « liquidation » (« *liquidazione* ») never appears. The Board simply decided that « production will be discontinued immediately », and « commercial activities and employment contracts will be terminated on 29 March 1968 » (Annexes to the Memorial, N. 31).

The shareholders simply decided that « the company cease operations », and that the Board of Directors — not the « *liquidatore* » — was empowered:

> « to make contact with the banks and principal creditors of the company to reach an agreement on the procedures to be followed to dispose of the company's assets in an orderly manner and at their highest realizable value in the interests of all creditors » (Annexes to the Memorial, N. 32).

Thus production was to be discontinued; commercial activity and employments contracts were to be terminated. The company was to cease operations.

But this means that in the directors' and shareholders' opinion the business ceased to be an operating entity, and became a collection of assets to be realized piecemeal. At the best price of course; but in a manner that does not need a plan, and is carried out on a daily basis and, most importantly, requiring the understanding (to the extent of some 50 per cent of their outstanding debts) of the creditors.

The Respondent has already shown that the option of an orderly liquidation was not open to ELSI, since its accounts expressed its clear inability to pay its debts. The Respondent now emphasizes that when the question was discussed by ELSI, no liquidation plan was in place, no « *liquidatore* » was appointed, and the word « *liquidazione* » (« liquidation ») was not even used. Thus, the orderly liquidation is really a legend, a sophism created when no liquidation, neither substantially nor formally, could in fact take place.

8. Let us go on to my fourth and last point. The Respondent is still awaiting for the Applicant to provide some sort of coherent evidence that ELSI was still in a state of solvency on 31 March 1968. ELSI had lost billions of lire over the years, was out of money and could pay neither its creditors nor its workmen. Therefore, when the Applicant states that ELSI was a technological jewel, it cannot seriously pretend to base all its arguments on statements made by representatives of the very Company seeking damages, statements which are moreover contradictory and incongruous.

The Respondent has however indicated, *ad abundantiam*, numerous circumstances demonstrating the real situation of ELSI. The Applicant has tried to reply to the Respondent's demonstrations of the facts but in a very ineffective way. A few examples will be sufficient.

A. The premise is that ELSI had been losing billions for years.

I do not want to repeat the fantastic figures of ELSI's losses throughout the sixties.

I would like to recall only that the accumulated operating cash flow deficit from 1 October 1962 through 31 March 1968 amounted to a negative position of 14,309.7 million lire, this enormous amount of funds having being swallowed in the disastrous trading operations of ELSI (see Mr. Schene's Affidavit, Annex 13 to the Memorial).

I would like to recall too that for the year ended 30 September 1967 the product line contribution of ELSI was negative for 976.3 million lire and could thus not cover the general manufacturing, marketing and administrative expenses and financial costs (see audited accounts as at 30 September 1967). This is insolvency.

Any reasonable person must thus conclude that the product lines of the insolvent ELSI cannot be considered to be of any great value.

The Applicant affirms, however, that « ELSI's product lines utilized top-of-the-line technology, that they enjoyed solid markets throughout Europe », etc. (C 3/CR 89/9, p. 483).

What nobody understands is why such a technological jewel could only produce losses. But where is the evidence for the Applicant's affirmation? Only the words of Raytheon's officers. All other opinions — for example, those expressed in the Affidavits of Mr. Ravalico and of Mr. Busacca (see Annexes 14 to the Rejoinder and 44 to the Counter-Memorial) — must of course be ignored.

It is a very simple and comfortable way of arguing, Mr. President. Unfavourable evidence is simply disregarded.

But there is the admission of ELSI's own management made before litigation began, and therefore not open to suspicion. In my first pleadings, I stressed the Project for the financing

and reorganization of the company (see Annex 22 to the Memorial), because it is a document drafted prior to ELSI's final disaster and the start of litigation.

In that Project, we read that « the present range of products are beginning to come under significant market pressures » (Annex 22 to the Memorial, p. 24).

> « Without additional help being provided both from Raytheon and from Italian Government agencies ... the annual sales turnover of the present product ranges cannot do anything but decrease. This is particularly so in the case of the cathode ray tubes line where the advent of colour television in a few years time will have a very significant effect indeed » (Annex 22 to the Memorial, p. 24).

The words are polite; but the meaning is sure. ELSI was out of the market.

The Applicant now speaks about colour television laboratories in Palermo (C 3/CR 89/9, p. 485). But also on this matter the Project is strict. « It would certainly be quite uneconomic to try to extend this line and create a colour tube facility in Palermo » (Annex 22 to the Memorial, p. 24).

The project was presented by ELSI in May 1967. The words are those of ELSI's officers. Do we need any more proof of the fact that the Applicant's efforts to attach a high value for ELSI's obsolete products are useless?

B. With the permission of the Court, I would like to make one more observation.

The Respondent noted that the famigerate cathode ray tubes were made with glass brought from Russia. The Respondent has quoted the Affidavit of Mr. Ravalico. The Applicant says that this is not true. In its opinion the « tubes » were bought in Germany or France (C 3/CR 89/9, p. 39). Whether Mr. Ravalico's « glass » is the same as the tubes just referred to is not a question of interest. No evidence has been, however, provided by the Applicant to clarify this point.

Mr. President, it is perhaps inaccurate — as the Applicant has contested (C 3/CR 89/9, p. 485) — to quote an affidavit; but it is certainly inaccurate to quote nothing.

Moreover, the above-mentioned Project for financing and reorganization stresses the need for financial help for transport costs (Annex 22 to the Memorial, p. 40). Evidently, regardless of its place of origin, the total raw material cost was uneconomic to the Sicilian company. ELSI own officers have admitted the same.

C. Things do not appear different if we discuss semi-conductors, the product line of ELSI second in importance. The Applicant submits that a certain TAG of Zurich implemented a profitable transition from germanium technology to silicon technology. Therefore — the Applicant argues — the semi-conductor line of ELSI was excellent because it could be converted from germanium to silicon technology.

Unfortunately, TAG of Zurich is not ELSI of Palermo, and nobody can deduce success for an economic disaster like ELSI from events connected to a company situated in one of the richest and industrially strongest areas in Europe. Moreover, at the moment of the dismissal of the workmen — 28 March 1968 — there was « only an attempt in progress to produce silicon diodes » (see the Affidavit of ing. Busacca, who was at the head of ELSI's microwave tube design department until 29 March 1968 (Annex 44 to the Counter-Memorial).

This forecast of happy results was still only a dream.

Mr. President, distinguished Members of the Court. The conclusion is that the Applicant has not substantiated any of its assumptions that ELSI's lines of business had a value at least equal to extrapolated book values at 31 March 1968. No valid argument has been put forward. No evidence, no document, no figures have been produced. Once again only theories, only a castle built on sand. The sole value that can be surely attributed to ELSI is the one arising from piecemeal disposal of its assets through its regularly appointed Receiver in the bankruptcy.

Mr. President, I think I have ten minutes more.

The PRESIDENT: Well we can have a break now and you can continue afterwards.

The Court adjourned from 11.30 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. Professor Libonati.

Mr. LIBONATI: Thank you, Mr. President.

9. One last small point. – According to the Applicant it is not possible to complain about royalties or expenses for technical consultancies charged by Raytheon to ELSI, because on 31 March 1968 there was in ELSI's accounts an unpaid amount of US $521,653 for royalties, and an unpaid amount of US $143,763 for consultancies.

The position assumed by the Applicant is curious. The Exhibit C to Mr. Deithcher's Affidavit (Annex 14 to the Memorial) talks of US $1,273,653.49 in accounts receivable due from ELSI to Raytheon. Not such a small amount.

This amount was shown in ELSI's financials as a debt. Raytheon therefore wanted to be paid that amount, and the Applicant asks now for damages which include that same amount.

What is the Respondent meant to say? That it is not ELSI but the Respondent itself that Raytheon considers a lemon to be squeezed?

10. The Respondent does not think it necessary to say any more about the industrial, economic and financial situation of ELSI. The Applicant can repeat yet again that « the Respondent has not presented any real disagreement on the basic sequence of facts in this case » (C 3/CR 89/9, p. 32). Really, I do not know what more the Respondent must say in order to disagree. But I want to point out here that it is not only the Respondent, but the facts themselves that speak in disagreement with the Applicant.

The Applicant knows it, and has recognized its error on the question of the solvency or insolvency of ELSI. It is true, he says, ELSI was unable to pay its debts; but nobody had to worry. There was Raytheon standing behind the scene committed to backing its subsidiary, assuring it of the necessary funds for an orderly liquidation. All the discussions on bankruptcy are therefore useless; the Applicant has produced no objections to Professor Bonell's arguments.

I must apologize to the Court, as must many others.

For the past 21 years, nobody has understood that Raytheon was committed to anything. ELSI's creditors did not understand this commitment. Italian judges did not consider the commitment of Raytheon to pay anything. The Italian banks never saw Raytheon offering money. After 21 years we learn that when Mr. Adams was saying that Raytheon was not willing to put any more money into ELSI, he did not really mean this. When Mr. Clare said that ELSI was out of money, he did not mean it. What is curious, is that we have had to wait 21 years — more than 15 years of litigation — one Claim; one Memorial; one Counter-Memorial; one Reply; one Rejoinder; two weeks of oral pleadings; in order to learn of it.

Mr. Highet has already stressed the incongruence of the case.

I want only to recall how Raytheon appears and disappears, how Raytheon says it is ready to put or not put money in ELSI, how the parent company seems to be ready to implement its parental duties depending on the circumstances of the moment.

I want to further point out that the thesis of Raytheon's backing has come out only after the production of the Coopers & Lybrand Report, kept secret until two weeks ago, which Report put an end, once and for all, to the question of ELSI's insolvency. Mr. Highet has already stressed this point, but I want to stress it again, because of its importance.

It is convenient, however, to examine one point of bankruptcy law.

We know that ELSI was in a state of insolvency. The Applicant suggests that Raytheon was ready to back ELSI's orderly liquidation, to financially sustain its subsidiary. Raytheon's commitment, however, is based only on words: there is no documentary proof, moreover, there is no document giving legal form to this obligation of Raytheon to financially sustain ELSI.

ELSI's state of insolvency, in law, is thus in no way modified. I do not wish to discuss whether or not what the Applicant now says has any grounds. I mean that the supposed commitment of Raytheon, having no legal effect, leaves ELSI in exactly the same position as before: out of money, not capable of paying its debts in a regular manner — regular manner in law, not in words.

According to Italian bankruptcy law and to many other legal systems, the actual situation, in law, of the debtor must be taken into account in order to decide whether it is insolvent or not. The supposed commitment, with no binding force, that the Applicant now says was taken by Raytheon years ago, has thus no significance. It is a rhetorical way intended to distort the truth. And in any case, ELSI still had to be declared bankrupt.

I must apologize to the Court, but figures cannot be discussed in the over–simple way that Applicant would like. Where there is a loss, there is a loss. Where there is insolvency, there is insolvency. And bankruptcy must be declared when there is insolvency.

Mr. President, distinguished Members of the Court, may I recall one last time the figures, the principal figures, expressed in these oral pleadings?

Audited losses of ELSI for the year ended 30 September 1967 amount to:	4,882.8	million lire
(almost 5 billions);		
ELSI's adjusted audited shareholders' deficit at 30 September 1967	881	million lire
(million lire of 1967, of course);		
ELSI's losses according to the adjusted accounts and audit qualifications at 30 September 1967	5,799.3	million lire
(almost 6 billions);		
ELSI's deficit according to the adjusted accounts at 30 September 1967	1,798.2	million lire
ELSI's losses throughout the sixties	8,451.5	million lire
ELSI's accumulated cash flow deficit from 1 October 1962 through to 31 March 1968	14,309.7	million lire

The Respondent is convinced that these facts, that now are truly undisputed, demonstrate:

– that ELSI was in a state of insolvency long before 31 March 1968;

– that no orderly liquidation was open to ELSI, and that no orderly liquidation was decided on, or prepared by, ELSI at the time;

– that no causal relationship can be established between the order of requisition issued by the Mayor of Palermo and the bankruptcy of ELSI requested by its management.

Mr. President, I thank you very much.

The PRESIDENT: Thank you very much, Professor Libonati. I give the floor to Mr. Caramazza.

Mr. CARAMAZZA:

Préambule.

Monsieur le Président, MM. les juges. Laissez–moi tout d'abord avouer que je suis en quelque sorte embarrassé par la technique adoptée par la partie demanderesse au cours de sa contre–plaidoirie.

J'avais toujours pensé qu'un des principes fondamentaux de notre culture juridique en tant que règle de droit naturel était le principe contradictoire: l'*audiatur et altera pars* des Romains, le «*fair hearing*» de la *Common Law*.

Un principe qui devrait se traduire, d'un point de vue procédural, par une sorte de dialogue entre la partie demanderesse et la partie défenderesse, qui répondent, à tour de rôle, aux observations, déductions et critiques de l'adversaire.

Je m'attendais donc, en ce qui concerne les aspects du différend qui m'ont été confiés, à ce que la contre–plaidoirie de mes adversaires eût tenu compte des observations que j'avais eu

l'honneur de présenter à ce sujet à cette Cour la semaine dernière, tout comme j'avais cherché, en présentant ma plaidoirie, à prendre en juste considération toutes les observations faites par mes adversaires au cours de leur première intervention.

Jamais attente ne fut plus vaine.

Aussi bien M. Matheson que Mme Chandler et M. Lawrence ont cru bon de se passer de tout commentaire sur mes thèses et ont repris, dans la deuxième phase de la discussion, une fois de plus, les mêmes mots (on pourrayit dire à la virgule près) qui avaient été énoncés dans le Mémoire, répétés dans la Réplique et réitérés dans la première plaidoirie.

Est–ce que mes confrères de la partie adverse ont pensé pouvoir adopter, aux fins de la logique juridique, la règle issue du calcul algébrique, selon laquelle une erreur répétée deux fois (ou un nombre de fois multiple de deux) devient vérité ?

Franchement, je ne le crois pas.

Est–ce que mes considérations étaient tellement convaincantes qu'aucune réponse ne pouvait être donnée ? Je devrais alors renoncer tout simplement à ma contre–plaidoirie. Mais ce serait vraiment présomptueux de ma part de penser une chose pareille.

Je dois donc conclure après une nécessaire autocritique, que je n'avais pas été assez clair dans mon exposé pour mériter une réponse.

Je m'en excuse et j'essaierai donc, d'une façon aussi brève que possible, de mieux m'expliquer aujourd'hui sur les quatre points qui m'ont été confiés, à savoir les avantages pour le Sud, la protection de l'usine par la force publique, l'ordonnance de réquisition, et le délai dans la décision du recours hiérarchique.

1. – *Les avantages pour le Sud.*

J'avais affirmé, lors de ma première plaidoirie, que la doléance, à ce sujet, était générale, vague et non pertinente, et qu'aucune preuve n'avait été offerte sur la présentation d'instances formelles et de demandes aux autorités judiciaires compétentes.

Nous apprenons maintenant par la plaidoirie de Mme Chandler et par la réponse écrite à une question posée par M. Schwebel, que, comme il résulte d'une note en bas de page d'un des documents annexés à un affidavit de M. Scopelliti, rédigé le 1er avril 1987, quelqu'un — on ne sait pas qui, on ne sait pas quand — avait présenté une protestation — on ne sait pas à quelle autorité — pour réclamer les avantages dont on parle. On ne précise pas exactement lesquels. Mais, cela va de soi! Il est encore affirmé dans la même note en bas de page qu'un ingénieur et un expert comptable étaient, à l'époque, en train de travailler pour présenter une nouvelle réclamation. Seul le ciel sait pourquoi un ingénieur et un expert comptable et non pas un avocat!

En tout cas l'annexe à l'affidavit, après avoir donné toutes ces précisions, va jusqu'à indiquer le montant de la réclamation: de 100 à 300 millions de lires.

Nous sommes vraiment en plein royaume de l'à–peu–près.

Evidemment il s'agit là de quelque chose que même le plus généreux des optimistes ne pourrait jamais considérer comme une valeur sûre. Et en effet, M. Scopelliti ne tient pas compte de ces chiffres dans son évaluation, comme il a soin de le préciser.

Mais on se trouve sans doute en présence d'un excès de prudence, d'un manque impardonnable de confiance dans la chance!

Heureusement, au cours de ce procès, M. Lawrence a pu apporter un remède à cette erreur du *management* américain d'ELSI et, puisque la valeur de cette réclamation fantomatique était estimée entre 100 et 300 millions, avec toute la prudence et la pondération que sa profession exige, il a choisi le chiffre le plus haut — 300 millions — et a inclu cette somme dans la valeur comptable de la société.

Voilà la mesure pour apprécier les critères dont M. Lawrence s'est servi pour donner son avis sur la valeur de l'ELSI et que M. Libonati a déjà soulignée.

Ils' agit là d'un papier de tournesol sur lequel je me permets d'attirer l'attention de la Cour, sans pour autant me livrer à tout autre commentaire.

2. – *La non-intervention de la force publique.*

Nous avions précisé que l'occupation de l'usine par les travailleurs avait été:

1) antérieure à la réquisition;
2) pacifique;
3) symbolique;
4) tolérée par l'ELSI;
5) menée dans un esprit de collaboration;
6) conduite sans causer aucun préjudice à l'usine (C_3 CR 89/6, texte français, p. 20–26).

Nous en avions fourni les preuves appropriées, à savoir les arrêts du Tribunal et de la Cour d'appel de Palerme, et nous avons énoncé quelles étaient les raisons spécifiques pour lesquelles ces deux arrêts constiuaient une preuve privilégiée. Il y avait encore les affidavits de MM. Bevilacqua et Maggio et *le recours hiérarchique de l'ELSI* qui, en faisant une référence spécifique à la période suivant la réquisition, esquissait une description idyllique évoquant l'atmosphère d'un salon littéraire ou d'un club anglais plutôt que celle d'une usine ravagée par une lutte syndicale acharnée, comme on voudrait aujourd'hui nous la présenter.

Chers confrères américains, souvenez-vous de ce qu'écrivait l'ELSI dans son recours hiérarchique du 19 avril 1968: « les jours suivants [le 30 mars] un petit groupe de travailleurs a erré dans l'enceinte de l'usine sans toutefois provoquer aucun incident ».

Nous affirmions donc entre autres que, dans cette situation, il n'y avait lieu à aucune intervention de la force publique.

Et bien, que nous a-t-on répondu lundi dernier?

Rien. Rien de rien. M. Matheson et Mme Chandler ont continué, comme si de rien n'était, à répéter les mêmes choses. Que l'occupation avait commencé après la réquisition, qu'elle avait empêché tout accès à l'usine, etc., etc. Choses qui ont été prouvées être aussi loin de la vérité que possible, et qui sont en tout cas démenties par les déclarations de l'ELSI elle-même.

Pas un mot donc, pas un seul mot pour contredire nos arguments.

Que dire, Monsieur le Président? Encore une fois, permettez-moi de me passer de tout commentaire.

3. – *L'ordonnance de réquisition.*

Avant de traiter ce sujet, je dois présenter, au préalable, des excuses à la Cour.

Ces excuses ont trait à un certain mélange linguistique auquel je vais devoir recourir concernant l'anglais et le français. Cela n'a rien à voir avec le « franglais » tellement à la mode parmi la jeunesse française, mais plutôt avec la *Common Law* et le droit administratif.

Je m'explique mieux. Encore une fois, mes éminents confrères de la partie demanderesse continuent à ignorer nos arguments, relatifs cette fois à l'illégalité de l'ordonnance de réquisition.

Mais à ce sujet, je crois qu'il y a un malentendu vraiment profond dû à la différence entre le système de *Common Law* et le sytème de *Civil Law*, une différence qui est particulièrement sensible lorsqu'il faut aborder les récifs périlleux du droit administratif. Je m'efforcerai donc d'illustrer encore une fois le point de vue du Gouvernement italien sous cet angle particulier. Nos adversaires affirment que le caractère arbitraire de l'ordonnance de réquisition découlerait de la décision du préfet, dans laquelle on lit que « *the order is destitute of any juridical cause which may justify it or make it enforceable* ». Je dois dire tout de suite que cette phrase est une très mauvaise traduction de la phrase italienne « *manca, pertanto, nel provvedimento, genericamente, la causa giuridica che possa giustificarlo e renderlo operante* » qui pourrait être plus exactement traduite par « l'ordonnance, d'un point de vue général, manque d'un fondement juridique suffisant qui puisse la soutenir et la rendre effective ».

De plus, il faut lire cette phrase dans le contexte général de la décision du préfet: « *incivile est nisi tota lege perspecta consiliare vel respondere* ». Si l'on procède de cette manière, si on lit

la phrase dans le contexte général, on constate qu'en dépit du fait que, dans le recours, l'ELSI contestait sous de nombreux aspects l'existence même du pouvoir du maire de prendre l'ordonnance de réquisition attaquée, *le préfet en a reconnu l'existence*, affirmant aussi l'existence des conditions préalables pour l'exercice du pouvoir. C'est-à-dire la grave nécessité publique et l'urgence (cf. réponses écrites aux questions posées par la Cour et qui ont été déposées ce matin).

Le préfet a toutefois nié que ce pouvoir ait été exercé correctement, car il a jugé que le but poursuivi — à savoir la continuation des activités de l'usine — n'avait pas été atteint.

Le préfet de Palerme, en accueillant le recours hiérarchique de l'ELSI a donc affirmé, à travers un pronostic fait *a posteriori*, l'existence de l'usage incorrect d'un pouvoir qui était, en tant que tel, reconnu. Pour cette raison il a annulé l'ordonnance de réquisition.

Tout cela semble être traduit par nos adversaires, si je comprends quelque chose à la *Common Law* — et je précise que je me base essentiellement pour ce point sur le fameux livre de Wade, *Administrative Law* — tout cela — disais-je — semble être traduit par nos adversaires par un « *quashing for an unreasonable use of discretionary power of an act that was challenged as ultra vires by means of an application for judicial review* ». Car, dans la *Common Law*, seul un acte *ultra vires* ou affecté par « *an error on the face of the record* » peut être annulé, comme le disait Lord Reid, « *if a tribunal has jurisdiction to go right, it as jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy its jurisdiction* » (*R. v. Governor of Brixton Prison*, *Annuals* [1968] A.C., p. 234).

Or la raison pour laquelle l'acte dont il est question, c'est-à-dire l'ordonnance du maire, a été annulé, à savoir une erreur de prévision, est traduite par nos adversaires, en termes de *Common Law*, par « le mauvais exercice d'un pouvoir discrétionnaire ». Mauvais exercice qui d'ailleur ne conduit en *Common Law* à l'annulation de l'acte que lorsqu'il est tellement grave qu'il rend celui-ci « *unreasonable* » on « *arbitrary* ».

In fact, as Lord Diplock states:

> « *not every mistaken exercise of judgment is unreasonable; the very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred* » (*H.W.R.* WADE, *Administrative Law*, *Oxford*, *1982*, *p. 364*).

En traduisant cette histoire de recours hiérarchique survenu dans un système de *Civil Law* en termes de *Common Law*, nos adversaires arrivent donc à la conclusion que l'ordonnance du maire était «*ultra vires*, because unreasonable and *therefore arbitrary*». *S'il en était différemment, semblent-ils dire, il n'y aurait pas eu d'annulation.*

Et voilà, Monsieur le Président, où est l'erreur fondamentale.

La seule chose exacte dans tout cela, c'est que le recours hiérarchique au préfet doit être considéré, dans ce cas, plutôt comme une « *application for judicial review* » que comme un appel — « *an appeal* » — (voilà une autre erreur de traduction).

La preuve en est que le préfet, en décidant du cas, ne s'est pas posé l'alternative « *right or wrong* » ? Mais l'alternative « *lawfull-unlawfull* » ? (H.W.R. WADE, précité, p. 35).

Mais il faut penser qu'à la différence des systèmes de *Common Law*, dans les systèmes de *Civil Law* tels que les systèmes français ou l'italien, la « *judicial review* » peut se conclure avec l'annulation de l'acte administratif même si l'acte est *intra vires*, à cause d'une erreur de droit ou de fait. Et cela même si l'erreur n'est pas évidente, ou n'est pas « *on the face of the record* ».

Bien plus, dans le système français comme dans le système italien, un acte administratif peut être annulé pour un mauvais exercice du pouvoir discrétionnaire même s'il s'agit d'un mauvais exercice absolument raisonnable. Le mauvais exercice du pouvoir discrétionnaire ne doit pas devenir « *unreasonnable* » pour que l'annulation puisse s'ensuivre. Voilà la différence entre les systèmes et voilà ce qui a causé le quiproquo.

Nous nous trouvons, dans le cas de l'ordonnance du maire de Palerme, exactement dans cette situation: l'ordonnance était *intra vires* car le maire était compétent, comme le préfet l'a très clairement dit. Les conditions préalables pour l'exercice du pouvoir existaient, comme le préfet l'a également dit. Mais le maire a commis une erreur de fait en évaluant mal les perspectives de succès de son initiative.

En *Common Law*, ce genre d'erreur n'aurait jamais pu conduire à l'annulation de la décision du maire car les simples erreurs d'appréciation dans l'exercice d'un pouvoir discrétionnaire ne rendraient jamais un acte nul ou annulable. Les erreurs d'appréciation dans l'exercice d'un pouvoir discrétionnaire, en *Common Law*, rendent nul ou annulable un acte seulement quand elles sont tellement graves qu'elles rendent l'acte *unreasonable, arbitrary*.

Si cela est vrai, alors l'équation de la partie défenderesse « annulation à la suite d'un recours en excès de pouvoir = *quashing of an act as being ultra vires because of abuse of discretionary power* » est erronée. Est également erronée l'équation corollaire « annulation = *arbitrariness* ».

En conclusion, l'ordonnance du maire n'était nullement arbitraire, quoiqu'elle ait été annulée, et les exemples que M. Matheson a donnés lundi dernier m'aideront à le prouver.

M. Matheson a parlé de pouvoirs administratifs, tel que le pouvoir d'arrestation, le pouvoir de déportation, le pouvoir d'imposition, qui pourraient être exercés pour des raisons politiques.

Dans ce cas-là, a-t-il plaidé, est-il soutenable que, puisque les autorités ont le pouvoir en question, son exercice ne serait jamais « arbitraire » même s'il reposait sur des motifs politiques ? C'est à cela, a-t-il dit, que conduirait la thèse du gouvernement italien (C 3/CR 89/10, p. 42). Et voilà l'erreur, Monsieur le Président. Voilà encore une fois une confusion de langages juridiques.

Dans les exemples de M. Matheson, il y aurait non pas un excès de pouvoir pour mauvais usage du pouvoir discrétionnaire, mais un *débordement de pouvoir*. Et si le maire de Palerme avait adopté l'ordonnance non pas pour les raisons énoncées dans l'acte mais pour nuire à Raytheon et Machlett ou pour donner des avantages à l'IRI, dans ce cas-là, lui aussi, aurait commis un débordement de pouvoir, et bien sûr l'acte administratif serait *arbitraire*.

Mais dans le cas d'espèce, à moins que les Etats-Unis ne veuillent revenir à la thèse de la *conspiracy*, il n'y a aucun débordement. Il y a tout simplement une erreur d'appréciation dans l'exercice d'un pouvoir discrétionnaire reconnu, ce qui est bien loin de produire un acte arbitraire. Cela découle très clairement d'une lecture de toutes les pièces concernées et surtout de la lecture de la pièce en langue italienne car, comme je l'ai dit, la traduction est erronée. Mais M. Capotorti parlera encore de l'*arbitariness* cet après-midi et je ne veux pas insister davantage.

4. – *Le prétendu retard du préfet.*

Encore une fois, permettez-moi de le dire, mes adversaires ont fait la sourde oreille. Comment peut-on, disais-je la semaine passée, prétendre à une décision tambour-battant quand, toute autre considération mise à part:

1. la partie plaidante n'indique dans son recours aucun caractère d'urgence, ne soligne d'aucune façon le besoin d'une décision immédiate alors que la loi accorde à l'autorité saisie 120 jours pour décider;

2. La partie plaidante fait preuve d'un total manque d'intérêt en présentant le recours 19 jours après et en déposant immédiatement après une requête de mise en faillite.

J'aurais été très intéressé d'entendre de la voix même de M. Bisconti les raisons pour lesquelles, en tant qu'avocat et conseiller juridique de l'ELSI et de Raytheon, il avait jugé bon de préparer un recours hiérarchique en écrivant jusqu'à 16 pages remplies de doctrine juridique, mais sans insérer une seule phrase, sans insérer un seul mot pour souligner que la décision était urgente pour l'ELSI.

Malheureusement, il ne nous a rien dit à ce sujet, et les règles strictes du contre-interrogatoire nous défendaient de lui poser des questions sur ce point.

En tout cas reste le fait que M. Matheson a ignoré totalement le problème et a continué, imperturbable, à parler du retard de la décision du préfet comme d'un fait *undisputed*.

Monsieur le Président, si vous me permettez la boutade, j'ai l'impression que si à la place du gouvernement italien comme partie défenderesse se trouvait ici un astronome de mes compatriotes, Galilée, accusé d'impiété, même après le témoignage de Copernic entendu comme expert, M. Matheson continuerait à dire que le soleil tourne autour de la terre et qu'il s'agit là d'un « undisputed fact ».

5. – *Conclusion.*

Monsieur le Président, je crois que je dois m'arrêter là pour ne pas abuser de votre patience et pour ne pas soustraire encore du temps à mes confrères de la défense italienne.

Je me bornerai donc, quant aux points que je n'ai pas eu le temps d'évoquer, à faire un renvoi à l'exposé que j'ai eu l'honneur de vous faire la semaine dernière.

Permettez–moi seulement de vous dire que plaider devant cette Cour a été le plus grand des privilèges qu'un avocat puisse souhaiter, surtout si, comme dans mon cas, il ne s'agit pas d'un spécialiste de droit international. Merci mille fois pour votre attention.

Le PRESIDENT: Je vous remercie, Monsieur Caramazza, et je donne la parole à M. Capotorti.

M. CAPOTORTI: Monsieur le Président, Messieurs de la Cour.

Je reviens, si vous le permettez, au sujet de l'interprétation des accords d'établissement en vigueur entre les Etats–Unis et l'Italie, pour répondre aux affirmations faites lundi dernier par M. Matheson, coagent des Etats–Unis. Mon intention est de limiter cette réponse à l'essentiel; en tout cas, je voudrais bien traiter d'abord quelques problèmes d'ordre général qui sont controversés.

A propos des objectifs pursuivis par le Traité de 1948, M. Matheson vous a dit que les dispositions concernant le droit de propriété des sociétés étrangères sur les entreprises et sur les biens doivent être interprétées à la lumière de l'objectif de la protection des investissements, indépendamment de la question de savoir si cette protection constitue le but primaire ou seulement l'un des buts du Traité en cause. Cette alternative n'aurait donc pas beaucoup d'importance. Nous restons, par contre, convaincus que, s'agissant d'interpréter chaque traité *dans son ensemble*, selon une méthode qui s'applique à toutes ses règles, le fait de qualifier le Traité de 1948 d'accord de protection des investissements plutôt que d'accord d'établissement a sa relevance. C'est M. Matheson, lui–même, qui en donne la preuve lorsqu'il critique la thèse d'une « présomption contraire à la protection des actionnaires étrangers de sociétés locales »: en effet, dit–il, une telle thèse est certainement inexacte quand il s'agit d'interpréter un traité « *which is designed specifically to provide protection for foreign investments* ». Voici donc une conséquence importante qu'il prétend tirer de l'encadrement du Traité de 1948 dans la catégorie des traités visant spécifiquement la protection des investissements.

En réalité, ce que nous avions dit, c'était seulement qu'on ne saurait présumer de l'existence de droits subjectifs des actionnaires là où des clauses conventionelles confèrent des droits aux sociétés. Nous restons de cet avis, qui se fonde d'ailleurs sur la lettre et sur l'esprit de l'arrêt *Barcelona Traction.* Par conséquent, selon nous, la reconnaissance aux actionnaires de droits subjectifs ne saurait dériver que de règles *ad hoc.*

Toujours à propos de la structure des articles, par lesquels les sociétés Raytheon et Machlett prétendent être protégées, notre adversaire nous reproche d'avoir, d'une manière générale, avancé l'objection que ces dispositions concernent des actes dirigés contre l'ELSI (et donc contre une société italienne) et non pas contre ses actionnaires américains. Cela est inexact: par exemple nous n'avions pas exprimé d'objections de ce genre à l'égard de l'article III du Traité, ou de, l'article premier de l'Accord supplémentaire de 1951.

Nous avons par contre mis en évidence le fait de l'article VII du Traité ne se réfère qu'aux personnes physiques et aux sociétés ayant la nationalité de l'une des Parties contractantes et qui se trouvent sur le territorire de l'autre, sans s'étendre aux actionnaires de ces sociétés ni aux sociétés locales qui en sont les filiales (C 3/CR 89/7, p. 41). Bref, nous avons été fidèles à notre critère de base, à savoir que la structure de chaque article exige d'être interprétée en respectant sa singularité, sans qu'on puisse opérer de généralisaton sur la protection des actionnaires.

A propos des faits imputables à l'Etat italien, je suis franchement surpris de constater que les actes de l'IRI et ceux de la société ELTEL — qui a un rapport d'affiliation avec l'IRI — sont encore compris dans la catégorie des faits imputables à l'Etat italien, avec la justification lapidaire que « *IRI is not only owned and controlled by the Respondent but it is an arm and agent of the* Respondent ». On aurait pu espérer qu'un débat sérieux s'engage, au sujet de l'imputation des actes accomplis par des sujets autres que les Etats, dans le cadre de la réglementation internatio-

nale concernant la responsabilité des Etats. En effet, nous avions mentionné le texte des articles élaborés soit par la Harvard Law School, soit par la Commission du Droit international des Nations Unies (C 3/CR 89/7, p. 46). Mais M. Matheson s'est borné à dire qu'un critère fondamental pour l'attribution à l'Etat du comportement d'une entreprise « *is whethert hat enterprise serves State purposes, thus becoming a part of the States's apparatus* » (C 3/CR 89/10, p. 36): ce qui se serait, selon lui, clairement vérifié dans le cas de l'attitude de l'IRI et de l'ELTEL « *in acquiring the plant and assets of ELSI* » (*ibid.*, p. 37). L'orateur a négligé évidemment de considérer que l'achat de la fabrique de l'ELSI par l'ELTEL ne saurait être qualifié d'acte correspondant aux buts de l'Etat qu'à la condition d'avoir établi au préalable que l'Etat italien pursuivait le but d'acheter l'usine de l'ELSI (ce que nous contestons en fait ainsi qu'en droit).

Enfin, à propos du caractère temporaire ou définitif de la réquisition, le Requérant affirme que la mesure de réquisition, le défaut de révocation de cet acte, l'occupation de l'usine, la vente de l'ELTEL dans le cadre de la procédure de faillite « *were serious and irreversible intrusions into the essential rights and interests of Raytheon and Machlett in the control and disposition of ELSI* » (*ibid.*). Il en arrive donc, par là, à établir les effets de la réquisition sur la base des effets de la faillite.

Qu'il me soit permis de répéter que:

1) l'efficacité de la réquisition dans le temps ne saurait être établie que sur la base de l'ordonnance de réquisition, dont le terme final n'a jamais été prolongé;

2) les actes ayant eu lieu postérieurement n'ont eu aucune influence sur la durée de la réquisition;

3) en particulier, la faillite a été la conséquence d'une demande des administrateurs de l'ELSI, qui se fondait sur l'état d'insolvabilité de celle-ci; la faillite a donc été tout à fait indépendante de la réquisition.

* * *

Dans le nombre des dispositions du Traité de 1948, dont les Etats-Unis affirment la violation par l'Italie, un rôle éminent revient à l'article III. Nous l'avions interprété en employant les méthodes d'interprétation textuelle et fonctionnelle; mais nous avions en premir lieu constaté et souligné (C 3/CR 89/7, p. 13-20) que le paragraphe 2 de cet article donne aux nationaux et aux sociétés de chaque Partie contractante *la faculté*, conformément aux lois et aux règlements en vigueur dans le territoire de l'autre Partie, d'*organiser*, *contrôler* et *diriger* des sociétés de celle-ci, qui mettent en oeuvre certaines activités (commerciales, industrielles, etc.). Le même paragraphe donne en outre aux sociétés *contrôlées* par les nationaux et par les sociétés de chaque partie, et créées ou organisées en conformité aux lois et aux règlements en vigueur dans les territoires de l'autre, *la faculté* de mettre en oeuvre les activités susmentionnées, en conformité aux lois et aux règlements en vigueur. Jusqu'à ce point, nous n'avons fait que citer le texte du paragraphe en question, en omettant uniquement l'expression finale relative aux conditions de traitement faites aux sociétés contrôlées.

M. Matheson a objecté que, contrairement au sens ordinaire ainsi qu'au but évident de cette disposition, le droit formel d'organiser, de diriger et de contrôler des sociétés filiales n'a été accompagné de notre part par aucune référence à la soi-disant « *operational protection to the parent corporation for any interference with those rights* » (C 3/CR 89/10, p. 41). En réalité, une référence de ce genre ne sauraiti être faite qu'au delà du texte de l'article III, paragraphe 2. C'est entièrement en dehors du texte de cette disposition que notre adversaire a élaboré l'idée d'une protection de la société mère contre toute interférence dans ses activités d'organisation de contrôle et de direction, en ajoutant que ces mots « *necessarily imply a continuing right to direct the enterprise and dispose of its assets* » (*ibid.*).

Nous avons déjà mis au clair à cet égard que le demandeur fait volontairement une confusion entre l'article III, paragraphe 2, et l'article premier de l'Accord de 1951. Ce dernier protège, il est vrai, les nationaux et les sociétés de chaque partie contre les mesures prises dans les territoires de l'autre partie ayant pour conséquence *d'empêcher le contrôle effectif et l'administration* des

entreprises qu'ils aient établies ou achetées; mais ceci à condition qu'il s'agisse de mesures arbitraires ou discriminatoires.

Au contraire, dans l'article III, paragraphe 2, on ne s'occupe pas de mesures susceptibles d'entraver le contrôle et la direction effectifs d'une filiale, pour la simple raison que la règle ne s'étend pas à la notion d'interférence dans ces droits. En réalité, l'article III, paragraphe 2, se limite à garantir aux sociétés mères ce que notre adversaire qualifie de droit « formel » d'organiser, de contrôler et de diriger des sociétés filiales: je souligne que ce droit n'est pas du tout formel. Les côtés concrets de cette faculté coïncide plutôt avec l'aspect *structurel* de la réalité sociale; il est extrêmement important, sur le plan pratique, que les sociétés mères aient l'assurance de pouvoir librement régler l'organisation des filiales (par leurs statuts), de pouvoir librement assurer leur contrôle (par la formation des majorités suffisantes), de pouvoir librement aménager leur direction (par l'entremise des administrateurs). Bien entendu, cet aspect structurel est autre chose que l'activité quotidienne; mais le libellé de l'article III, paragraphe 2, permet de comprendre que c'est le premier et non pas la seconde qui forme l'objet de cette disposition.

D'autre part: est-ce qu'on pourrait admettre, dans la ligne indiquée par notre adversaire, une garantie de protection totale des investisseurs étrangers contre l'interférence de toute autorité dans l'activité effective de direction et de contrôle des filiales locales, et cela en dépit de la condition de la conformité aux lois et aux règlements en vigueur ? Evidemment pas. Nous avons déjà manifesté notre contrariété à l'égard d'une telle interprétation de l'article III, paragraphe 2, qui nous semble absolument inadmissible. Nous ajoutons enfin qu'il faut éviter de considérer le libellé de cet article à travers des lunettes déformantes, du genre de celles qui sont imposées par l'idée fixe de la protection des investisseurs étrangers. Si on interprète la règle en question sans ce genre de lunettes, il devient plus facile de reconnaître la différence qui existe entre la faculté de contrôler et de diriger des associations (qui pourraient être de nature philantropique, religieuse ou scientifique) et la prétendue obligation de non-interférence dans l'activité quotidienne de ces associations.

D'autre part, dans le cas d'espèce, même si on faisait découler de l'article III, paragraphe 2, un droit de Raytheon et Machlett de poursuivre sans entrave leur activité industrielle par l'entremise de l'ELSI, il ne faudrait pas oublier que cette activité a été arrêtée par la décision de la société elle-même avant que la réquisition ait eu lieu.

Un autre point qui a été traité par M. Matheson dans sa plaidoirie de lundi dernier concerne l'article premier de l'Accord supplémentaire de 1951, cité par lui, précisément afin de réaffirmer que la réquisition ordonnée par le maire de Palerme était une mesure arbitraire (C 3/CR 89/10, p. 42-44).

Permettez-moi, Messieurs de la Cour, de prendre volontiers acte que la défense des Etats-Unis n'a plus insisté sur le prétendu caractère discriminatoire de cette mesure. En effet, la thèse de la discrimination mise en oeuvre par les autorités italiennes était nécessairement liée à l'idée du « complot » organisé par ces autorités en vue de faire acheter à l'IRI l'établissement de l'ELTEL, et cette idée fantastique semble n'être plus retenue par nos adversaires. La matière controversée a donc subi une petite réduction, et je m'en félicite.

Mais les points de vue des Etats-Unis et de l'Italie sont encore partagés quant au fait de considérer la réquisition comme arbitraire dans le cadre de l'Accord de 1951 seulement au motif qu'elle a été annulée par le préfet de Palerme. La réponse positive des Etats-Unis a été déjà critiquée dans ma première plaidoirie: je me suis fondé sur une notion de mesure arbitraire qui a des connotations précises, c'est-à-dire les caractéristiques d'un acte déraisonnable, capricieux et dépourvue de toute justification, d'un acte conçu uniquement comme un moyen de porter un préjudice injuste à quel'qu'un (C 3/CR 89/7, p. 42-43). Par contre, M. Matheson a cité des morceaux de la décision du préfet de Palerme pour affirmer que l'ordonnance de réquisition ne se fondait sur aucune considération unique mais se proposait simplement d'alléger la pression politique locale. M. Caramazza vous a largement parlé de ce sujet ce matin même. J'ajoute, si vous le permettez, qu'afin de démentir une telle affirmation (à part les réponses italiennes aux questions relatives à ce problème, posées par la Cour), il suffira de signaler que:

1. Dans la décision du préfet de Palerme il n'est pas dit que la mesure de réquisition visait uniquement un allégement de la pression politique locale. En réalité, cette décision commençait

par reconnaître la compétence du maire de prendre la mesure dont il s'agit, ainsi que l'existence — sur un plan théorique — des conditions de grave nécessité publique et de l'urgence — et précisait par la suite que le but visé par la réquisition ne pouvait trouver sa réalisation pratique par la mesure adoptée (Unnumbered, Documents Vol. II, p. 113–114).

2. Cette précision aide à comprendre l'expression qui suit. Elle a été traduite par notre adversaire d'une façon, à notre avis, inappropriée (C 3/CR 89/10, p. 43), à savoir que l'ordre de réquisition était dépourvu de toute cause juridique qui puisse la justifier et la rendre efficace; on doit par contre la traduire, et M. Caramazza vient de le dire, par la phrase: « l'ordonnance est pourtant dépouvue, en termes généraux, du fondement juridique qui puisse la justifier et la rendre efficace » (Unnumbered Documetsn, Vol. II, p. 114).

3. En tout cas, à la fin de la page suivante — après avoir décrit la situation de l'entreprise la réaction de la main-d'oeuvre et les conditions de l'ordre publique — la décision du préfet ajoutait des considérations sur la pression exercée par la presse (*ibid.*, p. 115).

Il est donc absolument inexact de prétendre que le préfet ait annulé l'ordonnance de réquisition au motif qu'elle était fondée sur le propos d'alléger la pression politique locale. La mention de ce propos n'est qu'une considération additionnelle, supplémentaire et certainement superflue par rapport au texte de la mesure.

Il convient d'ajouter, à l'égard du fondement de la réquisition, que le maire de Palerme avait placé au début de son ordonnance sept « considérants » se référant à un nombre correspondant, de circonstances susceptibles, à son avis, de justifier sa mesure, à savoir: la décision de l'ELSI de fermer son établissement; les lettres de licenciement; la réaction des syndicats et de l'opinion publique; le préjudice pour l'économie de la province; les critiques de la presse; le danger pour l'ordre public; l'intérêt économique général (*ibid.*, p. 5–6). Or, lorsqu'on essaye d'établir si une certaine mesure a été arbitraire ou non, la décision ultérieure d'annulation ne saurait être considérée comme la seule source d'information. Il convient de tenir compte aussi du texte de la mesure elle-même, qui reflète la manière de voir la situation par l'autorité appelée à prendre une décision. En effet, la mesure de réquisition exige d'être évaluée par rapport au moment où elle a été adoptée.

Ce critère s'applique aussi à la question consistant à établir si la condition de la conformité aux lois et aux règlements locaux (qui figure dans le texte de l'article III, paragraphe 2, du Traité) peut être considérée comme remplie dans l'hypothèse où une mesure de l'autorité s'avère être illégale et avoir été annulée. Je remarque à cet égard que, comme il est clair, la mesure en cause était la réquisition; nous n'acceptons pas que la réquisition rentre dans le nombre des actes prévus par l'article III. C'est seulement, je l'ai déjà dit, l'article premier de l'Accord de 1951 qui pourrait s'appliquer à la réquisition (si celle-ci était une mesure arbitraire, ce que nous contestoos), et cet article, à la différence de l'article III, ne prévoit pas la condition de la conformité aux lois et aux règlements locaux. Ceci dit, je réponds à la question posée par deux observations.

La première: au moment où la réquisition a été décidée et mise en oeuvre, elle était sans doute conforme à la loi, sous l'angle de la compétence du maire et de l'existence des conditions de l'urgence et de la nécessité: le décret du préfet l'a ultérieurement reconnu (Unnumbered Documents, Vol. II, p. 112–114). Quant au vice découlant de ce que certains objectifs ne pouvaient pas être atteints par le moyen de la réquisition, il est évident que, jusqu'à la date de la décision du préfet qui a constaté ce vice, la mesure produisait en droit italien les effets juridiques qui lui sont propres.

Deuxième observation: la conformité à la loi est une notion qui englobe aussi celle de l'existence de moyens de recours. Une mesure est donc conforme à la loi si le sujet frappé par un préjudice qu'elle a provoqué est en mesure de s'adresser à un juge qui soit habilité à redresser le tort. M. Matheson se plaint de l'insuffisance pratique de cette solution, ou bien des inconvénients qu'elle peut présenter (C 3/CR 89/10, p. 43). Il a noté que cette solution ne serait pas en harmonie avec l'article premier de l'Accord de 1951 (*ibid.*); mais, je le répète, la règle où figure la condition de la conformité à la loi, c'est l'article III du Traité, et non pas l'article premier de l'Accord supplémentaire.

Le demandeur a réitéré son point de vue d'après lequel l'article V, paragraphe 2 du Traité aurait été également violé par l'Italie, parce que celle-ci aurait exproprié les biens de l'ELSI sans respecter ni la règle de « *due process* », ni celle du paiement d'une indemnité juste et efficace (*ibid.*, p. 45-47). Dans notre plaidoirie du premier tour, nous avons identifié trois questions à cet égard: premièrement: s'il est vrai que la réquisition ordonnée par le maire de Palerme rentre dans la notion d'expropriation (C 3/CR 89/7, p. 26-30); *deuxièmement* si les actionnaires américains de l'ELSI avaient des droits fondés sur l'article V, paragraphe 2, du Traité (*ibid.*, p. 30-33); *troisièmement*: si les conditions prévues par cet article ont été respectées ou non par l'Italie (*ibid.*, p. 33-35).

Quant à la première de ces trois questions, notre adversaire est, comme souvent, très avare d'explications: il se limite à affirmer que « *under international law the acts and omissions of the Respondent in this case constitute a taking or expropriation of property* » (C 3/CR 89/10, p. 47). Cette position aurait le soutien d'une « *ample evidence* » (*ibid.*); en tout cas, l'interprétation de la règle citée irait dans le sens que « *they protect property from any unreasonable interference in its use, whether this be characterized as a direct taking, indirect taking or expropriation* » (*ibid.*, p. 46).

Nous ne pouvons que manifester notre surprise. Où trouve-t-on dans l'article V, paragraphe 2, la notion de *unreasonable interference*? D'autre part, à supposer que les termes de *taking* ou d'*expropriation* soient absolument équivalents, est-ce que cette équivalence s'étend aussi à la réquisition et au contrôle temporaire des biens dont M. Mahteson ne parle pas?

Et pourquoi notre adversaire persiste-t-il à nous dire qu'il n'y a aucune différence entre *taking* et *expropriation* alors qu'il sait que le fond du problème est ailleurs, et se traduit par ceci: le mot anglais « *taking* » couvre également la réquisition (*ibid.*), tandis que le mot italien « *espropriazione* » ne comprend pas la réquisition temporaire?

Nous restons donc sur l'idée qu'il y a des différences réelles entre le texte anglais et le texte italien de l'article V, paragraphe 2, ainsi qu'entre les deux textes du protocole: l'un parle de « *interests held directly or indirectly* », l'autre de « *diritti spettanti direttamente o indirettamente* ».

On n'arrivera pas, je me permets de penser, à surmonter les difficultés découlant de ces différences sans recourir à la méthode établie par l'article 33 de la Convention de Vienne. Je ne veux pas me répéter à ce sujet. En tout cas, il serait très difficile de soutenir qu'une réquisition temporaire, telle que celle ordonnée par le maire de Palerme le 1 avril 1968, rentre effectivement dans le champ d'application de l'article V, paragraphe 2.

Deuxième question: est-ce que les actionnaires de l'ELSI ont des droits fondés sur la règle dont il s'agit? La réponse est certainement négative si on se limite à interpréter l'article V, paragraphe 2: il ne protège que les biens des nationaux et des personnes juridiques de chaque partie dans les territoires de l'autre (donc dans l'espèce, les biens appartenant aux sociétés Raytheon et Machlett et non pas à l'ELSI). Mais le protocole étend les dispositions du paragraphe 2 « qui disposent le paiement d'une indemnité » aux droits des personnes juridiques de chaque partie sur les biens qui sont expropriés dans les territoires de l'autre. Ici, on a à faire encore une fois avec la non-coïncidence du texte italien avec le texte anglais: nous en avons déjà parlé. On a besoin de résoudre aussi le problème qui découle de l'expression « dispositions qui disposent du paiement d'une indemnité », ainsi que le problème des droits indirects sur les biens. M. Matheson n'a fait rien d'autre que répéter son point de vue (*ibid.*, p. 45); sur ces points, qu'il nous soit permis de faire de même, parce que nous estimons avoir dit assez à leur égard dans la précédente plaidoirie.

Troisième question: est-ce que les conditions établies par le paragraphe en question ont été remplies par l'Italie? Notre adversaire a préféré ne pas dire un mot à propos du respect par l'Italie des règles de procédure en matière de réquisition, ni à l'égard du paiement de l'indemnité liquidée par la Cour d'appel de Palerme. Son silence, ici, semble avoir été suggéré par un certain embarras: comment soumettre à la Cour une demande d'indemnisation qui fait pourtant double emploi avec l'indeminité perçue par le syndic de la faillite (à la suite d'un jugement en trois instances)? Nous nous contentons de poser la question.

La dernière imputation que notre adversaire a repris concerne la prétendue violation par l'Italie de l'article V, paragraphes 1 et 3, due Traité, en conséquence du défaut de protection des biens des sociétés américaines actionnaires de l'ELSI. Ce défaut de protection serait devenu manifeste au moment de l'occupation de l'usine par les ouvriers: la force publique ne serait pas intervenue après la réquisition (*ibid.*, p. 47–48).

Nous avions déjà objecté, dans notre plaidoirie précédente, que les paragraphes 1 et 3 de l'article V concernent les nationaux et les sociétés de chaque partie dans les territoires de l'autre: en l'espèce, les sociétés Raytheon et Machlett, et non leur filiale italienne à qui l'usine appartenait (C 3 CR 89/7, p. 36). En présence d'une affirmation faite par notre adversaire dans sa réplique écrite, — à savoir que l'ELSI représentait les biens de Raytheon et Machlett en Italie — nous avions précisé dans notre plaidoirie qu'il est inexact de considérer une société comme l'objet d'un droit de propriété de ses actionnaires: nous avions rappelé la notion élémentaire que les actionnaires ont plutôt un droit de participation à la société dont ils sont les membres et non un droit de propriété ayant pour objet la société (*ibid.*, p. 37).

M. Matheson a qualifié cette proposition d'« untenable » (C 3/CR 89/10, p. 47); il a dit aussi que « this would come as quite a shock to the shareholders around the world, particularly those with 100 per cent ownership in a company » (*ibid.*). A notre tour, nous restons franchement choqués; à tel point qu'il nous semble irrespectueux de rappeler que la propriété de 100 p. cent des actions n'est pas la même chose que la propriété de la société: depuis l'arrêt *Barcelona Traction*, nous croyons que la séparation juridique entre une société anonyme et ses associés était entrée au nombre des connaissances acquises par tout le monde.

Monsieur le Président, Messieurs les juges, cette remarque me donne l'occasion de conclure en mettant au clair un dernier problème d'ordre général.

Très souvent, au cours de notre travail de défense dans cette affaire, nous avons eu le sentiment que toute précision juridique, tout effort d'interpétation rigoureuse du Traité, toute résistance ou opposition aux constructions sommaires de certaines thèses, recevaient chez notre éminent adversaire un accueil non seulement froid, mais plutôt géné: on nous a accusés parfois de faire du formalisme (C 3/CR 89/10, p. 55). Je reconnais, pour ma part, que le respect exagéré des formes du droit risque dans certaines hypothèses d'occulter la substance des règles juridiques. Néanmoins, une idéee que je me refuse d'accepter est que l'interprétation des règles de droit puisse être facilitée en prenant comme point de repère le langage et la pratique (auxquels j'ajoute le degré de connaissance du droit) de ceux qu'on qualifie d'opérateurs de la vie économique. Non, on ne peut pas simplifier le droit jusqu'au point de lui faire dire seulement ce qui correspond aux intérêts des opérateurs économiques. Ce n'est qu'au juriste que revient l'humble métier de technicien du droit, aussi bien que le privilège de mettre en oeuvre cette technique sans craindre de passer pour un formaliste. Merci, Monsieur le Président, j'ai terminé.

Le PRESIDENT: Je vous remercie, Monsieur Capotorti. Nous continuerons cet après-midi à 15 heures.

The Court rose at 12.55 p.m.

C 3/CR 89/12
Thursday 2 March 1989, at 3 p.m.

MR. GAJA, MR. FERRARI BRAVO

The PRESIDENT: Please be seated. As I said this morning, we have received a reply by Italy to the questions put by some Members of the Court, and one of the replies has a document attached. Does the American delegation object to the presentation of these documents?

Mr. MATHESON: Mr. President, we do not object to these documents. We would like to reserve the right to submit comments when we have looked at the information contained therein in detail. Thank you.

The PRESIDENT: Very well. In this case we have discussed the procedural matter in the Chamber; since the replies have been received before the closing of the oral proceedings, we have decided as follows. Both the United States may comment on the replies to questions that have been submitted by Italy, and the Italian delegation will have the opportunity to comment on the United States reply to the questions, attached to C 3/CR 89/10, in each case after the closing of the hearings.

Now we continue with the business of the day and I give the floor to Professor Gaja.

Mr. GAJA: Mr. President and Members of the Court.

1. The Applicant insists on its theory that the local remedies rule does not apply in relation to claims under the FCN Treaty and the Supplementary Agreement. This contention does not rest on firm ground.

It is difficult to see why Article XXVI of the FCN Treaty, on which the jurisdiction of the Court is based, should be construed as affecting the application of the local remedies rule (C 3/CR 89/9, p. 470), as the rule provides a bar only to the admissibility of claims and not to jurisdiction. Nor can the fact that the local remedies rule is expressly referred to in some treaties make it inapplicable with regard to claims under other treaties. This would run counter to the provisions of the Vienna Convention on the Law of Treaties concerning interpretation. Moreover, the example taken from Article X of the Economic Co-operation Agreement between the United States and Italy (C 3/CR 89/9, p. 470) is of little significance since it only contains a proviso confirming the applicability of the rule. The relevant paragraph runs as follows:

> « It is further understood that neither Government will espouse a claim pursuant to this Article until its national has exhausted the remedies available to him in the Administrative and Juridical Tribunals of the country in which the claim arose » (20 *UNTS*, p. 66).

It may be added that the applicability of the rule to claims under the FCN Treaty had been clearly accepted by the Applicant when submitting its Memorandum of Law with the 1974 Claim (Unnumbered Documents, Vol. I, pp. 133-137).

The Applicant also developed a more general argument. Mr. Matheson said:

> « *First*, has the Respondent demonstrated that the local remedies rule applies, as a matter of general international law, to the request of a State under a treaty for a declaration that its rights have been violated, and for reparation as a result? In our view, the answer is no » (C 3/CR 89/9, p. 468).

The only precedents invoked to support this proposition are the *Finnish Shipowners* and *Ambatielos cases*.

Let us first look at the *Finnish Shipowners* Arbitration Award. After giving his interpretation of the Court's Judgment in the *Ambatielos case*, Mr. Matheson said:

> «Likewise, in the *Finnish Shipowners* Arbitration, the Arbitrator found that the local remedies issue only applied to the principal claim of Finland — a claim under customary international law, and not to the alternative claim of Finland — a claim based on a bilateral agreement» (*Claim of Finnish Shipowners*, 3, *Reports of International Arbitral Awards*, p. 1490) (C 3/CR 89/9, p. 469).

But what did the Arbitrator in fact say in relation to the alternative claim? He said:

> « To the alternative claim as definitely formulated, the question of the exhaustion of local remedies is not relevant as this claim is based on an international agreement which does not give the shipowners any legal right, but a purely moral interest. The shipowners, therefore, cannot have recourse, on that basis, to any municipal court» (3 *Reports of International Arbitral Awards*, p. 1490).

This clearly implies that the remedies, had there been any, would have had to be pursued.

The Applicant's argument concerning the *Ambatielos case* is equally curious. The Court only dealt with the question whether there was an obligation to submit the dispute to arbitration and decided that there was (*I.C.J. Reports 1953*, pp. 22–23). The subsequent special agreement required the Arbitration Commission to determine:

> « (*a*) The validity of the Ambatielos claim under the 1886 Treaty having regard to:
>
> ... (ii) the question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English courts in respect of acts alleged to constitute breaches of any Treaty » (12 *Reports of International Arbitral Awards*, p. 88).

The Arbitration Commission examined this question and found that the local remedies rule was applicable and that remedies had not been exhausted. How could one then say that, as Mr. Matheson put it, « the Commission did not have to decide whether the rule would apply as a matter of law to a dispute under a treaty » (C 3/CR 89/9, p. 469)?

There is a more recent arbitration case in point. It was quoted in the Rejoinder (p. 213) but totally ignored by the Applicant. The award is given in the case concerning the *Air Services Agreement of 27 March 1946* (United States v. France). The Arbitral Tribunal said:

> « the rule of international law relating to the requirement of exhaustion of local remedies, when making a distinction between the State-to-State claims in which the requirement applies, and claims which are not subject to such a requirement, must necessarily base this distinction on the *juridical* character of the *legal relationship* between States which is invoked in support of the claim. Consequently, with respect to the applicability of the local remedies rule, a distinction is generally made between 'cases of diplomatic protection' and ' cases of direct injury ' » (54 *International Law Reports*, pp. 304–324).

Despite some wording in the rebuttal to the effect that the application to the Court seeks to assert « broader rights and interests of the United States under the Treaty ... vindicating its own rights and interests and clarifying the obligations of the Parties » (C 3/CR 89/9, pp. 468–469 also p. 471), one cannot escape the conclusion tha tthe present case is a case of diplomatic protection to which the rule consequently applies. Suffice it to notice that the submissions only consider violations of Treaty provisions, obviously, with reference to Raytheon's claim and that reparation is only sought for the damage allegedly caused to Raytheon.

2. The Applicant again put forward the contention that the rule should not apply because the United States seeks a « declaration that the FCN Treaty has been violated, as well as reparation to itself for violations of the Treaty » (C 3/CR 89/9, p. 469). However, the Applicant's submissions have not been modified accordingly. No alternative submissions have been made.

As they stand — Mr. Highet explained it this morning — the submissions do not read as if there was a request solely for declaratory relief and even less for an abstract interpretation of Treaty provisions.

The passage in the United States Government's Memorial in the *Interhandel case* which was quoted by Mr. Matheson (C 3/CR 89/9, p. 469) in order to contend the inapplicability of the rule with regard to declaratory judgments should be read in the context of the subsequent statement made by the Agent of the United States Government, Mr. Becker, when the Swiss Government had made an alternative submission requesting a declaratory judgment. He said that « there is no general and universally accepted principle excepting all requests for declaratory judgments from the doctrine of exhaustion of local remedies » (*I.C.J. Pleadings, Interhandel*, p. 502). The views expressed by the United States Government in the *Interhandel case* are in any case of some what academic importance, given the passage of the Court's Judgment in the same case on the alternative submission — a passage to which I referred in my previous pleading (*I.C.J. Reports 1959*, p. 29; C 3/CR 89/5, p. 366).

3. The Italian Government never waived the application of the rule, nor did it maintain in the course of diplomatic negotiations, unlike the United States Government in the *Interhandel* case (see *I.C.J. Reports 1959*, p. 27), that all the available remedies had been exhausted. The United States Government, nevertheless, filed a preliminary objection in that case with regard to the non-exhaustion of local remedies (*I.C.J. Pleadings, Interhandel*, p. 303). Why should it be improper for the Italian Government to raise the same objection?

Mr. Matheson's statement that the Italian Government only contended that no remedies had been exhausted « after proceedings have been instituted with its concurrence » (C 3/CR 89/9, p. 473) is incorrect for two reasons. First, proceedings before the Court have been instituted by a unilateral application of the United States Government. Second, as I recalled in my previous pleading (C 3/CR 89/5, p. 365), the Italian Government had specifically indicated to the United States Government that it would raise the question of non-exhaustion of local remedies should the United States Government institute judicial proceedings and no objection was made to this communication.

4. According to the Applicant, there exists an exception to the local remedies rule when a claimant has made a « reasonable and good-faith effort » to exhaust those remedies (C 3/CR 89/9, p. 472).

If one could justify non-exhaustion of local remedies simply by stating later that one had assumed in good faith that no remedies were available the rule would have in practice little meaning. Anyway, this is not a case in which a « reasonable and good-faith effort » has been made. The Applicant insists on Raytheon's requests for opinions addressed to two Italian lawyers. One of them was Avvocato Bisconti, Raytheon's lawyer in Italy. These opinions were referred to in the Memorandum of Law of 1974 as «opinions of independent Italian legal experts» (Unnumbered Documents, Vol. I, p. 137). The Applicant has not contested the analysis that I made of Professor La Pergola's opinion, showing that no argument was offered on local remedies in Italy and that the opinion had in all likelihood been requested in order to justify recourse to the United States Government (C 3/CR 89/5, p. 369). No argument on the relevance of the Treaty was either put to the lawyers or offered in their opinions. The question of the effects of the Treaty in Italy was totally ignored. Was it « reasonable » not to take the Treaty into account when one intended to persuade one's Government to bring a claim for one's benefit on the basis of the very same Treaty and when the Court of Cassation had already held the Treaty to be applicable by Italian courts?

5. While several remedies were not exhausted by Raytheon, attention has rightly been focussed on what I called the « radical remedy »: a claim for compensation under Article 2043 of the Civil Code. This would have allowed Raytheon to recover any damage allegedly occurred according either to the earlier version of the Claim or to its new presentation.

In substance, the Applicant develops two arguments against the requirement that this radical remedy should have been exhausted: the remedy would not have been effective; and the FCN

Treaty, from which one could draw the unlawful character of the damage, could not be applied by Italian courts. I will examine them in turn.

Much has been made by the Applicant of the decisions given over the receiver's claim for compensation (C 3/CR 89/9, pp. 470–471; Annex 2 to C 3/CR 89/10, pp. 2–3). I would like to recall that this point had not been put forward in the Applicant's first round of pleadings. Nevertheless, it is not a new argument. I had brought it to the attention of the Court myself (C 3/CR 89/5, p. 368). However, I pointed out that the receiver had claimed on the basis of a more limited set of facts and that he could only act in the interest of all the creditors. He could not act on behalf of Raytheon and vindicate Raytheon's rights under the Treaty.

Those rights were listed by Professor Gardner in the following way:

> « rights to manage and control ELSI and liquidate it in an orderly fashion ... the right not to have their investment rights and interests impaired, the right not to have their interests in property taken without just and effective compensation, and the right ... to have the security of their interests in property protected » (C 3/CR 89/3, p. 325).

Could one seriously argue that the bankruptcy receiver was entitled to bring a claim for compensation because of an infringement of any of these rights? Furthermore, could any compensation thus awarded be used to pay all the creditors?

The issues relating to Raytheon's rights were never brought to the attention of Italian courts. No reference to them was made by the receiver in his claim (Unnumbered Documents attached to the Counter-Memorial, Vol. II, pp. 137 et seq.). Besides, the receiver did not and could not algele or demonstrate all the facts alleged by the Applicant — most of them originating from Raytheon's documents — concerning the relation between the requisition order and the bankruptcy. Thus, the highest court which dealt with the merits of the receiver's claim had to state that there was « no proof whatsover as to the damages incurred from that viewpoint » (Annex 81 to the Memorial, p. 14).

All this leads one to conclude that, even in its reshaped version, the Applicant's Claim cannot be justified under the local remedies rule.

6. In its written and oral discussion of the local remedies rule the Applicant has given little attention to judicial and arbitral precedents or has not considered them carefully. One of these precedents is the *Panevezys–Saldutiskis Railway case* (C 3/CR 89/9, p. 471). Here the Permanent Court of International Justice accepted the Lithuanian objection that remedies had not been exhausted and said:

> « The question whether or not the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian court alone can pronunce a final decision. It is not for this Court to consider the arguments which have been addressed to it for the purpose either of establishing the jurisdiction of the Lithuanian tribunals by adducing particular provisions of the laws in force in Lithuania, or of denying the jurisdiction of those tribunals by attributing a particular character (seizure *jure imperii*) to the act of the Lithuanian Government. Until it has been clearly shown that the Lithuanian courts have no jurisdiction to entertain a suit by the *Esimene Company* as to its title to the *Panevezys–Saldutiskis railway*, the Court cannot accept the contention of the Estonian Agent that the rule as to the exhaustion of local remedies does not apply in this case because Lithuanian law affords no means of redress ». (*PCIJ*, *Series A/B*, *N. 76*, p. 19).

A similar point was made by Sir Hersch Lauterpacht in his Separate Opinion in the *Norwegian Loans case* (*I.C.J. Reports 1957*, pp. 39–41). With reference to this opinion Mr. Matheson said: « As judge Lauterpacht stated in the *Norwegian Loans case*, the rule only requires exhaustion of effective local remedies that are available ' as a matter of reasonable possibility ' » (C 3/CR 89/9, p. 472). But here is the full quotation of what Sir Hersch Lauterpacht in fact stated: « The legal position on the subject cannot be regarded as so abundantly clear as to rule out,

as a matter of reasonable possibility, any effective remedy before Norwegian courts ». (*ICJ Reports 1957*, p. 39).

This kind of reasoning could be easily transposed to the case in point. Moreover, in our case there is little reason to doubt the applicability of the FCN Treaty by Italian courts. The attitude of Italian courts is friendly towards the self-executing character of treaty provisions. Three decisions by the Italian Supreme Court applied provisions contained in the FCN Treaty or in the Supplementary Agreement as a matter of course; no question about their self-executing character was raised. No doubts about that character were expressed at all until the Applicant voiced them in its Reply.

The Applicant looks for support for its theory that the Treaty could not be invoked essentially to an opinion of one of Rome's State attorneys (C 3/CR 89/9, p. 469). However, the reasons that I gave in my previous pleading to the effect that the opinion has been misinterpreted and is anyway immaterial (C 3/CR 89/5, pp. 370-371) have not been challenged. I would only like to stress that in the Italian legal system, courts interpret treaties and decide on their effects in Italy independently from whatever State attorneys or other Government officials may say and that what matters when it comes to decide whether a treaty provision may be applied is the court's attitude alone.

A significant precedent which is also not challenged by the Applicant is represented by the *Corte di Cassazione* decision that applied, again as a matter of course, a provision of the FCN Treaty between Italy and the Federal Republic of Germany which corresponds to the FCN Treaty provision concerning taking of property (C 3/CR 89/5, p. 369).

Moreover, the Applicant's argument that the FCN Treaty provisions are not sufficiently specific to be applied by Italian courts makes little sense. Let us assume for example that, as the Applicant contends, what is « arbitrary » under Italian law is also « arbitrary » under the Supplementary Agreement. What kind of Italian legislation would have been necessary in order to make what is « arbitrary » under the Supplementary Agreement, «arbitrary» under Italian law?

It is anyway to be noted that, if one held that most of the Treaty provisions are not regarded as self-executing in Italy, one would have to expect that, as a result, infringements of obligations under the same provisions would very likely occur. Why did the United States Government never make representations to the Italian Government in order to have the implementing legislation, which is supposedly necessary, enacted by the Italian Parliament?

7. Mr. President and Members of the Court – The present case only involves claims for the alleged violation of Treaty provisions. These provisions were designed for the benefit of individuals and corporations who are nationals of a Contracting State. They regulate in detail the treatment of those individuals and corporations in the local State. The very nature of these provisions implies that any question relating to their applicability should first be brought tothe courts of the State in which the provisions are invoked.

The local remedies rule simply meets the reasonable need not to encumber diplomatic channels with claims under the Treaty before local courts have had a chance to consider the alleged infringement. As Jenks put it, the rule is based « on the practical convenience of channelling the settlement of private grievances through the established machinery of municipal law wherever possible with a view to reducing the strains placed by such grievances on international relations and procedures » (*The Prospects of International Adjudication* [1964], p. 536).

Thus, rights under the Treaty belonging either to a United States or an Italian national should not be invoked first in diplomatic protection, but should be brought to the test of local courts. If remedies have not been used, as in the present case, a diplomatic claim is inadmissible. No « rigid » application of the local remedies rule is thus suggested; only an application of the rule.

I thank you, Mr. President and Members of the Court, for your kind attention.

The PRESIDENT: Thank you very much, Professor Gaja, I call upon the Agent of the Republic of Italy, Professor Ferrari Bravo.

M. FERRARI BRAVO: Monsieur le Président, Messieurs de la Cour, nous arrivons à la fin des plaidoiries dans une affaire qui demandait l'examen de nombreuses, très nombreuses en vérité, questions de fait, ainsi que de bon nombre d'importantes questions de droit.

Comme dans toute affaire où les questions de fait sont prépondérantes, au moins d'un point de vue quantitatif, et où, de surcroît, elles sont hautement controversées (et cela malgré toute opinion contraire exprimée à plusieurs reprises par la délégation des Etats-Unis), l'étude de cette affaire a demandé la présentation d'un grand nombre de documents. En outre, nous avons aussi écouté la voix de personnes qu'une des Parties a appelées en tant que témoins ou experts. La vivacité des argumentations développées par les Parties aura eu, faute d'autres mérites, celui de ne pas avoir ennuyé la Cour.

L'Italie a présenté beaucoup de documents et les Etats-Unis en ont produit plusieurs. La nécessité de recourir à une documentation supplémentaire s'est manifestée parfois dans la phase orale du procès (et d'autres documents ont été ajoutés aux dossiers préexistants). Concernant ce sujet et d'un point de vue tout à fait général, je voudrais faire deux remarques.

La première consiste à rappeler que, en annexe à son Contre-mémoire, l'Italie présenta trois gros tomes intitulés « Unnumbered Documents ». Ces trois tomes reproduisaient sans aucune omission le « Claim » présenté en 1974 par le gouvernment des Etats-Unis pour le compte de ses deux nationaux, les sociétés Raytheon et Machlett Laboratories, ainsi que tout document que les Etats-Unis avaient cru bon d'annexer audit *Claim*.

Malgré la dénomination « Unnumbered Documents », un index de la documentation annexée au *Claim* de 1974 se trouve aux pages 198 à 204 du premier tome. C'est l'index établi en son temps par Raytheon aux fins de la consultation de ladite documentation.

Sans doute, nous aurions pu établir un nouvel index, ce qui aurait facilité peut-être le travail de la Cour. Si nous ne l'avons pas fait — et nous nous en excusons auprès du Greffe pour ce travail supplémentaire que nous lui avons imposé — c'était pour une raison très simple, que j'espère la Cour approuvera. La raison est que nous n'avons rien voulu changer au texte de la documentation qui se trouvait disponible chez nous, pas même une seule virgule.

Les trois tomes contiennent quelques documents qui nous semblent favorables aux thèses italiennes, d'autres qui peut-être le sont moins; d'autres encore qui ne nous paraissaient pas pertinents. Mais, après mûre réflexion, nous avons pensé que dans une affaire telle que celle-ci, à propos de laquelle nous avons constaté avec une certaine amertume la transformation du *Claim* américain entre 1974 et 1987 ainsi que l'augmentation vraiment astronomique du montant de mandé à titre d'indemnité, il n'aurait pas été honnête de notre part de donner un aperçu seulement partiel de la documentation disponible. La Cour, dans sa sagesse, choisira les documents qu'elle considérera comme pertinents.

La deuxième remarque relative à la documentation concerne *tous* les documents présentés par les deux Parties. La présente affaire se rapporte à des événements qui, en quasi-totalité, se sont produits en Italie. Elle concerne des mesures administratives italiennes, des lois italiennes ainsi que des accords internationaux dont le texte italien fait foi avec le texte en langue non italienne. C'est pourquoi il est nécessaire de vérifier avec une attention que je dirais méticuleuse toute traduction en anglais des documents dont l'original est en langue italienne. Cela d'autant plus que la terminologie juridique des pays de langue anglaise qui est celle de la *Common Law*, n'a souvent pas d'équivalent précis et automatique dans une langue latine.

Or, la lecture des documents pertinents a révélé dans certains cas des erreurs de traduction et chaque fois que nous nous en sommes rendus compte nous les avons signalées. Mais il est fort probable que d'autres imperfections existent, dont la défense de l'Italie pourrait ne pas s'être aperçue, particulièrement lorsqu'il s'agit de traductions faites en dehors de l'Italie, dans un environnement linguistique anglophone où le risque de se tromper, même en toute bonne foi, est plus élevé.

Voici pourquoi la défense de l'Italie qui à cause du régime linguistique de la Cour, a dû travailler, tout au long de la présente affaire, et à la différence de la défence des Etats-Unis, dans des langues qui ne sont pas les siennes, se permet de demander à la Cour de faire vérifier soigneusement la traduction, chaque fois qu'elle utilisera un document dont l'original est en langue italienne, car c'est seulement ainsi que la Cour se forgera la certitude que le document en

question revêt un sens déterminé et non pas un autre qui, encore que voisin, pourrait ne pas être identique.

Cette prémisse m'a paru nécessaire étant donné les caractères spécifiques de la présente affaire.

* * *

Quant à l'affaire elle-même, il n'est pas dans mes intentions de résumer les arguments développés tant par notre défense que par celle des Etats-Unis. Il me semble que tout ce qu'il était nécessaire de dire a déjà été dit.

Nous croyons, avant tout, avoir démontré de la façon la plus convaincante que l'exception présentée par l'Italie et par laquelle il est demandé à la Cour de déclarer irrecevable la requête américaine parce que les actionnaires américains de l'ELSI n'ont pas épuisé les voies de recours offertes par l'ordre juridique italien, est pleinement fondée. Nous sommes confiants, par conséquent, dans le jugement de la Cour, qui voudra bien déclarer irrecevable, la requête américaine sans passer à l'examen du fond de l'affaire.

Nous avons présenté cette exception non seulement parce que nous croyons en son bien-fondé, mais aussi parce que la règle de l'épuisement préalable des voies internes de recours est une règale fondamentale du droit international qui protège l'intérêt de tout Etat à résister aux demandes injustifiées que des nationaux influents adressent à leur Etat, comme le soulignait M. Highet dans sa plaidoirie du 23 février. Cette règle a été réaffirmée récemment par la Commission du droit international des Nations Unies, à l'article 22 du projet d'articles (première partie) sur la responsabilité des Etats. Et ses conclusions, unanimes, ont trouvé l'appui de la Commission juridique de l'Assemblée générale des Nations Unies.

Il aurait été peu raisonnable de notre part de ne pas nous prévaloir d'une règle fondamentale du droit international alors que nous sommes convaincus qu'elle est applicable en l'espèce.

L'acceptation de notre exception ne serait pas, comme l'a dit M. Matheson dans sa plaidoirie finale le 27 février, une victoire du formalisme juridique. Le droit internationale, dans toutes ses règles — et notamment dans celle-ci — toujours égard au fond des problèmes, en départageant les intérêts des Etats en jeu selon des critères de justice. Nulle considération d'opportunité ne s'oppose donc à l'application, dans la présente affaire, de la règle de l'épuisement préalable des voies internes de recours, dont le fonctionnement n'est pas, en l'absence d'une exclusion expresse dans le Traité, mis en échec par l'existence de celui-ci, comme l'a démontré tout à l'heure M. Gaja.

D'ailleurs, avant de présenter leur requête, les Etats-Unis étaient bien au courant de l'intention de l'Italie de présenter l'exception en question.

Tout ce qui précède ne signifie nullement que l'Italie ait peur de soumettre au jugement de la Cour les faits qui se sont effectivement produits. Elle ne craint pas non plus l'application des normes pertinentes aux faits tels qu'ils seront établis par la Cour sur la base des preuves fournies par la Partie à laquelle incombe le fardeau de la preuve. Bien au contraire. Au cas où la Cour déciderait de ne pas accepter l'exception préliminaire présentée par l'Italie, nous n'aurions aucune crainte d'être jugé pour nos agissements. La vigueur de notre défense en témoigne.

En effet, nous sommes profondément persuadés que le gouvernement des Etats-Unis n'a pas réussi à fournir la preuve, dont le fardeau lui incombait pourtant, des faits qu'il a invoqués et dont nous contestons la véracité. Il n'a pas non plus prouvé l'exactitude de son interprétation des règles de droit.

La défense des Etats-Unis, qui dans ce procès sont la partie demanderesse — une circonstance qu'il ne faut jamais oublier — n'a sur aucun point démontré que l'Italie serait responsable d'avoir commis des actes illicites internationaux.

Il y a un manque total de preuve des faits qui pourraient justifier cette conclusion, notamment de celle d'un lien de causalité ininterrompu entre les événements qui se sont réellement produits. Il n'y a, en outre, aucune démonstration convaincante de l'exactitude de l'interprétation données par les Etats-Unis des normes pertinentes. La requête américaine doit donc être rejetée.

En plus, et en tout état de cause, il n'existe aucune preuve que des faits dommageables, pour lesquels une indemnisation tout à fait adéquate n'a pas déjà été versée, se soient produits au détriment des actionnaires américains de l'ELSI. J'ose dire que, s'il y a quelqu'un qui a été lésé par le déroulement de l'affaire, c'est plutôt l'IRI qui, d'une part, a perdu de grosses sommes d'argent à travers les banques qu'elle contrôlait à 100 p. cent et qui se sont vu déboutées de leurs plaintes contre la compagnie américaine par les juridictions italiennes. L'IRI encore, par l'intermédiaire d'une des ses sociétés, achetait à un prix tout à fait raisonnable, mais en réalité à contre-coeur, les avoirs restants de l'ELSI.

Cet IRI, qui, comme dans un jeu de miroirs chinois, apparaît et disparaît, selon les convenances de la défense américaine, tantôt comme partie intégrante de l'Etat italien, tantôt comme entité indépendante, mais dont les agissements, même ceux ayant causé des pertes à l'IRI et des avantages aux réquérants américains, sont invariablement mis à la charge de l'Etat italien à qui une indemnisation est demandée.

Monsieur le Président, Messieurs de la Cour, aucune perte, aucun dommage qui n'ait été la faute des actionnaires américains de l'ELSI ne s'est produit. Pourtant, même dans le hypothèse, qui nous semble tout à fait absurde, que quelque irrégularité serait imputable à l'Etat italien dans le respect des traités qui le lient aux Etats-Unis, ceci n'aurait produit aucun effet dommageable dont les Etats-Unis auraient le droit de se plaindre. Même dans ce cas la demande américaine doit donc être rejetée.

En effet, Monsieur le Président, et en ragardant en arrière, je crois que ces trois semaines de plaidoiries ont vu s'effacer, jusqu'à disparaître totalement, le fondement de la requête américaine. Paroles, paroles, paroles, comme le disait Hamlet, rien que des paroles. Mais des paroles écrites sur sable et effacées par l'eau.

Monsieur le Président, Messieurs de la Cour, dans son intervention du 13 février, au tout début de la phase orale, mon éminent collègue et cher ami, l'honorable Abraham Sofaer, agent des Etats-Unis, déclarait ce qui suit:

> « *Economic development and social progress are the common concern of the whole international community. By establishing legal norms that encourage economic prosperity and the well-being of all nations, we help strengthen peaceful relations and co-operation globally. Chaper 9 of the Charter of the United Nations acknowledges that the development of economic and social relations creates the conditions of stability and well-being necessary for friendly relations among nations* » (*C 3/CR 89/1, p. 247*).

Je suis tout à fait d'accord avec M. Sofaer sur cette évaluation d'ordre général et je peux assurer la Cour que le Gouvernement italien est pleinement conscient de l'importance et de l'utilité d'instruments internationaux tels que le Traité d'amitié, de commerce et de navigation de 1948 entre l'Italie et les Etats-Unis ou l'Accord supplémentaire de 1951. Ce sont des instruments internationaux qui, peut-être, s'ils étaient négociés aujourd'hui, seraient rédigés de façon quelque peu différente compte tenu du changement des réalités économiques et sociales qui s'est produit partout dans le monde entre 1948 et nos jours. Mais les bases fondamentales de ces accords restent toujours valables et de toute manière, tant qu'ils existent dans leur libellé actuel, ces accords demandent à être respectés scrupuleusement. L'Italie, pour sa part, est sûre de les avoir toujours respectés et continue de les respecter.

De ce point de vue, si la Cour décide qu'il lui est nécessaire, pour rendre son jugement, d'aborder l'interprétation des traités en question, l'Italie pense n'avoir rien à craindre. Elle respectera scrupuleusement le jugement de la Cour et, si celui-ci contient des éléments d'interprétation, l'Italie en tiendra dûment compte pour orienter sa propre pratique vis-à-vis des traités en question.

D'ailleurs, le présent différend, que les deux Parties ont plaidé au mieux de leur capacité en cherchant, comme il se doit, à obtenir la victoire, n'est qu'un épisode dans l'histoire des relations entre deux pays amis, relations qui se développent d'une façon heureuse et qui se développeront encore plus de cette manière si elles sont débarassées de quelques débris d'une époque révolue dans laquelle le déséquilibre entre les deux Parties se faisait encore sentir.

Monsieur le Président, Messieurs de la Cour, c'est à l'aide de ces réflexions que l'Italie, persuadée du bien-fondé de ses thèses, se prépare à se soumettre à votre jugement. La défense du gouvernement italien vous a exposé, au mieux de ses ressources intellectuelles, ses arguments. Elle a confiance qu'ils seront bien accueillis. Elle attend donc avec la plus grande sérénité le jugement de la plus haute instance judiciaire internationale, étant persuadée que les décisions de la Cour internationale de Justice ne peuvent que contribuer, par la seule force du droit, au développement des relations amicales entre les nations.

Dans cet esprit, je me permets de lire maintenant, les conclusions finales présentées par l'Italie. Elles coïncident avec celles présentées le 23 février dernier. Et pour éviter tout malentendu je les lirai en anglais, langue que j'ai employée lors de la précédente lecture. Voici ces conclusions:

May it please the Court,

A. To adjudge and declare that the Application filed on 6 February 1987 by the United States Government is inadmissible because local remedies have not been exhausted.

B. If not, to adjudge and declare:

1. That Article III of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;

2. That Article V, paragraphs 1 and 3, of the Treaty has not been violated;

3. That Article V, paragraph 2, of the Treaty, and the related provisions of the Protocol to the Treaty, have not been violated;

4. That Article VII of the Treaty has not been violated;

5. That Article I of the Supplementary Agreement of 26 September 1951 has not been violated; and

6. That no other Article of the Treaty or the Supplementary Agreement has been violated.

C. On a subsidiary and alternative basis only: to adjudge and declare that, even if there had been a violation of obligations under the Treaty or the Supplementary Agreement, such violation caused no injury for which the payment of any indemnity would be justified; and, accordingly, to dismiss the claim.

Monsieur le Président, Messieurs les Juges, même au nom des autres membres de la délégation italienne, je vous remercie de votre attention.

The PRESIDENT: Merci Monsieur Ferrari Bravo. On behalf of the Members of the Chamber, I thank the Agents and Counsels of both Parties for their assistance to this Chamber. Befor closing these oral proceedings, and in order to facilitate the future work of the Chamber, I thinke is necessary to fix the time-limit for the written comments of each Party on the replies to the questions put by the judges of the Court to which I referred at the beginning of our sitting this afternoon. Therefore, I fix, Monday, 13 March as the time-limit to receive the comments to which I have already referred.

In accordance with our practice, I request the Agents to remain at the disposal of the Chamber for any further assistance it may require. Subject to this, and thanking you again, gentlemen, for your assistance, I declare the oral proceedings in this case closed.

The Court rose at 15.55 p.m.