INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING ELETTRONICA SICULA S.p.A. (ELSI)

(UNITED STATES OF AMERICA *v.* ITALY)

VOLUME III
Oral Arguments; Correspondence

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE L'ELETTRONICA SICULA S.p.A. (ELSI)

(ÉTATS-UNIS D'AMÉRIQUE c. ITALIE)

VOLUME III
Procédure orale; correspondance

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PLAIDOIRIES

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tenues au Palais de la Paix, à La Haye, le 27 novembre 1987, sous la présidence de M. Nagendra Singh, Président et président de la Chambre, et du 13 février au 20 juillet 1989, sous la présidence de M. Ruda, Président et président de la Chambre

FIRST PUBLIC SITTING (27 XI 87, 12 noon)

Present: President NAGENDRA SINGH, *President of the Chamber; Judges* ODA, AGO, SCHWEBEL, Sir Robert JENNINGS; *Registrar* VALENCIA-OSPINA.

Also present:

For the Government of the United States of America:

Mr. Timothy F. Ramish, Counsellor, Embassy of the United States in the Netherlands, *as Deputy-Agent.*

For the Government of Italy:

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;*

Mr. Alberto Collela, Legal Service of the Ministry of Foreign Affairs,
Mr. F. Ercolano, Counsellor, Embassy of Italy in the Netherlands.

FIRST PUBLIC SITTING OF THE CHAMBER

The PRESIDENT: Nearly six years ago a sitting was held to mark the first occasion upon which the International Court of Justice had formed, at the request of the parties to a dispute, a Chamber to deal with a particular case. The initiative on that occasion had been taken by the Governments of Canada and of the United States of America and resulted in 1984 in the resolution of their longstanding dispute over the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*. The Government of the United States has also instituted the present proceedings, by means of an Application [1] against the Republic of Italy, and in concert with the Italian Government has requested the formation of a chamber to deal with their dispute concerning an industrial corporation, Elettronica Sicula S.p.A., known acronymically as ELSI.

I am glad to note the presence of the Agent of Italy, Mr. Ferrari Bravo, and of the Deputy-Agent of the United States, Mr. Ramish.

You see before you, here upon the bench, the judges whom the Court, after the views of the Parties had been ascertained and conveyed to it, has elected to constitute this Chamber. Since I have the honour to be among those elected, it falls to me automatically as President of the Court also to preside over the Chamber, in accordance with the applicable Rule of Court.

In any event, in the six years during which Chambers formed for particular cases have begun to operate within the Court, the practice has taken root of having the President of the Court inaugurate the first public sitting of each such Chamber, and introduce the President of that Chamber.

Today, owing to the Rule of Court to which I have referred, I find myself, as it were, my own co-President at this sitting and am not able to offer you the variation of speaker from the bench which has hitherto been a feature of these occasions. Nor can I proceed to a ceremony which has graced the inauguration of three other Chambers, namely the swearing-in of a judge or judges *ad hoc*, or, to use the language of the Statute, the making in open Court of their solemn declaration. This is because every judge who will be sitting in this case would have already done so by virtue of election from among the 15 Members of the Court who are serving regular terms of office and are sitting likewise in other cases before the Court. Two of those judges are nationals of Italy and the United States.

The present case is the first dealt with by the Court for 36 years in which judges possessing the nationality of both the Parties joining issue were already sitting upon the bench at the time of institution of proceedings. In consequence of their presence, neither Party is entitled to choose a judge *ad hoc*, and so this, the fourth Chamber to be formed under Article 26, paragraph 2, of the Statute, and the fourth also to comprise five judges, is in fact the first to be entirely made up of elected Members of the International Court of Justice.

It is time that I should present to you the four distinguished colleagues who, together with myself, make up this Chamber. They are Judge Shigeru Oda, of Japanese nationality, who became a Member of the Court three years after myself, in 1976; Judge Roberto Ago, of Italian nationality, a Member since 1979; Judge

[1] I, pp. 3-40.

Stephen Schwebel, of United States nationality, a Member since 1981; and Judge Sir Robert Jennings, of British nationality, a Member since 1982. It gives me great pleasure to congratulate Judges Ago and Schwebel on each having last week been elected by the Security Council and the General Assembly of the United Nations, with a thumping majority, to serve a further nine-year term of office on the bench of the Court as from 6 February next year.

The present case has one feature which is quite distinctive, namely, its combination of reference to a Chamber with the fact of its having been brought by means of a unilateral Application. Its Chamber predecessors had all been submitted by virtue of a Special Agreement, so that neither party could be identified as plaintiff or defendant (or, to use the normal language of the Court, as Applicant or Respondent).

It is not surprising that cases referred to Chambers tend to be the subject of Special Agreements, since a measure of co-operation between the parties is already a requisite for the invocation of Article 26, paragraph 3, of the Statute, which says that "cases shall be heard and determined by the chamber provided for in this article *if the parties so request*"[1]. After all, if a common view upon that request is already achieved, it is natural, if the character of the case so warrants, that further points of concurrence should emerge and result in the conclusion of that particular form of treaty known as a Special Agreement for the submission of a dispute to the International Court of Justice. Indeed, where there appears no other basis for the Court's jurisdiction, such an Agreement is indispensable, irrespective of whether or not a chamber is to be formed.

Nevertheless, the current case of *Elettronica Sicula S.p.A. (ELSI)* has been introduced by Application, which also is a perfectly legitimate way to proceed in the matter.

As is recounted in the Court's Order of 2 March 1987[2], constituting this Chamber, the first step in the proceedings was taken by the United States of America when, on 6 February this year, it filed an Application against the Republic of Italy in respect of a dispute concerning an Italian company said to have been wholly owned by two United States corporations and whose plant and related assets were said to have been requisitioned by the Italian Government. In the submission of the Applicant, that Government had in the circumstances violated the bilateral Treaty of Friendship, Commerce and Navigation which Italy and the United States had concluded in 1948, as well as a later supplement[3] thereto, and, since Article XXVI of that Treaty provided for the jurisdiction of the International Court of Justice, it was upon that Treaty, in the view of the Applicant, that a referral to this Court could be based. I may add that in responding to the Application, of which a copy was of course immediately sent to the Respondent[4], the Government of Italy raised no objection to the jurisdiction of the Court[5]. It is apparent therefore that this is not one of those cases in which the conclusion of a Special Agreement is necessary if only to provide a basis of jurisdiction.

It will not escape notice that this first public sitting in the case is taking place well after the constitution of the Chamber. Had there been any cause to proceed to the induction of judges *ad hoc*, an earlier sitting would have been required, but these questions did not arise here.

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[1] Emphasis added.
[2] *I.C.J. Reports 1987*, p. 3.
[3] I, pp. 9-31 and 32-37.
[4] See Correspondence, No. 5, *infra*.
[5] See Correspondence, No. 7, *infra*.

In the event, we assemble one day after the completion of the written proceedings ordered by the Court on 2 March 1987.

The Memorial[1] was duly submitted by the Applicant, the United States of America, on 15 May of this year, and yesterday, that is on 16 November, Italy filed its Counter-Memorial[2] in the Registry of the Court.

The volume of evidence submitted by these pleadings is such that it has come as no surprise to the Chamber to learn that in the view of both Parties a second round of written proceedings will be necessary before they will be in a position to present their oral arguments.

Although Article 45 of the Rules of Court provides, in paragraph 1, for only a Memorial and a Counter-Memorial when a case is presented by means of an Application, that same Article also allows, in paragraph 2, the production of a Reply and a Rejoinder to be authorized in certain circumstances, including agreement by the Parties that such a second round is required.

The moment has now come when I must afford an opportunity to the representatives of the Parties to address the Chamber. I first call upon the Deputy-Agent of the Applicant in these proceedings.

Mr. RAMISH: Mr. President, distinguished Judges, may it please the Chamber. I am honoured to appear before you as Deputy-Agent of the United States in the case concerning *Elettronica Sicula, S.p.A. (ELSI)*. Judge Sofaer has asked me to convey to you his sincere regrets that he is unable to attend today's first public meeting of this Chamber.

The United States looks forward to working with this Chamber toward the resolution of this case, which has been the subject for many years of a diplomatic dispute between the Government of the United States and the Government of Italy. We believe that this dispute is an excellent example of a matter that can effectively and appropriately be determined by the Court and by chambers of the Court, and we extend to you our commitment to full co-operation as we bring this case to a satisfactory resolution. We also believe that the disposition of this case by this Chamber will demonstrate the importance and the effectiveness of the use of chambers by parties to the Statute of the International Court.

Finally, we look forward to our continued excellent working relationship with the Government of Italy as we work together to resolve this matter.

The PRESIDENT: And now I invite the Agent of the Republic of Italy, Mr. Ferrari Bravo, to address this Chamber.

Mr. FERRARI BRAVO: Mr. President, distinguished members of the Chamber. It is a privilege and an honour for me to address you and Their Excellencies the Judges of the Court who are members of this special Chamber which will adjudicate the case between the United States of America and Italy concerning *Elettronica Sicula S.p.A. (ELSI)*.

Every international lawyer has a secret dream; to appear before this venerable Court. My personal dream comes true today and I am proud of it.

First of all, Mr. President, I wish to convey to you and to the members of the Chamber the expressions of the deep satisfaction of the Government of Italy for the way this Chamber was established. In particular we are honoured that you, the President of the International Court of Justice, are also the President of this special Chamber. We are fully confident in your wisdom as well as in the wisdom of your colleagues.

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[1] **I**, pp. 43-458.
[2] **II**, pp. 3-360.

The present case opposes two States which are friends and longstanding allies. But also among friends, differences of view may occur which cannot be settled by diplomatic means. When this happens, it is quite natural that the two countries, while continuing to keep their friendship, go before an independent authority like the World Court in order to have their differences solved. This is not felt as an unfriendly act and, in this spirit, we welcomed the Application of the Government of the United States of America against Italy as the most appropriate way to bring the present dispute to an unchallengeable solution.

Of course, we are convinced that we are right and that the United States is wrong, as far as the case is concerned, and the Court can be sure that we will plead our case to the best of our forces in order to get victory. This is part of the rules of the game and we are sure that, on their part, the United States will behave in the same way. And then, at the end of the proceedings, the Court will deliver its judgment which, I am sure, will be faithfully implemented by the Parties, whatever its content may be.

This is, in our opinion, the correct way to make full use of the Court and we think that the present case, because of the good relations which exist among the litigating Parties as well as because of the circumstances on the basis of which it was brought before the Court, shall be looked at in the future as an example of correct implementation of the letter and the spirit of the Charter of the United Nations whose Article 36, alas too often forgotten, states that "legal disputes should as a general rule be referred by the parties to the International Court of Justice". In all international fora the Italian Government has constantly stressed the importance of the function of this Court for strengthening the cause of peace and our appearance here wants to be, also, a sign of the consistency of our policy in this regard.

Mr. President, distinguished Judges, while thanking you and Their Excellencies the Judges of the Chamber for your kind attention to these few words, may I express to you all the best wishes of my Government for the work you are starting today for the benefit of the Parties but in the sole interest of international justice.

The PRESIDENT: The Chamber is most appreciative of the observations made on behalf of the Parties. In conclusion, I would like to draw attention to the fact that the present case provides an excellent illustration of the very wide scope of the Court's caseload and procedural possibilities. I have already referred to those possibilities. But I should observe that the subject-matter of the present case is far removed from the themes of cases hitherto submitted to a Chamber. In the three other Chamber cases, a boundary dispute was presented for resolution, but now we have a case concerning alleged violation of international law in respect of industrial enterprises of the nationality of the applicant State. It is 20 years since the Court has had a case in this field. Meanwhile, it has dealt with numerous law-of-the-sea problems as well as boundary issues upon land, and it has dealt with important questions concerning diplomatic inviolability and the non-use of force in inter-State relations, to mention only the contentious aspect of the Court's jurisdiction.

It is gratifying to be able to point to such diversity at a moment when the role of the Court as an instrument for the peaceful resolution of disputes is becoming even clearer, and when a serious reassessment of the potential of the United Nations and its principal judicial organ is under way.

The Chamber rose at 12.20 p.m.

SECOND PUBLIC SITTING (13 II 89, 10 a.m.)

Present: President RUDA, *President of the Chamber; Judges* ODA, AGO, SCHWEBEL, Sir Robert JENNINGS; *Registrar* VALENCIA-OSPINA.

Also present:

For the Government of the United States of America:

The Honorable 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, Agent of the United States of America to the Iran-United States Claims Tribunal, *as Deputy-Agent*;

Ms Melinda P. Chandler, Attorney/Adviser, Department of State,
Mr. Sean D. Murphy, Attorney/Adviser, Department of State,
The Honorable Richard N. Gardner, Ambassador to Italy (1977-1981); Henry L. Moses Professor of Law and International Diplomacy, Columbia 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.*

For the Government of Italy:

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, *as Co-Agent and Counsel*;

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, LL.B. (Hons), Member of the Law Society of Scotland,
Mr. Alberto Colella, Assistant Legal Adviser to the Ministry of Foreign Affairs,
Mr. Alan Derek Hayward, Fellow of the Institute of Chartered Accountants in England and Wales,
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.*

OPENING OF THE ORAL PROCEEDINGS

The PRESIDENT: 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 *ad 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 archaeology 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.

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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 [1] 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 [2]. The United States requested that the case should be dealt with by a Chamber of the Court [3], and that proposal was agreed to by the Government of Italy [4]. By an Order dated 2 March 1987 [5] 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 [6] and in due course the United States filed a Memorial [7], Italy a Counter-Memorial, the United States a Reply and Italy a Rejoinder [8]. Following the death on 11 December 1988 of Judge Nagendra Singh, President of the Chamber, the Court proceeded to fill the vacancy on 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 on 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.

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[1] **I**, pp. 3-40.
[2] **I**, pp. 9-31 and 32-37.
[3] See Correspondence, No. 1, *infra*.
[4] See Correspondence, No. 7, *infra*..
[5] *I.C.J. Reports 1987*, p. 3.
[6] *I.C.J. Reports 1987*, pp. 3 and 185.
[7] **I**, pp. 43-458.
[8] **II**, 3-360, 363-414 and 417-509.

STATEMENT BY MR. SOFAER

CO-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. 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 Nagendra Singh. Judge Nagendra 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 United States 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-Second World War 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 IX 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 expectation 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 United States companies abroad and by foreign companies in the United States. The cornerstone of this legal framework has been the commercial treaty. While commercial treaties have been part of United States 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 United States 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 United States 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 United States 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 United States 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 requisition. 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. President 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 interpretation 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 $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 United States company and United States 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.

ARGUMENT OF MR. MATHESON

CO-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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 favour 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 18-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) (I, Memorial, Ann. 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 (plant and 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 (I, Memorial, Ann. 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) (I, Memorial, Ann. 81).

It is undisputed that, after the sale of the remaining materials and collection of receivables, a total of only 6.374 billion lire (US$10,192,000) was realized from the sale of ELSI's assets in bankruptcy (I, Memorial, Ann. 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, **I**, p. 48; Reply, **II**, pp. 366-374) 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 cooperation of the Italian Government would be secured. Beginning in April 1967 Raytheon provided 4 billion lire (I, Memorial, Ann. 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 was 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 (I, Memorial, Ann. 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 (I, Memorial, Ann. 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 relevant 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. Moreover, 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 corner-stone 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 assets. 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 advertise 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 possible 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 million lire to the First National City Bank branch in Milan to pay the small creditors in full (I, Memorial, Ann. 17, para. 14). (I should point out that this transfer was accomplished without any difficulty under United States 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) (I, Memorial, Ann. 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) (I, Memorial, Ann. 13, Schedule E) in full, including amounts owed by ELSI to Raytheon. This would have left 391 million lire (US$625,600) (I, Memorial, Ann. 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) (I, Memorial, Ann. 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 pro rata 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 pro rata 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, **II**, pp. 9-10; Rejoinder, **II**, pp. 477-478), 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) (**I**, Memorial, Ann. 13, Schedule F).

Mr. President, it is our intention next to ask that Mr. Charles Adams be called to testify.

The Chamber adjourned from 11.20 a.m. to 11.42 a.m.

EVIDENCE OF MR. ADAMS

WITNESS CALLED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA

The PRESIDENT: 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.

Mr. SOFAER: 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 missile 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 US$4.5 million, the last of the 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 stablity 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 US$4.5 million of our last investment in that period of time and that United States 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 $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 licence 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 various sales to meet our obligations and we had people out there with experience in this kind of thing, 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 licences 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 workforce 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 60s. That volume had dropped off as the production 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.

ARGUMENT OF MR. MATHESON *(cont.)*

CO-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. MATHESON: As Mr. Adams has now testified, the orderly liquidation plan was commercially viable: ESLI or ELSI's product lines would have been sold as going businesses and the sale of the assets was reasonably calculated to pay off 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 Mr. 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 Caused 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 employees" (**I**, Memorial, Ann. 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 (**I**, Memorial, 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 (**I**, Memorial, Ann. 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 (I, Memorial, Ann. 76). He stated "the order is destitute of any juridical cause which may justify it or make it enforceable" (I, p. 362).

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 (I, Memorial, Ann. 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." (I, p. 284.)

The second statute established the Mayor's authority to issue "emergency and urgent orders of this character" (I, Memorial, Ann. 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." (I, p. 285.)

The Mayor of Palermo, invoking both of these statutes, cited several bases for requisitioning ELSI (I, Memorial, Ann. 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 strongly 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 caused 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" (I, p. 39).

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, II, p. 418) 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 (I, Memorial, Ann. 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 (I, Memorial, Ann. 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 Annex 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 favor 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." (I, p. 297.)

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 (I, Memorial, Ann. 43). ELSI was found bankrupt on 16 May 1968 (I, Memorial, Ann. 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 repeated 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 (I, Memorial, Ann. 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 (I, Memorial, Ann. 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 (I, Memorial, Ann. 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 (I, Memorial, Ann. 56). Interestingly, the Prefect, who had pending before him Raytheon 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 acquired 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 remaining 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 (I, Memorial, Ann. 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 requisition to the Prefect of Palermo on 19 April 1968. Although on 22 August 1969, the Prefect found the requisition to be unlawful (I, Memorial, Ann. 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, II, pp. 13-14; Rejoinder, II, pp. 426-428) that the requisitions it cites were almost uniformly annulled or set aside.

Further, appeals of these requisitions to the Prefect were usually set aside within days — not months — within days of the requisition order. The Respondent has submitted as Document 30 to the Counter-Memorial (II) a statement that prior to 1971 the average administrative appeals 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 Societe 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 (I, Memorial, Ann. 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 alternately 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 his 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 opportunity 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, ESLSI 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?

The PRESIDENT: Yes, we will begin with the statement of Professor Bonelli tomorrow morning at 10 o'clock.

The Chamber rose at 12.25 p.m.

THIRD PUBLIC SITTING (14 II 89, 10 a.m.)

Present: [See sitting of 13 II 89.]

EVIDENCE OF MR. ADAMS *(cont.)*

WITNESS CALLED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA

The PRESIDENT: 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.

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.

Mr. HIGHET: 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-1960s or possibly in the 1950s verging into the 1960s, 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 couldn't 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 29, *supra*. 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 29, *supra*. 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" *(ibid.)*.

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 this 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 page 29, *supra*, 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 page 26, *supra*, 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 page 26, *supra*, 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 and 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 micromanage 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 couldn'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, could 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. 26, *supra*), 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. 27, *supra*) 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 see, you take my point. You said yesterday that Raytheon and ELSI could have offered licence and know-how agreements to prospective purchasers and you said that (p. 28, *supra*) "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 licences. 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 licence 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. 26-27, *supra*) 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 (**I**). 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 (Memorial, Ann. 22, I, p. 224), 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 page 41 (Memorial, Ann. 22, I, p. 224), 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 had 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 who, 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 page 27, *supra*, in response to a question from Mr. 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 10-K with the SEC, in a footnote I think a comment said that the plan, 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" (**II**, p. 435, fn. 1). And then later on, two or three years later, before the programme was finally terminated, much to nobody's sadness, in your 10-K Raytheon acknowledged the continuation of this payments programme might restrict Raytheon's "ability to develop its international operations" *(ibid.)*. 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 OFDI 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, I, page 125, and Annex 22, I, pages 220 and 221. Turning from that kind of assistance to the other kind which is the Italian Government benefits, that were more immediate, that were required to help ELSI succeed, I refer to the testimony you gave yesterday at pages 25-26, *supra*. 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 X-ray tubes that were made in Palermo in the Mezzogiorno when at the same time X-ray tubes of that nature were being bought from Philips or other suppliers outside of Italy, so we thought that 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 benefit, 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.

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 workforce 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.

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: This 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 this 12 million dollars operate?

Mr. ADAMS: I haven'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 owned — 100 per cent of the shares, as compared to small investments earlier.

The PRESIDENT: I would like to put another question. You said yesterday, on page 29, *supra*, 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, but 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 been expected to accept 50 per cent and perhaps lower.

The PRESIDENT: Thank you very much, Mr. Adams, for your assistance.

EVIDENCE OF MR. CLARE

WITNESS CALLED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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.

Ms CHANDLER: 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 pursuade 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.

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.

Ms CHANDLER: Mr. Clare, would you please describe for the Court your association with ELSI during late 1967 and early 1968.

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 semiconductors.

We did upgrade the systems; we got significant improvement 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 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 certainly 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 Onorevole 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 15 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; and 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 small 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 small 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 ten 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-controlwise, 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 licence 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 licence 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 to 5 billion to over 6 billion per year. Now these transport costs we talk about amounted to something like 6 to 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 to 8 per cent on 6 billion sales would have added in 4 to 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 licence 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 licence 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 X-ray tube line. These were made with technical know-how from Machlett which was a Raytheon company. Machlett had X-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 X-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 X-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 an 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 United Kingdom. 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 licence from Raytheon to manufacture these tubes in the United Kingdom 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, the magnetrons alone would have sales of a billion lire or more per year.

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 semiconductor 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 semiconductor 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 opportunitites 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 50 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 cost 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 semiconductor 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 semiconductor 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 techno-

logy there which existed nowhere else in Europe, except where we licensed 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. 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 doubts 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. It cost 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: 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 lire.

The PRESIDENT: 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!

The Chamber adjourned from 11.45 a.m. to 12.00 p.m.

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.

Mr. HIGHET: 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 happen 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 you 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 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 marvellous exhibits, and it's one of the meetings, it's the sort of the ante-penultimate 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 beseiged, 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 some time 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 per cent, we put 30 per cent, we put 50 per cent, they put 50 per

cent, 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.

Judge 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 some time 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.

Judge 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. 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 about 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. When the personnel 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.

Judge 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.

Judge Sir Robert JENNINGS: That was in the first week of March, 7 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, 17 March, I believe.

Judge 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.*

Judge 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 build 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.

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: Any other questions? Well, I thank you very much, Mr. Clare, for your assistance to the Court.

Mr. MATHESON: 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.

ARGUMENT OF PROFESSOR BONELLI

ADVISER FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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 (**II**, Reply, Ann. 1, para. 1), Article 2448, No. 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, **II**, Doc. 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, **II**, p. 433) 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 *(ibid.)* 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 **II**, page 434, 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 (**II**, Rejoinder, Doc. 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*, Padua, 1984; F. Ziccardi, "Concordato stragiudiziale", in *Dizionario del diritto privato*, Milan, 1981, page 345. I do not mix citations here but it is an 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 negotiations 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, **II**, p. 21) that ELSI violated Article 2447 of the Italian Civil Code. Articles 2447 and 2448, No. 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 (I) 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 liquidation. 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, Doc. 32, II, p. 504). Professor Jaeger makes reference in his opinion to Article 217, No. 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*, Milan, 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, No. 4, refers to the case in which a company, being insolvent, keeps running new business, and by so doing makes worse its insolvency. This is the fact which is contemplated by Article 217, No. 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, No. 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, No. 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, No. 3 (I was speaking before on Article 217, No. 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, No. 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, No. 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 offence for promoters, 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, **II**, p. 8) 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, **II**, p. 7). The Respondent has not pursued these arguments in its Rejoinder and for a good reason. As I stated in my statement (Reply, Ann. 1, 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 record-keeping and do not violate Italian law. It was a *force majeur* — earthquakes and strikes at the plant. I further affirm my statement (*ibid.*, 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 work-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 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.

Mr. MATHESON: 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.

ARGUMENT OF PROFESSOR FAZZALARI

ADVISER FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Professor FAZZALARI: 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 (**II**, p. 28) and the Rejoinder (**II**, p. 452), 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 No. 1455 of 21 May 1973

On page 115 (II) of its Rejoinder the Respondent cites *Ministero delle Finanze* v. *S.p.A. Manifattura Lane Marzotto*, Decision No. 1455 of 21 May 1973 (II, Rejoinder, Doc. 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 Tariffs and Trade (GATT). The Supreme Court of Cassasione, 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, is 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 not 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, Doc. 5, II, p. 487 [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 No. 107 of 14 January 1976

The other case is Case No. 107 of 14 January 1976. On page 455 (II) of the Rejoinder, the Respondent cites *Ministereo del Tesoro* v. *Mander Brothers Ltd.*, Decision No. 107 of 14 January 1976 (II, Rejoinder, Doc. 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 No. 2228 of 30 July 1960

Now I come to the two cases involving the United States-Italy FCN Treaty. The enforcement of the FCN Treaty in these cases was limited to provisions containing a "most-favoured-nation" clause. The United States 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 page 28 (II) of the Counter-Memorial and page 454 (II) of the Rejoinder, the Respondent cites *The Durst Manufacturing Co.* v. *Banca Commercial Italiana*, Decision No. 2228 of 30 July 1960 (II, Rejoinder, Doc. 11). In this case the United States-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 United States 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 United States-Italy FCN provisions argued in this case calls 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 No. 2579 of 6 December 1983/17 February 1984

On page 454 (II) of the Rejoinder the Respondent cites *In re Walsh*, Decision No. 2579 of 6 December 1983/17 February 1984 (II, Rejoinder, Doc. 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, II, p. 454) 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*, No. 32266/83, brief filed 30 October 1987[1], 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 relevant 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 analyse 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 (II) at Document 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."

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[1] See Correspondence, No. 66, *infra*.

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, II, p. 452). 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, paragraph 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 No 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 No. 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 No. 436 of 21 January 1988 and Decision No. 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 pages 104-105. This treatise explains — as do 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 important 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 page 453 (II) of the Rejoinder, Professor La Pergola did not

discuss only the diplomatic protection of foreign shareholders in Italian corporations. On pages 409 and 412 (II) of the English translation of his opinion (Reply, Ann. 3) 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, II, p. 451). 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 Respondent'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 bankrupt 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 "*tipicita 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 entitled *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 also 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 requisitioning 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: 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.

Mr. 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 by the judgment as such, 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. From 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. President, we would be happy to accept the proposal of the Respondent. We will provide you with both a copy of the decision [1] and a copy of the brief [2].

The PRESIDENT: There is agreement of all Parties that we will receive this document in one of the official languages of the Court.

The Chamber rose at 13.40 p.m.

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[1] See Correspondence, Nos. 66 and 73, *infra*.
[2] See Correspondence, No. 66, *infra*.

FOURTH PUBLIC SITTING (15 II 89, 10 a.m.)

Present: [See sitting of 13 II 89.]

Mr. MATHESON: 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.

ARGUMENT OF MR. MURPHY

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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, paragraph 1, of this Court's Statute, which provides the Court jurisdiction over all matters specially provided for in treaties and conventions in force. Article XXVI 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 (II), on page 26, the Respondent accepted the Court's jurisdiction.

ADMISSIBILITY

In the Counter-Memorial (II), on page 27, 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, paragraph 8, of the Rules of Court. In letters sent to the Court dated 16 November 1987[1], 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[2] of 17 November 1987 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, II, p. 450). 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

[1] See Correspondence, Nos. 27 and 33, *infra*.
[2] *I.C.J. Reports 1987*, p. 185.

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 injured 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 *BYBIL* 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 (*P.C.I.J., Series C, No. 84*, pp. 443, 447-448). 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, *I.C.J. 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 page 27 (II) 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 (I, Memorial, Ann. 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 (I, Memorial, Ann. 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, I, p. 55, and Ann. 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, I, p. 58). 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, I, p. 64). 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, Ann. 76, I, p. 362).

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 (I, Memorial, Anns. 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 (I, Memorial, Ann. 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 (I, Memorial, Ann. 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 (I, Memorial, Ann. 79).

On 2 February 1973, the Court of Palermo ruled that the trustee was not entitled to compensation for the requisition (I, Memorial, Ann. 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 (I, Memorial, Ann. 80). This decision was upheld on appeal by the Italian Supreme Court on 26 April 1975 (I, Memorial, Ann. 82). The amount of the judgment was received by the trustee and, less costs and expenses, distributed to ELSI's creditors (I, Memorial, Ann. 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 (**II**) at page 278[1] of Volume I of the Unnumbered Documents. They are also Annexes 3 and 4 to the Reply (**II**, pp. 405-414). 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 No. 51 to the Respondent. *This Diplomatic Note* appears as the first few pages of Volume 3 of the Counter-Memorial (**II**), which is also Volume I of the Respondent's Unnumbered Documents. In this Diplomatic Note, the United States advanced a claim which it said was:

[1] Not reproduced.

> "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, II, p. 232).

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." (*Ibid.*, p. 233.)

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 (II, pp. 232-360). 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 démarches 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, Note 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 United States Diplomatic Note and letter and the 1980 Italian letter were all filed with the Court under cover of our letter of 20 January 1989[1].

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 page 450 (II) 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, I.C.J. Reports 1962*, pages 39 and 42, and Judge Alfaro's concurring opinion. I would also bring to the Court's attention the Commentary in the 1966 *Interna-*

[1] See Correspondence, No. 53, *infra*.

tional 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 *Arbitral 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, I.C.J. 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, *I.C.J. 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* (*I.C.J. Reports 1962*, p. 39), this Court found that Thailand's inconsistent actions over a period of 50 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, I.C.J. 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 (Australia* v. *France), I.C.J. 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. 147, 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 *BYBIL* 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* 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 1, pages 452-453 (II) 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* 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 United States nationals can sue in Italian courts based on the provisions of the FCN Treaty. This position is inconsistent with the Respondent's position when United States 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 United States 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 United States 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.

ARGUMENT OF PROFESSOR GARDNER

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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-Second World War 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-SECOND WORLD WAR 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 United States 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 the Second World War 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 United States 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 . . ." (H. Walker, "Treaties for the Encouragement of Foreign Investment: Present United States Practice", 5 *American Journal of Comparative Law*, 1956, p. 244.)

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 it 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 the Second World War.

Hence, the United States and Italy found themselves in the aftermath of the Second World War 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-Second World War 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, Doc. 7, II, p. 100; see also United States Memorial, Ann. 56, I, p. 322, for an alternate translation.)

This, then was a primary focus of the United States-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 UNITED STATES-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 until 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 United States corporations from interference with management and control of their enterprises in Italy (Arts. III and VII of the Treaty and Art. 1 of the Supplement are the relevant provisions here).
2. The obligation to protect United States 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 United States 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 United States 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 (I), as Annex 1 to the Memorial (I), and as Document 1 to the Counter-Memorial (II). 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 had developed a very good reputation and its assets could be expected 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 page 461 (II) 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 "parentheses" in the life of ELSI as the Respondent states on page 113 (II) 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, II, p. 462), 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.

The Chamber adjourned from 11.30 a.m. to 11.45 a.m.

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 United States 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 United States corporations from the impairment of their investment rights and interests, third, the obligation to protect United States corporations from the wrongful taking of their property and interest in property, and finally, the obligation to protect United States 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 United States 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 MFN 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, II, page 460. 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 United States 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, II, pages 461 and 463 to 464. 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 page 459 (**II**) 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 (**I**) and as Annex 2 to the Memorial (**I**) and Document 2 to the Counter-Memorial (**II**), 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, Doc. 9, II, p. 112).

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, Doc. 9, II, p. 112). 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, Ann. 4, I, p. 117; Counter-Memorial, Doc. 14, II, p. 135).

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 the Treaty, which themselves are already framed in very specific terms.

Article I states that corporations of one party "shall not be subjected to artibrary 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 management of ELSI. Since these measures were both arbitrary and discriminatory, the Respondent'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 Respondent'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 United States companies. Yet the meaning of "discrimination" in international law goes much beyond simple discrimination against aliens. On page 465 (II) 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*, 1977 (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, Doc. 9, **II**, p. 113.)

The 1960 Report of the Italian Senate speaks expansively of "measures aimed at impeding management or control" (Counter-Memorial, Doc. 13, **II**, p. 132). 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 United States 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 United States 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 United States company's state of incorporation. The Italian Republic is not obligated to accord to United States companies a standard of treatment higher than the treatment accorded to Italian corporations in the home states of the United States 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 (I, pp. 81-82) 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 page 463 (II) 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, II, page 462. 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 1 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 United States 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, Doc. 9, II, p. 113).

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 United States shareholders in Italian companies whose property is taken by the Respondent. There is no clause linking the treatment of United States 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 page 468 (II) 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" (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 United States Senate of 30 April 1948 (Counter-Memorial, Doc. 15, II, pp. 164-165).

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 (II, Counter-Memorial, Doc. 16 [p. 8]/Memorial, Ann. 86, I, p. 397), 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 an MFN 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, II, p. 468), 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 an article on expropriation issues before the Iran-United States Claims Tribunal (Rejoinder, II, p. 468, fn. 3), but it ignores the salient conclusion of that same article, which reads:

> "Several things have been clearly established by the Tribunal. First, the developing nations 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 No. 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 (II, Counter-Memorial, Doc. 16 [pp. 11-12]/Memorial, Ann. 86, I, pp. 401-402) 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, licences, 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, Doc. 4, II, p. 63).

And the discussion before the Foreign Relations Committee of the United States 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, Doc. 15, II, pp. 164-165).

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, Doc. 7, II, p. 104).

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 designed to protect the investment of United States 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 United States) 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), *I.C.J. 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 . . ." (*I.C.J. Reports 1970*, p. 46).

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." (*I.C.J. Reports 1970*, p. 48.)

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." (*I.C.J. Reports 1970*, p. 36.)

Our case, as we have demonstrated, is that very situation where the direct 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 United States nationals or companies in their ownership, management and control of Italian corporations as well as their investment rights and interests.

On pages 467 and 470 (II) of its Rejoinder, 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 Respondent's international Treaty commitments. As was stated in the Commentary to Article 4 of the International Law Commission Draft Articles on State Responsibility:

> "a State cannot, by pleading that its conduct conforms to the provisions of its internal laws, escape the characterization of that conduct as wrongful by international law if it constitutes a breach of an obligation imposed by international law" (*Yearbook of International Law Commission*, 1973, Vol. II, p. 184).

The ordinary meaning of the Treaty, in the light of its object and purpose, is clear. There is no need to determine whether under Italian law shareholders can hold rights only towards the company and not the company's assets. We are construing a Treaty here — a Treaty whose terms are clear in their ordinary meaning. I must note, however, that even under Italian law an expropriation can refer to the partial limitation of the rights of an owner (Sandulli, *Manuale de Diritto Amministrativo*, para. 196 (1984)).

Now the Respondent has made various references in its Rejoinder to United States Supreme Court cases, cases on takings of property. But these cases simply do not support the Respondent's position. One of the cases cited is *United States* v. *Pewee Coal Co.* (341 US 114 (1951)). The Supreme Court found, in that case, that there had been a taking of property and that the United States Government had to pay compensation. That, of course, is exactly the type of result the United States seeks in this case today. There are important differences between that case and the case before this Chamber, however. In the *Peewee Coal* case, the United States Government kept the company operating during the taking. Eventually the company's plant, equipment and assets were returned to their rightful owners. While the Respondent quotes the concurring opinion, it ignores the majority opinion which found that the United States 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 *Pewee 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, II, p. 469). 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 United States 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 I of the Protocol.

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 (I, Memorial, Ann. 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 deterioration 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 constituted 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 page 458 (II) 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 (**II**, pp. 36-37) and the Rejoinder (**II**, p. 458), 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, Doc. 11, **II**, p. 127). 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." (**II**, Counter-Memorial, Doc. 16 [p. 41]/Memorial, Ann. 86, **I**, pp. 43-438.)

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.

The Chamber rose at 13.10 p.m.

FIFTH PUBLIC SITTING (16 II 89, 10 a.m.)

Present: [See sitting of 13 II 89.]

ARGUMENT OF MR. RAMISH

DEPUTY-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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 requested 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 (*I.C.J. Reports 1980*, p. 44). That Treaty is similar to the Treaty before the Court in this case. As was stated in the *Factory at Chorzów* 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 Nos. 7 and 8 (Factory at Chorzów), 1927, Judgment No. 11, P.C.I.J., Series A, No. 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 principle 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 stricly 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 Memorial, I, pp. 103-104). 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 Chorzów* 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 re-establish 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 Chorzów, Merits, 1928, P.C.I.J., Series A, No. 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, although ELSI was to be sold as a live business, ELSI was not generating profits at the time of the requisition. Therefore, 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 enterprise's "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 and 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 example, 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 renowned 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 page 151 (I) 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 (I). 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 million lire. Raytheon, in its capacity as unsecured creditor, would have been paid in full in the amount of 1,143.8 million lire. The remaining 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 (I). The proceeds realized in bankruptcy, and their distribution, are matters of record and are not disputed by the Respondent.

Line 1 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 (I, Memorial, Ann. 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 value 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, semiconductor, 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 . . ." (Counter-Memorial, Unnumbered Documents, **II**, p. 233).

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 smaller 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 (**I**, Memorial, Ann. 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?

EVIDENCE OF MR. LAWRENCE[1]

EXPERT CALLED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA

The PRESIDENT: 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 been 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 but 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 shareholders' 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 workforce, 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

[1] Mr. Lawrence made use of a number of tables, which were made available to the Chamber and the United States delegation and are reproduced at pp. 429-431, *infra*.

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 wrongdoing 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 [1], 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). 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.

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[1] See Correspondence, No. 68, *infra*.

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." (II, Counter-Memorial, Unnumbered Documents, Exhibit 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. 1716.9 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 prepayments 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.

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.

The Chamber adjourned from 11.20 to 11.35 a.m.

The PRESIDENT: 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.

Professor BONELL: 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.

Professor 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.

Professor 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 1967, was audited or certified by your firm. Is that correct?

Mr. LAWRENCE: Yes.

Professor BONELL: On the basis of that balance sheet then ELSI's management extrapolated and prepared the balance sheet of 31 March 1968 which you did not certify. Is that correct?

Mr. LAWRENCE: We did not. My firm did not carry out an audit at March 1968.

Professor 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 only 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.

Professor 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.

Professor 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.

Professor BONELL: I see. You told us that your Milan branch did the job. I mean they prepared the audit report?

Mr. LAWRENCE: Yes, that is right.

Professor BONELL: Have you seen the report?

Mr. LAWRENCE: Yes.

Professor BONELL: Very recently?

Mr. LAWRENCE: Yes.

Professor BONELL: I see. Well, Mr. President, thank you very much. I have no further 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.

The PRESIDENT: 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[1].

Mr. MATHESON: We will be happy to do so.

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[1] See Correspondence, No. 71, *infra*.

ARGUMENT OF MR. RAMISH *(cont.)*

DEPUTY-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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 *R. Int'l Arb. Awards*, pp. 244, 259) involved a claimant who sought compensation for 18 years of future income from a market-place 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 Moore, *op. cit.*, pp. 3782-3783) the claimants sought an indemnity for the wrongful stoppage of their firm's 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 (I) (Ann. 40, and Ann. 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 (I, Ann. 40, and Ann. 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 **I**, pages 109-110 of our Memorial, and at **II**, pages 393-394 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 **I**, Memorial, Ann. 40, and Ann. 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 predictable, 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 Moore, *op. cit.*, p. 2117), Colombia seized the assets of the claimant's firm, and thus destroyed his ability to liquidate the firm'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 guarantee 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" (quoted in Commentary to Art. 4, Chap. I of the International Law Commission's 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.

III. 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", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 33; *Factory of Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 47). So have the vast majority of other international tribunals. A brief discussion of some of the prominent cases may be found at I, pages 110-111, of our Memorial. A Chamber of the Iran-United States 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.*, II, *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 No. 65-A19-FT*, p. 8 (30 September 1987) (italics added)).

The Respondent, in its Rejoinder (**II**, p. 479), makes the surprising assertion that "international case-law is virtually unanimous[ly] in refusing to acknowledge 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 at a 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. P. 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 *S.S. "Wimbledon"* case, take account of "the present financial situation of the world", including contemporary rates of interest (*S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 32).

In the discussion at pages 111-114 (**I**) 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 page 114 (**I**) 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-United States 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 it 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 *U.C. Davis Law Review* 577, 585 (1988).)

Similarly, in commenting on the issue of compound interest in the *Starrett* case (*Starrett Housing Corporation et al. and the Government of the Islamic Republic of Iran et al.*, Award No. 314-24-1 (14 August 1987), Concurring Opinion of Judge Holtzmann, p. 24), Judge Holtzmann of the Iran-United States 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, *op. cit.*, 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 *R. Int'l Arb. 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 remain unproductive." (V. Moore, *op. cit.*, 4914 (translation).)

Even the case primarily relied upon by the Respondent, *Great Britain* v. *Spain (Spanish Zone of Morocco)* (2 *R. Int'l Arb. 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, *op. cit.*, 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, *op. cit.*, 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.

IV. 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.

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 defence 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.

STATEMENT BY MR. MATHESON

CO-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. MATHESON: 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 principal 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. Decisions 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 claim 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?

QUESTION PUT BY JUDGE SCHWEBEL

Judge SCHWEBEL: 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 out 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?

The PRESIDENT: 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[1].

The Chamber rose at 12.35 p.m.

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[1] See Correspondence, No. 69, *infra*.

SIXTH PUBLIC SITTING (20 II 89, 10 a.m.)

Present: [See sitting of 13 II 89.]

ARGUMENT OF MR. FERRARI BRAVO

AGENT FOR THE GOVERNMENT OF ITALY

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.

The case you are called upon to decide arises from an Application (**I**) 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 (**I**, p. 25).

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 (**II**), as was suggested by counsel for the Applicant (see p. 81, *supra*). 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 a 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 (p. 88, *supra*) 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, paragraph 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 (II) and the Rejoinder (II). This objection is an essential part of the case for the Respondent and will accordingly be dealt with first in the course of the pleading.

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 (p. 95, *supra*) 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 II, p. 384, fn. 1) 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 (p. 103, *supra*) 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 seriously 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.

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?

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.

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 order to save 1,000 jobs in the 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" (p. 17, *supra*). 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 on undisputed facts Mr. Matheson said:

> "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." (P. 20, *supra.*)

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.

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 in 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 perspective, 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.

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 well 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* (*I.C.J. Reports 1986*, p. 14) and the case concerning *United States Diplomatic and Consular Staff in Tehran* (*I.C.J. 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 inquiry 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." (*I.C.J. 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 position of the Parties, both claiming sovereignty over the same territory, and in view of the formulation of the task of the Court in Article I, and the terms of Article II, the Court is of opinion that each Party has to prove its alleged title and the facts upon which it relies." (*I.C.J. 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 these will of course lie on the Party asserting or putting them forward." (*I.C.J. 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 identify any documents before the Court which support its position" (p. 17, *supra*).

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." (*I.C.J. Reports 1986*, p. 43.)

I do 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[1] 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 United States 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,

[1] See Correspondence, No. 69, *infra*.

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[1]." It adds "[i]t is the Respondent that describes the United States claims as based upon a diabolical plot hatched by the Italian public authorities . . . (Rejoinder, p. 3 [II, p. 417])".

Now, it is true that we have so described the United States case. It is possible to describe the case as 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.

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[1] See Correspondence, No. 69, *infra*.

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 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 be 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 as 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.

ARGUMENT OF PROFESSOR GAJA

COUNSEL FOR THE GOVERNMENT OF ITALY

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 . . ." (*I.C.J. Reports 1959*, p. 27). In a more recent report to the General Assembly, the International Law Commission noted that

> ". . . the requirements 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 session in Granada. 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, **II**, pp. 264-265). 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*, pp. 118 f.).

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" (p. 82, *supra*). 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 of 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 was 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, II, pp. 264-267).

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 (pp. 86-87, *supra*). This document was referred to in a letter[1] — which was filed by the Applicant on 20 January 1989

[1] See Correspondence, No. 53, p. 418, *infra*.

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" (p. 87, *supra*). 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 remedies 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 January 11th, 1957. This opinion was based upon a view which has proved unfounded." (*I.C.J. 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.

5. 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" (p. 82, *supra*). 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" (*I.C.J. Reports 1959*, p. 29). Thus, even if the attempt to split the submissions were insisted upon and eventually became successfull, the local remedies rule would still be considered fully applicable.

6. 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 Ships* 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, II, p. 265) — "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 f.). 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 (I would like to refer here to the cross-examination of Mr. Clare by Mr. Highet, pp. 58-59, *supra*).

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 its 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 Document 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 (pp. 75-77, *supra*). 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. 76, *supra*). 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 responsibility — 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. 424, *infra* [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 his detriment on part of the Italian State" *(ibid.)*.

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 that "ELSI's successful suit based on the specific remedy of an appeal to the Prefect eliminates any other remedies" (p. 78, *supra*). Professor Fazzalari argued that no interim measures of protection could have been granted by a judicial court against the requisition *(ibid.)*. 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, I, Ann. 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, II, pp. 23 f. and Rejoinder, II, p. 438). It is worth noting that, in settling a controversial issue concerning the shareholders' liability, the Italian Court of Cassation decided against Italian banks, including publicly-owned banks, and in favour of a 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." (**II**, Unnumbered Documents attached to the Counter-Memorial, [p. 161]/Reply, Ann. 3, **II**, p. 405.)

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 (8 in the printed 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 [1] by the United States Vice-Consul in Rome on the same day — 9 December 1971 — on which it had been delivered in Bologna (see **II**, Unnumbered Documents attached to the Counter-Memorial, [p. 173]/Reply, Ann. 3, **II**, p. 405.). 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 (**II**, pp. 375-376).

The Chamber adjourned from 11.25 to 11.40 a.m.

C. The Effects of the FCN Treaty in Italy

1. In bringing a claim for compensation for damages arising from the 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 legal basis for 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 Documents 11 and 12 to the Rejoinder, **II**. 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

[1] Not reproduced.

volumes *Il Foro Italiano. Repertorio*, where they can be easily traced (1961, at 2991 and 323; 1984, at 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, No. 4811 of 28 July 1986, *Parzinger and Nowak v. Provincia Autonoma di Bolzano* (the text was published in *Rivista di Diritto Internazionale Privato e Processuale*, 1987, pp. 788 ff.; it will be supplied together with an English translation to the Registrar and the Agent for the Applicant [1]). This decision applies Article VI of the Treaty of Friendship, 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, **II**, pages 454-455. 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-executing.

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 No. 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, pp. 195 f. and Vol. 14, pp. 449 ff., 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, **II**, page 29, footnote 1.

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

[1] Not reproduced; see Correspondence, No. 76, *infra*.

Treaty. His only argument appears to be that the Treaty provisions which were applied contain a most-favoured-nation clause (pp. 74-75, *supra*). 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 Italian legislation incorporating the Treaty into Italian law with greater specificity" (p. 72, *supra*).

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*, pp. 394 ff. (1970).

Unable to find any judicial decision in favour of their contention, Professor Fazzalari (pp. 75-76, *supra*) and later Mr. Murphy (pp. 90-91, *supra*) 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. 75, *supra*), 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 account 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 (II, pp. 454-455) 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 led 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 Ships* 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" (*I.C.J. Reports 1959*, p. 27).

In civil matters, that opportunity depends on the party which has allegedly been injured bringing 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 inadmissibility 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.

ARGUMENT OF PROFESSOR LIBONATI

COUNSEL FOR THE GOVERNMENT OF ITALY

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

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" (p. 17, *supra*).

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 31 May of the same year; the Project forms Annex 22 of the Memorial (I) submitted by the United States Government.

In the "Conclusions and Requested Action", put forward from page 223 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 201 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 5 billion lire (p. 222 of the Project);
(c) financial help, available for transport costs, capital investment and training (p. 224 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. 202).

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. 204 of the Project).

Soon afterwards, faced with a greater intervention by Raytheon, the Sicilian company realized that (see pp. 205-206 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. 215 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. 203-204 and 222 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 annexed to the Rejoinder, II) — 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 the 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 dismisal on 29 March 1968, tells us for example (II, Doc. 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"

and that,

— 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, *op. cit.*, 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 (**I**, Ann. 13, Schedule B1 to the United States 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 of the fact that ELSI was incurring *losses*); disbursements that must be added — as we again learn from Dr. Mercadante — to the royalties paid to the American company, on top of reimbursements for travel and accommodation out of all proportions, etc. (around 340 million in 1968 alone) (see Technical Report of Dr. Mercadante, Counter-Memorial, Doc. 36, pp. 16-19 of the Italian text[1], **II**, p. 209 of the English translation[2]. And all this to maintain a deficient production, given — and I quote again from Dr. Mercadante's technical report (**II**, p. 209) — "returned goods, return by customer, the faulty goods" that afflicted ELSI's profit and loss account.

Thus on to 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.

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[1] Not reproduced.
[2] See **II**, p. 202, footnote 1.

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 [1] — "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 **II**, p. 212 of Dr. Mercadante's technical report, Doc. 36 to the Counter-Memorial).

There is certainly an overvaluation of the stock of between 1,500 and 2,000 million lire (see **II**, pp. 211-212 of Dr. Mercadante's technical report, Doc. 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 **II**, p. 212 of the technical report of Dr. Mercadante).

There are certainly accommodation papers for 1,200 million lire (see *ibid.*).

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 No. 19 to the Rejoinder, **II**, p. 497 [p. 6]).

Mr. Clare even indicated a precise "time chart". In his opinion there would have been (see **II**, Doc. 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, **I**, Attachment A to Ann. 30 to the United States Memorial); but facing the company were 283 million in short-term debts

[1] See Correspondence, No. 71, *infra*.

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 **II**, Unnumbered Documents annexed to the Counter-Memorial, Exhibit III-16, [p. 179]/ Memorial, Ann. 43, I, p. 311), 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 **II**, Unnumbered Documents annexed to the Counter-Memorial, Exhibit II-19, [p. 444]/Memorial, Ann. 15, I, pp. 176-177). 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 destroyed 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)" (II, Rejoinder, Doc. 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 (p. 63, *supra*). 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 defence.

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 United States 1974 claim (**II**, pp. 233-234 [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 Book Value and the Impossibility 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's testimony: p. 41, *supra*) any

more than 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 figures, it would seem necessary, and useful, to stop for a moment and to 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 pp. 130-131, *supra*). 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 No. 12, of 13 May 1968, Document 37 attached to the Counter-Memorial, II). Incidentally, Mr. Adams in his testimony did not seem to remember this fact (see p. 39, *supra.*).

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 business. 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 No. 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.

(1) 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 — of Mr. Ravalico, Document No. 14 to the Rejoinder, **II**; of Mr. Cavalli, Document No. 1 to the Rejoinder, **II**; of Mr. Cammarata, Document No. 13 to the Rejoinder, **II** — show that the buildings were badly designed and badly constructed from the beginning. 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?

(2) 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" (p. 53, *supra*), and which in itself made up "half of the plant" (p. 55, *supra*) — 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, **II**, p. 491.)

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.

(3) 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 unusable materials that were for the production lines that were going to be sold off as scrap." (Document 14 annexed to the Rejoinder, II, p. 492.)

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?

(4) A few words on the "accounts receivable".

As 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 Dr. Mercadante. Mr. Lawrence cannot, however, contest the facts ascertained by Dr. Mercadante.

Dr. Mercadante observes (see his Technical Report attached as Document No. 36 to the Counter-Memorial, II, p. 212 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, Dr. Mercadante states that the goods dispatched to a certain Noya Alfred Enateckmer 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 soudness of the book value of the accounts receivable?

(5) In Mr. Lawrence's reports the figure of 300 million lire for Mezzogiorno grants appears. At paragraph 46 of his statement (p. 128, *supra*), 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 sheet [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 p. 128, *supra*) 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 offload 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 (**I**, p. 135) 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 indicates, under the heading entitled "Company's adjustments", a reduction of 3,062, and the revised total assets thus amounts to 14,803.

The 1967 figures in Mr. Schene's Schedule B1 are therefore incorrect. A similar error is to be found in the 31 March 1968 assets 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 (II, Docs. 37, 38 and 39 annexed 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 No. 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:

(i) that ELSI was not a going concern, but rather an economic and financial disaster;
(ii) that ELSI was not an industrial gem, but a structure capable of only producing losses, and that to the order of billions of lire;
(iii) that its plant and equipment were not at all desirable, being obsolescent and industrially invalid;
(iv) that the option of an "orderly liquidation" was not open to ELSI, since its accounts showed its clear inability to pay its debts;
(v) that ELSI's bankruptcy was not a consequence of the Mayor of Palermo's requisition order, since ELSI was already insolvent before this;
(vi) 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;
(vii) that an evaluation 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.

The Chamber rose at 12.55 p.m.

SEVENTH PUBLIC SITTING (21 II 89, 10 a.m.)

Present: [See sitting of 13 II 89.]

STATEMENT BY THE PRESIDENT

The PRESIDENT: 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 on pages 75 and 79, *supra*.

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[1]. 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.

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[1] Not reproduced; see Correspondence, No. 76, *infra*.

PLAIDOIRIE DE M. CARAMAZZA

COAGENT DU GOUVERNEMENT DE L'ITALIE

1. PRÉAMBULE

M. CARAMAZZA: Monsieur le Président, Messieurs les juges, c'est un très grand honneur de plaider au nom du Gouvernement 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 Gouvernement 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, II, p. 418, note 1). 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 contre-mémoire, «Unnumbered Documents», II, p. 232-277, particulièrement p. 248-250).

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 Gouvernement 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 (ci-dessus p. 97), 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, ci-dessus p. 18, 21, 23, 33 et 34-35; Murphy, ci-dessus p. 83; Gardner, ci-dessus p. 95, 97 et 104; Matheson, ci-dessus p. 140-141).

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 l'affaire *Dix Case* entre les Etats-Unis et le Venezuela 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. Mathuson 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 d'exception promulguées en vue de favoriser le dévelop-

pement industriel du Sud, notamment les facilités sur les tarifs des transports et la réserve de trente pour cent sur les fournitures destinées aux administrations publiques (cf. mémoire, I, p. 48-49, et réplique, II, p. 366).

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.

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 (cf. I, mémoire, annexe 9, par. 15), M. Adams (président de Raytheon) a affirmé: «nous croyions *[sic!]* que les incitations à l'investissement fortement publicisées offertes par le Gouvernement italien réduiraient les coûts et les difficultés du marché». Son témoignage, rendu devant la Cour, a confirmé cette affirmation (ci-dessus p. 45). 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, le vice-président de Raytheon, dans son «affidavit» de la même date (cf. I, mémoire, annexe 13, par. 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 (cf. I, mémoire, annexe 15, par. 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 gouvernement suivant la règle du trente pour cent». Au contraire,

> «le ministre de la santé a adressé aux autorités médicales périphériques une circulaire dans laquelle il était précisé que la loi du trente pour cent n'était pas applicable aux fournitures de tubes à rayon X» (cf. I, mémoire, annexe 15, par. 41).

M. Clare toujours, dans sa lettre du 28 février 1968 adressée à M. Carollo (contre-mémoire, «Unnumbered Documents», vol. I, II, p. 299), 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) (cf. I, mémoire, annexe 17, par. 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 des 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 (ci-dessus p. 58-59) quand il a expliqué de quelles sources il avait tiré la conclusion qu'ELSI avait droit aux facilités; de quelle façon 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. L'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, telles que la circulaire du ministre de la santé qu'on a déjà mentionnée, ou les affirmations du ministre de l'industrie dans son discours qui a été souvent cité par la Partie demanderesse (cf. mémoire, annexe 46, I, p. 316-317); le ministre de l'industrie a expliqué devant la chambre des députés que les avantages prévus pour le Midi 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 demandés 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.

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 du trente pour 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, mais il figurera sous forme de note dans les comptes rendus [1].

Il suffira 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: et c'est plutôt l'ELSI qui exigeait du Gouvernement italien l'octroi d'avantages relevant de l'assistance.

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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 dû réserver trente pour 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. Cela 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 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 et produits semi-ouvrés destinés à être utilisés pour la production;
b) de matériaux de construction, outillage et tout le 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 même, son application était subordonnée à une seule condition 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.

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 (cf. **I**, 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 (cf. mémoire, annexe 22, **I**, p. 223), soit une « interprétation favorable de la loi » (cf. *ibid.*, p. 224) — 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 la page 37 du compte rendu du 16 février 1989 (ci-dessus p. 128). 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 (cf. mémoire, **I**, p. 100 et *suiv.*).

Cela 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 » (cf. mémoire, **I**, p. 100, note 3).

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 (cf. **I**, mémoire, annexe 95), articles qui étaient déjà cités dans le « claim » de 1974 qui au contraire s'attardait sur ce point (contre-mémoire, « Unnumbered Documents », **II**, p. 244 et p. 315, pièce III-21), 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 qualifiés dans sa plaidoirie d'une façon univoque, en utilisant le terme anglais de « trespass », la défense du Gouvernement italien entend démontrer que les allégations de la Partie adverse sont erronées en fait et dépourvues de fondement sous l'angle du droit interne.

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 (cf. **I**, 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 1er 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 » (cf. mémoire, annexe 80, I, p. 374; 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, 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 et dont on a toute raison de penser 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 que quelque préjudice que ce soit ait été causé par les travailleurs (cf. mémoire, annexe 80, I, p. 375-376); *b)* les affidavits de MM. Bevilacqua et Maggio (II, duplique, annexes 2-3) qui non seulement confirment que l'occupation a commencé bien avant la réquisition, mais indiquent aussi qu'elle 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 du 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, au procès-verbal dans lequel tout le contenu du texte écrit figurera sous forme de note.

Voici 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. »[1]

[1] 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

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 penser plutôt au salon de la marquise de Sévigné qu'à une lutte syndicale dans une entreprise industrielle, et je me demande, dans ces conditions, quel besoin y aurait-il eu d'invoquer l'intervention de la force publique. Mais revenons-en aux faits.

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 pourrait être relevé dans ces conditions-là. Aucune plainte d'ailleurs n'avait été déposée par l'ELSI et, bien plus, jamais l'ELSI n'a demandé l'intervention de la force publique.

Pour prouver avec la précision voulue ma thèse, selon laquelle aucun des articles du code pénal visés par l'adversaire n'est applicable au cas, je devrais examiner l'un après l'autre tous les faits illicites mentionnés et, dans cette perspective, je devrais prier la Cour de ne tenir compte, à titre de référence, que des textes de loi italiens joints au «claim» (contre-mémoire, «Unnumbered Documents», **II**, p. 315, pièce **III-21**), 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, d'autres par excès, parce qu'il y a des commentaires ou des notes qui ont été rajoutés aux textes 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 en annexe au mémoire.

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 me bornerai, avec l'autorisation de la Cour, à renvoyer, pour ladite analyse, au texte du compte rendu de ma plaidoirie, où l'analyse de tous les articles du code pénal italien est conduite dans une note[1]. Oralement, je

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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 incident.

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.» (Cf. mémoire, annexe 36, **I**, p. 289-290.)

1 «*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 —

voudrais résumer le problème en disant qu'aucune des hypothèses délictuelles évoquées n'est réalisée dans le cas d'espèce, à défaut ou 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) tels par exemple que la violation de domicile qui correspond plus précisément, je crois, au « trespass » de la *common law*. Et aucune plainte n'a été déposée par l'ELSI à ce sujet.

En définitive et pour conclure sur ce point, l'occupation de l'usine par les travailleurs a été:

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 poursuivre 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 par 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 contres des personnes (c.p. 581 (2)) ou par des menaces (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'agit encore une fois d'un délit poursuivable sur plainte et, comme on sait, aucune plainte n'a été déposée à ce sujet.

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 Gouvernement italien a réservé une place importante à ce sujet dans les défenses écrites et n'a nullement l'intention d'ennuyer la Cour en répétant ce qui a été déjà exposé.

Le but poursuivi consiste à donner un aperçu 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 était illégale et avait 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 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 prérévolutionnaire, 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 postmoderne.

Et une des valeurs modèles de cette pararévolution, 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 pararévolution a mis au premier plan la valeur institutionnelle de l'entreprise, considérée non pas (ou non seulement) comme un complexe 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 démon-

trer 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 1er 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'ailleurs d'« arbitraire ». Sans envahir pour autant les domaines qui sont du ressort des autres membres de la délégation, je voudrais exposer brièvement deux considérations qui excluent ladite qualification d'« arbitraire ».

La première a trait à une expérience américaine, celle de la Pewee Coal Company (duplique, **II**, p. 428 et suiv.), 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 ou 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 prise 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 dans les 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 la Sicile, n° 155 du 27 juin 1978, publiée dans *Il Consiglio di Stato*, 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. C'est là que se trouve le cœur 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 à 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 reconnaître 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 circonstance certaine de l'insolvabilité de la société à une époque immédiatement antérieure 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.» (Article 5 de la loi en matière de faillite.)

Les deux décisions ont été, comme vous le savez, confirmées par la Cour suprême de cassation (voir I, mémoire, annexe 82).

Or, la défense du Gouvernement 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 effectuée 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 de l'intérieur italien 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 et donc sans défense, et dont le juge ressent la nécessité de défendre les intérêts *ex officio*.

Et c'était exactement le cas dans l'affaire de l'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* (**II**, documents joints au contre-mémoire, n° 20), prévoyait que, si le recours n'était pas décidé dans un délai de cent vingt jours qui suivait 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 (**II**, 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 était 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, de quatre, de 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, M^e^ 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 succurunt*. Pour obtenir quelque chose il faut tout d'abord le demander.

Mais qui plus est, l'ordonnance de réquisition date, Monsieur le Président, du 1^er^ 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 dix-huit 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, un 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 au 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!

Cela 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, je dirais) 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 interessée 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 (**II**, documents joints à la duplique, n° 8), 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 dix-neuf 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 manœuvres tactiques visant à influencer les autorités réticentes à accueillir les demandes d'aides susmentionnées.

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'ordonnance 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 produire 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. Cela 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, comme le dira M. Bonelli; enfin parce que la faillite elle-même aurait pu être déclarée (et dû être déclarée) d'office.

Admettons toutefois, hypothèse absurde, qu'il y ait eu une relation entre le moment de la 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 aussi dont le retard avec lequel ils l'avaient présenté révélait clairement un bien faible intérêt de leur part.* Cela aurait été de la part du préfet vraiment un excès de zèle que M. de Talleyrand n'aurait pas approuvé!

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 effleurer à peine le sujet de l'épuisement des recours internes. Ce sujet ayant 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 au 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 des préjudices directs à la société même 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 — avaient 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 a parlé. Mais cette question et l'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'actionnaire 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, ci-dessus p. 109-110). 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 innommé 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).» (**II**, documents joints à la duplique, n° 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» *(ibid.)*.

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 l'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'importants 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 dans lesquelles il était 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 la citer, car le tribunal de Rome a affirmé d'une façon 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 allégations, 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, II, p. 376-377), 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 (ci-dessus p. 78).

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 sur le 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 mêmes, que ce comportement n'a nullement contribué à causer les conséquences alléguées par la Partie demanderesse; et, en tout cas, qu'il n'était pas propre à justifier des accusations quant à son caractère arbitraire ou discriminatoire.

L'audience, suspendue à 11 h 20, est reprise à 11 h 35

ARGUMENT OF PROFESSOR BONELL

COUNSEL FOR THE GOVERNMENT OF ITALY

Professor 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.

I. The Impact of the Requisition on the Prospect of ELSI's "Orderly" Liquidation

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 failed 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, **I**, pp. 43, 56 *et seq.*, Reply, **II**, pp. 366 *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:

(a) 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 oustanding debts. To the contrary Raytheon itself foresaw the payment of no more than 30 to 50 per cent to the unsecured creditors;

(b) 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;

(c) 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 (*cf. II, Counter-Memorial, Unnumbered Documents*, 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 oustanding debts were some 16 billion lire — is not 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 . . ." (cf. pp. 51-52, *supra*).

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 lira, 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 (cf. his Affidavit annexed to the Memorial of the Applicant, I, Ann. 17).

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" (cf. Memorial, I, p. 524; but the same view is repeated in the Reply, II, p. 368).

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 had 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 (*supra*, pp. 29 and 51, respectively) which clearly show that Raytheon at that time considered bankruptcy, and the so-called 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 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 criminal sanctions. 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*, Leiden, 1968, pp. 95 *et seq.*; D. A. Allen and U. Drobnig, "Secured Credit in Commercial Insolvencies. A Comparative Analysis", in *Rabels Zeitschrift*, 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 its assets . . . Substantial payments were due from ELSI, the maturities of which had not been extended." (Counter-Memorial, Unnumbered Documents, II, p. 233 [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 (cf. p. 67, *supra*).

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 (cf. Art. 217, No. 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 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*

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? (Pp. 62-63, *supra.*)

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.

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 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

According to the Applicant in its Memorial:

> "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." (I, p. 85.)

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" (p. 50, *supra*).

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" (cf. p. 41, *supra*).

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. For the pertinent literature on this subject see among others *Corte di Cassazione*, 14 December 1985, No. 6328, in *Dir. fallimentare*, 1986, II, p. 214; F. Roversi-Monaco, *Gli enti di gestione*, Milan, 1967, pp. 164 *et seq.*; M. T. Cirenei, *Le imprese pubbliche*, Milan, 1983, pp. 227 *et seq.*; F. Galgano, *La società per azioni*, Padua, 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 behaved 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.

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 . . . then moved to look at the other nine or ten companies in Raytheon Europe, all of whom needed some attention." (P. 51, *supra*.)

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, Ann. 15, Exhibit G, to the Memorial, I).

The same proposal was renewed to Raytheon 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 "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, Ann. 38 of the Memorial, I; see also the minutes of the meeting in Palermo on 19-20 April 1968, Ann. 37 to the Memorial, I).

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" (cf. Memorial, I, p. 55).

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 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 he therefore simply refused to assist Raytheon in implementing its liquidation plan, as long as Raytheon was not willing to adopt a generally acceptable solution.

But also the other announcement, repeatedly quoted by the Applicant last week that "in 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" — even this announcement, Mr. President, cannot be considered a threat at all, but merely represents a forecast of the likely course of a dispute initiated by an order of the Mayor of Palermo over which an appeal was hanging.

Moreover, it should not be overlooked that what I have quoted here is the English translation of Mr. Carollo's memorandum as prepared by the Applicant. In this translation the word "shall" is used — "Nobody in Italy shall purchase"; "the requisition shall be maintained", etc., — a word which for lawyers and judges has the universal ring of a command or of an imperative. But Mr. Carollo wrote in Italian; and in Italian he said "will", he did not say "shall"; he used the future indicative only — "Nessuno in Italian comprerà"; "La requisizione sarà mantenuta". Thus, from the original version of the memorandum, it results even more clearly that, in reality, Mr. Carollo was simply predicting and not threatening.

By the way, one further thing which the Applicant deliberately chose not to mention: as it is often the case with predictions, Mr. Carollo was proved wrong, since the requisition was lifted at the expiry of its initial six-month term, while the appeal was still before the Prefect.

On 13 November 1968, the Italian Government publicly announced that IRI was willing to acquire the ELSI plant.

According to the Applicant this represented undue interference with the on-going bankruptcy proceedings, in so far as this announcement allegedly discouraged other possible bidders from competing at later auctions (cf. I, Memorial, Ann. 29, Exhibit 4A).

Yet another totally unfounded allegation.

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, understandably exasperated after months of waiting for a possible solution to the ELSI crisis.

There was absolutely no danger of discouraging other potential buyers from bidding for the plant.

The Applicant himself merely states that there had been "a few enquiries ... from all over the place" for single production lines (cf. p. 55, *supra*), without even being able to indicate one single case, Mr. President — one single case! — where a potential buyer was actually prevented by the requisition from concluding a deal.

The same can be said for the other alleged interference with the bankruptcy proceedings, i.e., the lease of the ELSI plant to ELTEL for 18 months at the beginning of April 1969.

When, at the request of the receiver, the bankruptcy judge authorized the lease to ELTEL, two auctions had already been held without even one single bidder showing up.

Obviously at that time both the receiver and the majority of the creditors saw the hopelessness and danger of continuing to wait for the miracle of someone coming along willing to buy the plant. They therefore did not hesitate to take the chance offered by ELTEL to lease the plant for the time being — all the more so since the expected rental of 150 million lire was far from peanuts!

In this respect I can only express my great surprise in hearing last week the Applicant distort the truth by saying that the proposed lease was opposed by the creditors' committee (cf. p. 18, *supra*).

The creditors' committee did approve the proposal and only Raytheon thought that the lease represented a poor bargain, making the sale of the plant to third parties impossible.

Yet, as pointed out by the Tribunal of Palermo, the lease, far from making the sale of the plant impossible, actually made it easier since ELTEL was under an obligation to maintain the plant in perfect working order and to carry out all the repairs and replacements due to normal wear and tear (cf. Memorial, Ann. 64, **I**, p. 342).

If the reasoning of the Tribunal was so unacceptable, why did Raytheon's usually so extremely diligent counsel fail to appeal the decision? We do not know. And what does the Applicant itself have to say as a serious criticism of the reasoning of the Tribunal?

Nothing, I am afraid.

(b) *The Price Paid for ELSI's Plant Was Perfectly Reasonable under the Circumstances*

Let us now deal with the argument that the Italian Government, after discouraging private bidders and boycotting the auctions, took ELSI's plant at an unfairly low price.

It is a matter of fact that three of the auctions called by the bankruptcy judge between January and July 1969 were completely unattended, and only at the fourth auction held on 12 July 1969, did ELTEL make a bid which was accepted in the absence of any other bidders.

This is what happened notwithstanding the extensive publicity given to each of the four auctions in both the national and the most important international foreign press.

And in this respect, I would like to bring to the Court's attention the fact that the Applicant, in order not to compromise its allegations completely, once again has felt it necessary to play with the documentation: photocopies of a number of the newspaper advertisements, which were attached to the 1974 Claim (cf. **II**, Exhibit III-19), no longer appear among the documents annexed to the present claim!

Yet the Applicant goes even further in its allegations, by accusing ELTEL of boycotting the first three auctions and seeking to unduly push down the price (cf. Memorial, **I**, pp. 86 *et seq.*, Reply, **II**, p. 372).

In this respect I simply want to say that I personally have never heard of any auction in bankruptcy where the bidders, instead of trying to pay the lowest possible price, rush off to the auction to pay the highest price, or in any case,

the first asking price! Why then should ELTEL have done so? All the more so, since, as repeatedly stressed, it was certainly not for economic considerations that it ultimately decided to purchase the ailing company.

On 12 July 1969, at the fourth auction, ELSI's plant and equipment, together with part of the supplies, were put up for sale at the starting price of 3,200 and 800 million lire respectively. ELTEL was the only bidder, and the whole lot was adjudicated to it at the total price of 4,006 billion lire.

According to the Applicant this was a ridiculously low price: the Italian Government is accused of having IRI purchase the ELSI assets "without paying a freely market-determined price" (cf. Memorial, I, pp. 62-63).

Mr. President, distinguished Members of the Court, let us be realistic and keep the world of fantasy at bay! By this stage — we were at the fourth auction, after the first three had been unattended! — to suppose that the sale of the plant could take place according to a "freely market-determined price" was totally out of the question: the issue is therefore not to see whether ELTEL had purchased at less than a fair market price, but rather, whether the price paid could be considered reasonable under the circumstances!

To this end the first thing, obviously, is to establish the value of the property in question.

Now the Applicant refers to an alleged "book value" of 12 billion lire (cf. Memorial, I, p. 97), but this is a totally unreliable and unrealistic figure.

First of all, because of the general considerations put forward by my colleague, Professor Libonati, on the unreliability of ELSI's balance sheet on 31 March 1968.

Secondly, it refers, apart from the plant and equipment, to all the supplies existing at that time — I mean at 31 March 1968 — while the supplies actually acquired by ELTEL in 1969, at the auction, were very limited. Many of them had been previously sold off by the receiver.

And not even all of what was left was put up for auction: in fact, the package offered did not include — contrary to the request put forward by ELTEL before the auction — any raw materials or finished products, nor the semi-finished products for semiconductors. In other words, quite a substantial part of the supplies which were still on the premises was not purchased by ELTEL!

If we want to be serious, only two estimates of the value of the assets can be taken into consideration.

Firstly, the "quick-sale" value, worked out by ELSI's management itself. Secondly, the judicial evaluation carried out by Engineer Puglisi in October 1968.

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.

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 (cf. **II**, pp. 19 *et seq.*).

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, Counter-Memorial, Unnumbered Documents, pp. 233-234 [p. 72]). 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?

QUESTION PUT BY JUDGE SCHWEBEL

Judge SCHWEBEL: 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?

Professor BONELL: Mr. President, that is entirely up to you.

The PRESIDENT: If you want to reply now, you may do so.

Professor BONELL[1]: 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 — this was 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 already 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 equal 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 (**II**,

[1] For a written supplement to this oral reply to the question put by Judge Schwebel, see Correspondence, No. 77, *infra*.

Docs. 37, 38 and 39), 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 there 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 was ended 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 that 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 Chamber rose at 1 p.m.

HUITIÈME AUDIENCE PUBLIQUE (22 II 89, 10 h)

Présents: [Voir audience du 13 II 89.]

DÉCLARATION DE M. FERRARI BRAVO

AGENT ET CONSEIL DU GOUVERNEMENT DE L'ITALIE

M. FERRARI BRAVO: Nous voulons seulement compléter la réponse donnée hier à la question posée par M. Schwebel [1], réponse donnée par M. Bonell [2]. Nous avons transmis au Greffe et, je crois comprendre, aussi à la Partie américaine, deux pages [3] 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. C'est tout ce que je voulais dire.

Le PRÉSIDENT: 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 «complément» à la délégation américaine.

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[1] Voir ci-dessus p. 211.
[2] Voir ci-dessus p. 211-212.
[3] Voir ci-après, correspondance, n° 77.

PLAIDOIRIE DE M. CAPOTORTI

CONSEIL DU GOUVERNEMENT DE L'ITALIE

M. 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 comme 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.

* * *

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 troisème 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.

* * *

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 refléteraient 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. Cela 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 on 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 et 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 étaient 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 en conformité avec les 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 1951?

Il est notoire que les cas où les actionnaires étrangers d'une société, et non pas la société elle-même, sont expressément protégés à l'échelon international entraînent 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* (*C.I.J. 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 reconnaisssant 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» (*C.I.J. 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» (*C.I.J. 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, C.I.J. Recueil 1970, arrêt*, p. 36, par. 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 ambiguïté des droits subjectifs aux actionnaires américains d'une société italienne — ou bien aux société 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 (ci-dessus p. 113). Tout au contraire, elle est la seule interprétation acceptable. La plupart des dispositions du traité et de l'accord complémentaire 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 jouiraient 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 incorporated subsidiaries was protected in 1948 and it is protected today.» *(Ibid.)* 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 soient 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 (ci-dessus p. 98), nous répondons que notre manière de procéder 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 de 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 du contrôle et à la prise de la direction des sociétés auxquelles 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'étaie 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 des 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 resssortissants 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 dont 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 limites 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 conventionnel ou par le droit 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.

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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 au 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 High 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 du 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 les 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 authentifiés 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 (ci-dessus p. 103). 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 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 l'annexe E de la loi n° 2248 de 1865, qui 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: une autre loi donc. 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 être influencé par l'état du droit interne de l'Etat obligé — un principe que M. Gardner a eu l'amabilité de nous rappeler (ci-dessus p. 110) — 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 a 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 et du texte anglais et 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.

* * *

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

jouissaient 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 étayée que par le point 1 du protocole annexé au traité. Nous avons déjà vu que ce point étend l'application des dispositions du paragraphe 2 de l'article V, qui prévoient le paiement d'une indemnité:

> « 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 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 ».

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 de la *Barcelona Traction* (*C.I.J. 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 indemnité ». 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 indemnité pour les biens expropriés, mais il prévoit aussi, en deuxième lieu, en faveur de « ceux qui recevront une telle indemnité », 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 indemnité: 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 pas 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, societés et associations de chaque partie contrac-

tante — 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.

* * *

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 indirects d'un droit de propriété sur les biens de l'ELSI. Cela 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 detaillée. 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 nécessairement 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* 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 enfreinte 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 pour 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 phrase 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, on 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 de 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 droits 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 appartenait, 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'expression «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 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 prétendus droits réels mineurs, tels que l'usufruit ou l'hypothèque.

En définitive, l'article VII, paragraphe 1, du traité de 1948 n'étaie 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.

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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: elle était 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 membres 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: afin qu'elles puissent obtenir, à des conditions normales, les capitaux, les procédés de fabrica-

tion 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 œuvre 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 et relatif au projet de convention en matière de responsabilité internationale des Etats pour les préjudices causés 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, paragraphe 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, mais à condition que cet organe soit autorisé par le droit interne à exercer les pouvoirs d'une autorité publique, et dans la mesure où il agit dans le cadre de l'exercice de ces pouvoirs, relativement à l'affaire en cause. Cela 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. Cela étant, cette disposition ne saurait être invoquée avec succès par les Etats-Unis.

La conclusion susmentionnée 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 et intérêts» des ressortissants et des sociétés de chaque partie contractante, dans les entreprises qu'ils ont acquises et dans les investissements qu'ils ont effectués 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 *repetita juvant* 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 intérêts 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 essayé fortement de «démoniser» ces autorités ne devrait pas avoir pour conséquence de mettre à leur charge toutes les conséquences des erreurs de Raytheon.

L'audience, suspendue à 11 h 35, est reprise à 11 h 45

PLAIDOIRIE DE M. MONACO

COAGENT ET CONSEIL DU GOUVERNEMENT DE L'ITALIE

1. PRÉMISSE

M. MONACO: 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 Gouvernement 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 CARACTÈRE 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 hypopthèse.

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 des prétendus faits illicites.

L'un de ces prétendus 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'État

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 réjudice qui n'a pas été « prouvé avoir été une conséquence réelle et inévitable » (affaire *Yuille et Shortridge*, dans Lapradelle et Politis, *Recueil 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 *Rémy-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, M^me^ 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 empêchée de transférer en Italie les fonds nécessaires pour payer les intérêts échus d'une hypothèque sur cette maison. Puisque

> « la situation pécuniaire de M^me^ Reverand était, avant le 10 juin 1940, obérée à tel point que depuis mais 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 » (réplique, II, p. 393).

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 (*ibid.*, p. 395). Cela est difficile à admetttre 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 cinquante pour 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, **II**, p. 396), comme le soutient le Gouvernement des Etats-Unis. Il faut aussi exclure qu'une telle évalutation, 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*» *(ibid.)*. 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 faite 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 l'évaluation fut faite sur une «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 évalutations du demandeur n'ont aucune signification. L'alternative à la «going concern basis» est la «break up value basis», utilisée nécessairment 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 basis» est bien ce à quoi l'on a procédé dans la faillite.

Ce n'est certes pas à la partie défenderesse — 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'évalutation. Comme nous l'avons déjà indiqué dans le contre-mémoire (**II**, p. 47), 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 assez compliquée des intérêts.

5. Le prétendu recouvrement des frais de justice et de procédure

Premièrement, outre les observations présentées dans le contre-mémoire italien (**II**, p. 48), quelques autres remarques peuvent être formulées au sujet des frais de justice et de procédure selon la présentation faite par Raytheon. Malgré les affirmations du Gouvernement 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 considérées, de toute manière, comme une conséquence directe des agissements de la Partie défenderesse (réplique, **II**, p. 393-394). 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 Responsibility 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 note 2, page 394, de la réplique (**II**):

> «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 incurrence of which was necessary to obtain reparation on the international plane*».

Il faut enfin souligner que les frais de justice ont été attribués 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, tous autres frais de justice éventuellement supportés par Raytheon ne peuvent apparaître admissibles 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, dont l'importance que lui accorde la partie demanderesse, surtout s'agissant d'intérêts composés, confère

à la réclamation une dimension que l'on peut qualifier d'astronomique en l'état des choses.

La thèse de la partie demanderesse peut être résumée 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-United States Claims Tribunal has not awarded compound interest. » (Ci-dessus p. 137.)

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 les précédents judiciaires et arbitraux.

Il cite par exemple l'affaire célèbre du *Vapeur* Wimbledon (*C.P.J.I. 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 *S.S.* "*Wimbledon*" case, take account of "the present financial situation of the world", including contemporary rates of interest (*S.S.* "*Wimbledon*", *Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 32). » (Ci-dessus p. 136.) 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% 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. » (*C.P.J.I. série A n° 1*, p. 32.)

M. Ramish cite également (ci-dessus p. 135) la phrase suivante d'une décision de la troisième chambre du tribunal des réclamations Iran-Etats-Unis dans l'affaire *McCollough* (*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 successful 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 (ci-dessus p. 135), 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 with the 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 gouvernement, qu'aucune violation n'ayant été commise, il n'y a pas lieu à une quelconque réparation.

EVIDENCE OF MR. HAYWARD

EXPERT CALLED BY THE GOVERNMENT OF ITALY

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 agréés. 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 général 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[1] 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 I, page 108, of the Memorial 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." (P. 117, *supra*.)

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[1] See Correspondence, No. 78, *infra*.

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 values 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 (I, pp. 135-136) 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.

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." (P. 128, *supra*.)

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 on page 51 (I) of the United States Memorial.

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.

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.

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.

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: During you 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.

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 état 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 Chamber rose at 12.50 p.m.

NINTH PUBLIC SITTING (23 II 89, 10 a.m.)

Present: [See sitting of 13 II 89.]

ARGUMENT OF MR. HIGHET

COUNSEL OF THE GOVERNMENT OF ITALY

The PRESIDENT: 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.

Mr. HIGHET: 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 (e.g., pp. 17-18, *supra*). 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 with, and . . . [to] refer to the documentary evidence which supports its position".

The Court has also heard 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.

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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 Raytheon's subsidiary Machlett Laboratories.

The factual harvest available to Applicant is therefore not of its own making. It may well be the case that Applicant's more extreme and tendentious characterizations have been quite naturally based on the long-term 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.

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 *injuria* 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.

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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 of 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 (p. 169, *supra*). 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 to be a "conspiracy". Perhaps now Applicant will come back and say that all they are denying is that there was sort of a "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)[1].

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 — at I, page 43 — 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).

At I, page 63 of the Memorial, 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 (I, p. 80),

> "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 in 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 (I, p. 85),

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[1] See Correspondence, No. 69, *infra*.

"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 (I, p. 86):

"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 8 March 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 possi-

bility 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.

At I, page 87 of the Memorial, 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.)

At I, page 89, the Memorial said

> "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 (I, pp. 106-107)

> "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, at I, page 109, 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 at **II**, pages 384-385:

> "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.*, p. 385, 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 innuendoes 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*" (p. 18, *supra*; italics added).

Later on, on that same morning of the first day, Mr. Matheson 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." (P. 34, *supra*; italics added.)

On the same 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.*" (P. 97, *supra*; 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 innuendoes. 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 things and persons Italian 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 it is 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?

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 then is 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: then Applicant's cause of action does not 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 gone 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 of the shareholder 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 (pp. 40, 60, *supra*). We learned that the top officer on the spot did not think that they could make the next payroll (p. 60, *supra*). We also learned that the same officer conceded that ELSI was "belly up just before the requisition" (p. 60, *supra*). We learn that he said that "It was impossible to get rid of anybody there" (p. 49, *supra*), and that even to get "rid of two people off the television line" caused a three-week strike (pp. 49, 63, *supra*).

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 (p. 31, *supra*). 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 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 product 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 suggestions 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 as a question would have been, 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 (Italian Rejoinder, **II**, pp. 445-446).

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]." (I, p. 43; 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?

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 was also plain to see, and in fact undenied — and even admitted against interest — by high United States 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 (I, United States Memorial, Ann. 38), 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 (p. 101, *supra*)".

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 (p. 208, *supra*).

Now, does Applicant not have to prove something more, in order to establish a "conspiracy" or a "boycott" — a 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 innuendoes, 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 linked 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.

Third: 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 (II, pp. 473-476) has set forth the principles and authorities 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. (See the handwritten minutes of the meeting of 20 February 1968.) It was "*belly up* just before the requisition", according to Mr. Clare (p. 60, *supra*). 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 (II, p. 434), 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? 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 — 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 she suing the United States under the Treaty, would have to do.

The Chamber adjourned from 11.10 to 11.30 a.m.

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 *grand lignes* of 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

that 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. (See for example United States Memorial, **I**, pp. 46, 48–50; Adams affidavit (Ann. 9 to the United States Memorial) at para. 28; Schene affidavit (Ann. 13 to the United States Memorial) at para. 12; and Clare affidavit (Ann. 15 to the United States Memorial) at paras. 21-42; United States Reply, **II**, pp. 365-366; and see *(contra)* Italian Rejoinder, **II**, pp. 442-443.) 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 was 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 was 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 benefit, 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 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 (United States Memorial, Ann. 22, **I**, p. 224). 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 at page 45, *supra*.

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, that there is neither proof nor persuasion and every component of this theory just evaporates when you look at it carefully.

Mr. President, upon 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 1½ 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" (Exhibit F to the Clare affidavit, United States Memorial, Ann. 15, I, p. 164).

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 *(ibid.)*", 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 (see Mr. Clare's testimony, p. 49, *supra*)? 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 calender 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 . . ." (Exhibit G to the Clare affidavit, United States Memorial, Ann. 15, I, p. 181).

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" *(ibid.)*.

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) (Exhibits F, G and H to the Clare affidavit, United States Memorial, I, Ann. 15) — 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 — seems 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 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 United States 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", weren't 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 dismissals 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 that 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 (p. 57, *supra*).

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 was due to Banca Nazionale del Lavoro on 18 April (see II, Unnumbered Documents Submitted by Italy annexed to the Counter-Memorial, Exhibit III-16, [p. 179]/Memorial, Ann. 43, p. 311), 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 and requisitions 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.

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.

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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 it, 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 [1]; the second was the 1973 Judgment of the Court of Palermo [2] on that question; the third was the 1974 Judgment of the Court of Appeal of Palermo, reversing the lower court decree [3]; and the last was the 1975 Judgment of the Court of Cassation [4]. 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 dealt with a number of the very issues that are before the Court here today (these are dealt with in the United States Memorial, Ann. 80, I, pp. 374-375), 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" (*ibid.*, p. 375).

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 . . ." (United States Memorial, Ann. 81, I, p. 382.)

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) [5]. There is also a court decision approving the lease to ELTEL [6] and a

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[1] Complaint dated 16 June 1970 (I, United States Memorial, Ann. 79).

[2] *Judgment of 2 February 1973 (I, United States Memorial, Ann. 80).*

[3] 24 January 1974 (I, United States Memorial, Ann. 81).

[4] 26 April 1975 (I, United States Memorial, Ann. 82).

[5] These include the Judgment of the Prefect of Palermo of 22 August 1969 (I, United States Memorial, Ann. 76); the appeal to the Council of State of that decision in turn decided on 19 November 1971 (*ibid.*, Ann. 77); 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 (*ibid.*, Ann. 78).

[6] Decree of the Civil and Criminal Tribunal of Palermo of 9 May 1969 (I, United States Memorial, Ann. 64).

judicial confirmation of the approval of ELTEL's offer to purchase the remaining physical assets [1].

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 chain of causation? To the burdens of proof and persuasion? The question, I submit, Mr. President, answers itself.

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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 (**II**, pp. 431-432):

> "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" (**II**, p. 432).

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 (Italian Rejoinder, **II**, p. 432). The pleadings of the United States — and most specifically the affidavit of Dr. Bisconti (**I**, United States Memorial, Ann. 26) — 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 (Nett affidavit, United States Memorial, Ann. 30, **I**, p. 250). 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.

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[1] 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, **I**, United States Memorial, Ann. 26, para. 24. (Exhibit 38 of "The Claim"; see Italian Counter-Memorial, **II**, pp. 19-20.)

Even the Merluzzo affidavit annexed to the United States Memorial (**I**, Ann. 21) fails to convince the reader.

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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, non-existent. 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 benefited 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? 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 (p. 124, *supra*).

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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 that 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 premises, 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 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 disasters that would surely have befallen it when the workers got the word on Monday morning.

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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 innuendo: 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 (pp. 16, 113, *supra*).

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, pages 98 to 100, *supra*. 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 United States 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 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, possessing the legal power, protected under the Treaty, to engage 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*'" (Carroll, *Through the Looking Glass*, 1896 (1965 ed.), p. 94 (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 page 99, *supra*, of his *compte rendu*, 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 analysed 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.]".

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, at page 98, *supra*, that part of Article III "expresses a treaty right that is not qualified by a national treatment 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 licence to conduct an enterprise without regard to corporate laws, bankruptcy laws, and the laws and rights of creditors generally.

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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 a remedy under a treaty, just because it happened abroad. *Injuria 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.

STATEMENT BY MR. FERRARI BRAVO

AGENT FOR THE GOVERNMENT OF ITALY

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."

QUESTIONS PUT BY JUDGES ODA AND SCHWEBEL AND BY THE PRESIDENT

The PRESIDENT: At this stage of the proceedings, and before the second round pleadings, some Judges want to put questions to the Party.

Judge ODA: 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[1]?

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]?
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[2]?

Judge SCHWEBEL: 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[1]?

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]?
2. And much more generally, what in the view of the Respondent were the purposes of the requisition? Were those purposes achieved[2]?
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

[1] See Correspondence, Nos. 81 and 85, *infra*.
[2] *Ibid.*, No. 85, *infra*.

> "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[1]?

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[1]?

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[1]?

6. Volume I of the Unnumbered Documents submitted by Italy with its Counter-Memorial (II) 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 view of the terms of this letter, is there ground for complaining of lack of notice[1]?

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[1].

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[1] See Correspondence, No. 85, *infra*.

The PRESIDENT: 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 Stockholders' 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 Stockholders' 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[1]?

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[1]?

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.

The Chamber rose at 1 p.m.

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[1] See Correspondence, Nos. 81 and 85, *infra*.

TENTH PUBLIC SITTING (27 II 89, 10 a.m.)

Present: [See sitting of 13 II 89.]

STATEMENT BY THE PRESIDENT

The PRESIDENT: The Chamber received, a few minutes ago, a letter[1] 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[2], 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.

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[1] See Correspondence, No. 80, *infra*.
[2] *Not reproduced.*

REPLY OF MR. MATHESON

CO-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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" (p. 267, *supra*) and "complete madness" (p. 175, *supra*), and likened our logic to that of certain characters from Lewis Carroll (p. 271, *supra*). 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 (p. 95, *supra*).

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-ordinated 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 (p. 246, *supra*), 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" (pp. 246-247, *supra*). 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 had 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 (p. 128, *supra*) 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 (p. 246, *supra*). 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 (p. 249, *supra*). 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 (I), 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, had 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 eclectic 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 proportions'." (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 circumstances 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" (pp. 246, 156-157, *supra*.

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 United States 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 *RIAA*, 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, I.C.J. 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 Ships* 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 *RIAA*, 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 own 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 (pp. 158-159, *supra*). 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 United States law

during the Second World War (*Interhandel, Judgment, I.C.J. 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 (*ibid.*, 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 United States 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". (*I.C.J. Pleadings, Interhandel*, p. 319; see also *Chorzów Factory* case, *P.C.I.J., Series A, No. 6*, p. 20.)

It is also important to note that the critical element in the *Interhandel* case was the fact that a United States court was actually considering the Interhandel claim at the time the case was before this Court (*Interhandel, Judgment, I.C.J. Reports 1959*, 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 purpose 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 disputes 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 Responsibility (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 based 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 (p. 160, *supra*).

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 (pp. 77-78, *supra*), 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 (pp. 72-77, *supra*).

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" (p. 164, *supra*) 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 (pp. 160-161, *supra*). 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 (I, Memorial, Ann. 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, Ann. 81, I, pp. 382-384).

Now there are some differences between 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, Judgment*, 1939, *P.C.I.J., Series A/B, No. 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 (pp. 266-267, *supra*). 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 *RIAA*, 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, I.C.J. 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 framework 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 (pp. 85-87, *supra*). 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 nationals is "irreceivable" by another State if local remedies have not been exhausted (p. 156, *supra*), 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 (pp. 87-90, *supra*).

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 (p. 157, *supra*). 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" (p. 158, *supra*). 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 *(ibid.)*. 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 United States 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 United States court case had failed (p. 158, *supra*). 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 United States Trading with the Enemy Act (*I.C.J. Pleadings, Interhandel*, p. 25 (Swiss Note of 4 May 1948), p. 27 (United States Note of 26 July 1948), p. 35 (United States 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 United States 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.

QUESTION PUT BY JUDGE SCHWEBEL

Judge SCHWEBEL: Mr. President, on the subject of local remedies: may I ask a question of the United States 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?

Mr. MATHESON: Mr. President, I know the answers to those questions but, if I might, I would prefer to answer them this afternoon[1], after we have thoroughly looked at the record.

The PRESIDENT: Of course you can answer in the afternoon if you wish.

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[1] See p. 450, *infra*.

REPLY OF MS CHANDLER

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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 ensuing 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, I, p. 106). We submit, however, that the positions 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" (p. 267, *supra*). 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 Government 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 (I, Memorial, Ann. 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 sub-contract work. At the end of the year, the sub-contract 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 United States 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 shareholders' 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 and irons, 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 SARL, 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, licences, 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 (p. 28, *supra*).

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" (p. 174, *supra*). 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, licences, 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 ensure 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 licence 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 (and I refer to the Respondent's Document 44) that the quality of the television tubes was "quite good" (Counter-Memorial, Doc. 44, **II**, p. 230).

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 (p. 53, *supra*).

I should point out that ELSI bought no glass tubes from Russia as was asserted by the Respondent (p. 167, *supra*). 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 white line had a good 10-year life of potential sales and profit (p. 53, *supra*).

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 licence for colour television tubes *(ibid.)*.

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 (p. 54, *supra*).

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 (p. 54, *supra*).

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, Doc. 44, **II**, p. 230). 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.

Semiconductors. It has not been disputed that prior to 1967 the semiconductor 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 Semiconductors.

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 semiconductor line, TAG would have taken it over.

The Respondent's only specific assertion with respect to the semiconductor line is that it utilized germanium technology which had been obsolescent for many years (p. 167, *supra*). 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 (p. 54, *supra*).

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 licence and know-how (pp. 27-28, 54, *supra*). 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 (p. 267, *supra*). 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 (p. 203, *supra*). 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 (**II**, Counter-Memorial, Unnumbered Documents II-24 to II-28; p. 55, *supra*). 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 (p. 46, *supra*). 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, and 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 (p. 66, *supra*).

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, I, p. 58). These negotiations were never completed because of the decision by the Italian Government to purchase ELSI's assets in the bankruptcy process *(ibid.)*.

The Respondent does not take issue with Professor Bonelli's detailed statement of Italian law, and announces instead that it is "irrelevant" (p. 201, *supra*). Curiously, the Respondent then devotes most of its argument to United States bankruptcy law. ELSI, however, was governed by Italian law, not United States law, and United States 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.

QUESTIONS PUT BY JUDGE SCHWEBEL AND THE PRESIDENT

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.

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 licences, 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[1].

The Chamber adjourned from 11.30 a.m. to 11.45 a.m.

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[1] See Correspondence, No. 81, *infra*.

STATEMENT BY MR. BISCONTI

ADVISER FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Ms CHANDLER: 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.

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 accomplish 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.

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.

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 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 was 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 practising 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.

The PRESIDENT: 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 Sir Robert 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[1]. Judge Schwebel, do you wish to put a question to Mr. Bisconti?

Judge SCHWEBEL: 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 was, 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[1].

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[1] See Correspondence, No. 81, *infra*.

REPLY OF MS CHANDLER *(cont.)*

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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*" (p. 244, *supra*, 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 (p. 149, *supra*) 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 worker's 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 reason, 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 (I, Memorial, Ann. 13, para. 14; Ann. 15, para. 53; Ann. 17, para. 14; II, Reply, p. 15) and in these oral proceedings (p. 51, *supra*). 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 (pp. 168-169, *supra*). 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 (I). 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 exchange 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.

Moreover, 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 performance 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 programme. 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 (I), 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" (p. 267, *supra*). 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 (pp. 185-186, *supra*). 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 by Cerruti in defending against creditor actions)).

The Respondent's reference to the practice of the Iran-United States 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 *Chorzów Factory* case, the reparation which is due "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" (*Chorzów Factory, Merits, P.C.I.J., Series A, No. 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 (*S.S. "Wimbledon", P.C.I.J., Series A, No. 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 non-performance (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 Sainto*. 51, 55-56 (1983).)

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.*" (P. 241, *supra*, 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 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 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 decide 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.

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 afternoon'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.

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?

QUESTIONS PUT BY JUDGES SCHWEBEL AND ODA

Judge SCHWEBEL: 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[1]?

Judge ODA: 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[1].

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.

The Chamber rose at 12.50 p.m.

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[1] See Correspondence, No. 81, *infra*.

ELEVENTH PUBLIC SITTING (27 II 89, 4 p.m.)

Present: [See sitting of 13 II 89.]

STATEMENT BY MR. BISCONTI *(cont.)*

ADVISER FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

The PRESIDENT: 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.

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 clients' 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 without qualification, in the independence of the lawyer and of the legal profession. Independence in 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.

Mr. HIGHET: 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" (p. 300, *supra*). At the bottom of that page 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 backing" (pp. 300-301, *supra*). 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. 301, *supra*). At page 302, *supra*, which admittedly was a different part of your statement but still did contain, I submit to you, Avvocato Bisconti, statements or conclusions of fact, you testified 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, on the same page 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" (p. 300, *supra*), to "backing" (p. 301, *supra*), to "assurance" *(ibid.)*, to "commitment" (p. 302, *supra*) and once again, to "backing" *(ibid.)*. Let me go back to page 301, *supra*, 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 Oppenheim (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 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 (p. 300, *supra*) "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, that 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", a "commitment" and a "backing", and I gave the citations. Now, Avvocato Bisconti, are you aware or do you know, today, or did you know, whether any of these ideas: guarantees, backing, assurance or commitment were expressed? How 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 in 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 maintaining employment.

Mr. HIGHET: But the assurance of which I believe you agreed 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 it 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 (I), 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 paragraph 4 at I, page 236, 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

> "I was 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, 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, paragraph 32, I, page 122, 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 . . . " (P. 40, *supra.*)

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. 300,

supra). 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 Profumo 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, Ann. 15, I, p. 164.)

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 your 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.

EVIDENCE OF MR. LAWRENCE

EXPERT CALLED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA

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 I, page 250, of Mr. Nett's affidavit (Ann. 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 United States 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 stockholders' 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 prepared 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 application, 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 the products or mode of manufacture" (Unnumbered Documents submitted by Italy, II, p. 353 [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, Ann. 13, I, p. 131).

Inventories

9. 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 (pp. 51-56, *supra*). 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 (p. 56, *supra*). Professor Libonati has referred to the suggestion in Dr. Mercadante's report that a debt of 246 million lire due from Noya Alfred Enateckmer was irrecoverable (p. 175, *supra*). 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 "Neye Alfred Enatechnik" 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 (p. 51, *supra*). 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: 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 is expected to listen to from an expert witness, some sort of "plaidoyer". But anyway he has offered testimony 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 was 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.

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.

Mr. MATHESON: 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.

The PRESIDENT: 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.

Mr. MATHESON: 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 a thick 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.

REPLY OF MR. MATHESON

CO-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. MATHESON: 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 régime 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 (p. 92, *supra*) 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:

> "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 régime 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" (pp. 219, 222, 227, *supra*). 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 (p. 217, *supra*).

This argument is incorrect and, at best, it is one of form over substance. The *true* effect of these acts struck at rights of United States 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 (pp. 217-218, *supra*). 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 (pp. 92, 98, *supra*).

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 United States 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 party 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 United States corporations merely the "faculty" or the formal right to organize, manage and control Italian corporations (p. 219, *supra*) but gives no ongoing or "operational" protection to the parent corporation from any interference with those rights (p. 271, *supra*). 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 Respondent'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 (p. 272, *supra*). 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 (p. 229, *supra*).

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 (p. 447, *infra*) to a question asked by Judge Schwebel (p. 211, *supra*), 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 (p. 276, *supra*), 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 (p. 229, *supra*). 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 (p. 231, *supra*). 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 compensation. Again, to summarize briefly Professor Gardner's more lengthy argument (pp. 105-111, *supra*), 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 is 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 (pp. 105-108, *supra*), 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 (p. 225, *supra*), 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, I, p. 89). 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 supports our interpretation, whether this is considered as a "functional interpretation" or an interpretation based on the intention of the Parties (p. 215, *supra*).

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, I, pp. 89-92; p. 105, *supra*) 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 (p. 227, *supra*). 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 (I, Memorial, Ann. 21). Once again, the failure to provide protection against this occupation constitutes a violation of the duty owed by the authorities of the Respondent, 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 (pp. 185-186, *supra*). 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 (I, Memorial, Ann. 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 (I, Memorial, Ann. 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 workers' 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 bankruptcy 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 circumstances 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 substantial 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 defence 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 bank-

ruptcy 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 purpose, 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 its 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[1]. 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 honour of appearing before you, for your consideration of our case and

[1] See Correspondence, No. 83, *infra*.

for your kindness to all of us. Mr. President, this concludes the presentation of the United States in these proceedings.

The PRESIDENT: On behalf of the Chamber I thank you very much for the assistance received from the American delegation.

The Chamber rose at 5.50 p.m.

TWELFTH PUBLIC SITTING (2 III 89, 10 a.m.)

Present: [See sitting of 13 II 89]

STATEMENT BY MR. FERRARI BRAVO

AGENT FOR THE GOVERNMENT OF ITALY

The PRESIDENT: I have received a few minutes ago a letter from the Agent of Italy [1] 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.

Mr. FERRARI BRAVO: 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 caused the bankruptcy 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.

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[1] See Correspondence, No. 85, *infra*.

REJOINDER OF MR. HIGHET

COUNSEL FOR THE GOVERNMENT OF ITALY

Mr. HIGHET: 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" (Rules of Court, Art. 60, para. 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.

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 23 February I took considerable pains to illustrate this element of Applicant's case and devoted, as you will remember, no fewer than 6 pages of argument to citing chapter and verse throughout the pleadings of where the conspiracy, the concerted action, occurred in Applicant's pleadings (pp. 247-252, *supra*).

But Applicant in the rebuttal arguments has not really dealt with this point at all (see pp. 280-281, *supra*). 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 (see, e.g., Ms Chandler at p. 305). It *was* clearly and emphatically described this way, as a "*series of concerted actions*", in the Memorial (I, p. 85; see p. 249, *supra*; emphasis added) — as a "*national government plan*" by my friend, Mr. Matheson, in the first round (p. 34, *supra*; see also p. 251, *supra*; emphasis added) — or as "the Respondent's *plan to take over ELSI* through its State-owned conglomerate", by Professor Richard Gardner (p. 97, *supra*; see also p. 251, *supra*; emphasis added).

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 — and also to its submissions.

Now the remaining case has shrunk in size and it has also been split up into *little bits*. Now we predicted this quite accurately, last week (p. 248, *supra*). We said this was going to happen and lo and behold it has. The complaint of the United States in this case is now shrunken, it has *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." (P. 280, *supra*.)

True, Professor Gardner also listed these four specific acts (p. 95, *supra*). 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 (pp. 96-97, *supra*). He was quite naturally impelled by the logic of the United States case, and this was 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.*" (P. 97, *supra*; emphasis added.) 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 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." (P. 106, *supra*; emphasis added.)

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 United States case or of the Treaty or Supplement (see, e.g., pp. 95-100, *supra*).

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 responsibility." (P. 247, *supra*; emphasis added.)

Mr. President, this dilemma is still — unhappily for Applicant — alive and well, and its horns are very sharp indeed (pp. 89-90, 247 and 252-253, *supra*).

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 (see p. 247, *supra*). 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 'causal link'" (p. 281, *supra*), 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." (*ibid.*; emphasis added.)

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, 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 upon 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." (P. 153, *supra.*)

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 by 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 *injuria*. 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 *injuria sine damnum*. And this might well comport with Applicant's new theory that it is now seeking a "declaratory judgment", 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 behove Applicant, or it would have behoved 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 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 acquisition of ELSI* by the Respondent for well below what it was worth." (P. 327, *supra*; emphasis added.)

There was precious little recognition, it seems, in Applicant's arguments on Monday of the problem of satisfying the burdens of proof and persuasion (see pp. 151, 154 and 252-254, *supra*). 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" (p. 282, *supra*; emphasis added) — 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 the 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* . . ." (p. 306, *supra*; emphasis added). Well it was *easily* overlooked. 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" (I, Memorial, Ann. 15, para. 53, as cited on p. 306, *supra*; emphasis added).

And 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" (II, p. 367). 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" (pp. 300, 301 and 302, *supra*; see also p. 314, *supra*). 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 (p. 316, *supra*).

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" (Memorial, Ann. 15, I, p. 173). 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" (p. 281, *supra*) — 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 cash flow necessary to made the liquidation work" (p. 51, *supra*; emphasis added).

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" (p. 293, *supra*; emphasis added); as a series of "possibilities" by which Raytheon and Machlett could have benefited ELSI (p. 298, *supra*); and as a "commitment" (p. 302, *supra*) or as a "backing" (*ibid.*).

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*" (p. 332, *supra*; emphasis added)

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* . . ." (p. 333, *supra*; emphasis added).

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 liquidation 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 obligations 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 succeed 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. 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 fides* 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 (Reply, **II**, pp. 384-385). It has stated that "the planned closing was not a *bona fide* public emergency, nor was the requisition a *bona fide* public response" (Memorial, **I**, p. 80). 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." (P. 334, *supra*; emphasis added.)

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 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" (1974 Claim, p. 15; Unnumbered Documents Submitted by Italy, II, pp. 233-234 [p. 21]; emphasis added).

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*" (1974 Claim, p. 35; Unnumbered Documents Submitted by Italy, II, pp. 233-234 [p. 47]; emphasis added). The 1974 Claim also rejected the possibility that "Raytheon would have to shoulder *all of the responsibility for ELSI's debts including interest*" (1974 Claim, p. 41; Unnumbered Documents Submitted by Italy, II, pp. 233-234 [p. 47]; emphasis added).

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" (Minutes of meeting (1974 version); Unnumbered Documents Submitted by Italy, II, pp. 295-296; emphasis added). 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" (Unnumbered Documents Submitted by Italy, II, p. 297; emphasis added).

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 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" (p. 318, *supra*; emphasis added). 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 (Minutes, Unnumbered Documents Submitted by Italy, II, p. 295). 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.

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 herself 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*" (in the cross-examination of John Clare, p. 61, *supra*). 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 particular 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. And 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 it 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 (No. 15) to the United States 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" (p. 333, *supra*)? These commitments were not known to the 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, communication, 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 disasters 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.

REJOINDER OF PROFESSOR LIBONATI

COUNSEL FOR THE GOVERNMENT OF ITALY

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. The submission has been prepared in collaboration with Professor Bonell and with our financial adviser, Mr. Hayward.

1. These points are:

(i) 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;
(ii) the story of extrapolation of the 31 March 1968 values;
(iii) the tale of the ordinary liquidation;
(iv) 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 page 3 of the Coopers & Lybrand Report (p. 432, *infra*) — 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 observations of the Respondent in its reply to President Ruda's first question (p. 455, *infra*)).

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 if 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 & Lybrand 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 note 2, point *(a)*). ELSI's lossess 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 evaluation 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 accounting 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, Ann. 13 to the Memorial, I);
- The directors knew that ELSI's product line contribution was negative for the year 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 belief 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.

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 p. 130, *supra*) 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, Ann. 13 to the Memorial, I, p. 133.)

This means

- that there were no accounting 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 (p. 324, *supra*) "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 (p. 321, *supra*) 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 (p. 128, *supra*) 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 bankruptcy. Mr. Lawrence says that in his opinion "the Puglisi appraisal . . . provides an appropriate basis for estimating the realizable value of its fixed assets" (p. 125, *supra*).

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, enclosure III-41, II, pp. 353-355 [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." (*Ibid.*, [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 interrrelation." (*Ibid.*, [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 (p. 41, *supra*). 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." (P. 292, *supra*.) "Raytheon and Machlett formulated a specific plan for the execution of the liquidation." (P. 293, *supra*.)

Mr. President, it is not true.

The Applicant should read the witnesses' depositions with greater attention. Mr. Clare — (see p. 63, *supra*) — 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" (Ann. 31 to the Memorial, I). The shareholders simply decided

that "the company cease operations", and that the Board of Directors — not the "liquidatore" — was empowered:

> "to make contacts 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" (Ann. 32 to the Memorial, I).

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 to demonstrate this.

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, Ann. 13 to the Memorial, I).

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. (p. 294, *supra*).

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 Affidavit of Mr. Ravalico and of Mr. Busacca (see Docs. 14 to the Rejoinder, II, and 44 to the Counter-Memorial, II) — 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 Ann. 22 to the Memorial, I), 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" (Ann. 22 to the Memorial, I, p. 214).

> "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." *(Ibid.)*

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 (p. 295, *supra*). 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" (Ann. 22 to the Memorial, I, p. 214).

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 it's opinion the "tubes" were bought in Germany or France (p. 295, *supra*). 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 *(ibid.)* — 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 (Ann. 22 to the Memorial, I, p. 224). Evidently, regardless of its place of origin the total raw material cost was uneconomic to the Sicilian company. ELSI's own officers have admitted the same.

C. Things do not appear different if we discuss semiconductors, 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 semiconductor 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

Engineer Busacca, who was at the head of ELSI's microwave tube design department until 29 March 1968 (Doc. 44 to the Counter-Memorial, II).

This forecast of happy results was still only a dream.

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.

The Chamber adjourned from 11.30 a.m. to 11.45 a.m.

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. Deitcher's Affidavit (Ann. 14 to the Memorial, I) 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" (p. 292, *supra*). 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 Bonnell'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.

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 billion	
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 billion –	
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*.

DUPLIQUE DE M. CARAMAZZA

COAGENT DU GOUVERNEMENT DE L'ITALIE

1. PRÉAMBULE

M. CARAMAZZA: Monsieur le Président, Messieurs 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 M^me^ 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 pourrait 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.

2. 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 M^me^ 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 de l'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 inclus 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.

Il s'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.

3. 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 (ci-dessus p. 184-188)

Nous en avions fourni les preuves appropriées, à savoir les arrêts du tribunal et de la cour d'appel de Palerme, et nous avions énoncé quelles étaient les raisons spécifiques pour lesquelles ces deux arrêts constituaient 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.

Eh bien, que nous a-t-on répondu lundi dernier?

Rien. Rien de rien. M. Matheson et M^me^ 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.

4. 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 système 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 other 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: *in civile 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 [1]).

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 à 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.

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[1] Voir ci-après, correspondance, n° 85.

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-là 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 has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy its jurisdiction » (*R.* v. *Governor of Brixton Prison ex p. 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'ailleurs ne conduit en *common law* à l'annulation de l'acte que lorsqu'il est tellement grave qu'il rend celui-ci « unreasonable » ou « arbitrary ».

In fact, as lord Diplock states:

> « not every mistaken exercise of judgment is unreasonable [for] 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 » (W. H. R. Wade, *Administrative Law*, Oxford, 1982, p. 364).

En traduisant cette histoire de recours hiérarchique survenue 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 le cas, ne s'est pas posé l'alternative « right or wrong? » Mais l'alternative « lawful-unlawful? » (H. W. R. Wade, précité, p. 35).

Mais il faut penser qu'à la différence des systèmes de *common law* dans les sytèmes de *civil law*, tels que le français et 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 « unreasonable » 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-ci: 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, tels que pouvoir d'arrestation, pouvoir de déportation, 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 (ci-dessus p. 329). 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 les 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'*arbitrariness* cet après-midi et je ne veux pas insister davantage.

5. 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 souligne d'aucune façon le besoin d'une décision immédiate alors que la loi accorde à l'autorité saisie cent vingt jours pour décider;
2) la partie plaidante fait preuve d'un total manque d'intérêt en présentant le recours dix-neuf 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[e] 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 seize 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 ».

6. 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 se souhaiter, surtout si, comme dans mon cas, il ne s'agit pas d'un spécialiste de droit international.

DUPLIQUE DE M. CAPOTORTI

CONSEIL DU GOUVERNEMENT DE L'ITALIE

M. CAPOTORTI: 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 poursuivis 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 l'existence de droits subjectifs des actionnaires là où des clauses conventionnelles 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 que 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 territoire de l'autre, sans s'étendre aux actionnaires de ces sociétés ni aux sociétés locales qui sont leurs filiales (ci-dessus p. 228). 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 généralisation 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 impu-

tables 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 internationale concernant la responsabilité des Etats. En effet, nous avions mentionné le texte des articles élaborés soit par la Harvard School, soit par la Commission du droit international des Nations Unies (ci-dessus p. 230). Mais M. Matheson s'est borné à dire qu'un critère fondamental pour l'attribution à l'Etat du comportement d'une entreprise « is whether that enterprise serves State purposes, thus becoming a part of the State's apparatus » (ci-dessus p. 326-327): 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. 327). L'orateur a négligé évidemment de considérer que l'achat de la fabrique de l'ELSI fait 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 poursuivait 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 tant 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 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 premier lieu constaté et souligné (ci-dessus p. 216-219) 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 œuvre 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 œuvre 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 prétendue « "operational" protection to the parent corporation from any interference with those rights » (ci-dessus p. 329). En réalité, une référence de ce genre

ne saurait 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» (ci-dessus p. 329).

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 coïncident 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 (ci-dessus p. 329-330).

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 œuvre 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 dépourvu de toute justification, d'un acte conçu uniquement comme un moyen de porter un préjudice injuste à quelqu'un (ci-dessus p. 229). 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 juridique 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 (contre-mémoire, «Unnumbered Documents», II, p. 310, pièce III-8 [p. 113-114]/mémoire, annexe 76, I, p. 362-363).

2) Cette précision aide à comprendre l'expression qui suit. Elle a été traduite par notre adversaire d'une façon, à notre avis, inappropriée (ci-dessus p. 329), à savoir que l'ordre de réquisition était dépourvu de toute cause juridique qui puisse le justifier et le rendre efficace; on doit par contre la traduire, et M. Caramazza vient de le dire, par la phrase: «l'ordonnance est pourtant dépourvue, en termes généraux, du fondement juridique qui puisse la justifier et la rendre efficace» (contre-mémoire, «Unnumbered Documents», II, p. 310, pièce III-8 [p. 114]/mémoire, annexe 76, I, p. 362-363).

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'œuvre et les conditions de l'ordre public — la décision du préfet ajoutait des considérations sur la pression exercée par la presse (*ibid.* [p. 115]/*ibid.*, p. 363).

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 (contre-mémoire, «Unnumbered Documents», II, p. 306, pièce III-2 [p. 5-6]/requête, I, p. 39). Or, lorsqu'on essaie

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 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 c'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 contestons), et cet article, à la différence de l'article III, ne prévoit pas la condition de la conformité aux lois et aux règlements locaux. Cela dit, je réponds à la question posée par deux observations.

La première: au moment où la réquisition a été décidée et mise en œuvre, 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 (contre-mémoire, « Unnumbered Documents », **II**, p. 310, pièce III-8 [p. 112-114]/mémoire, **I**, p. 362-363). 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 (ci-dessus p. 330). 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 (ci-dessus p. 330-331). 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 (ci-dessus p. 221-223); *deuxièmenent*, si les actionnaires américains de l'ELSI avaient des droits fondés sur l'article V, paragraphe 2, du traité (*ibid.*, p. 223-225); *troisièmement*, si les conditions prévues par cet article ont été respectées ou non par l'Italie (*ibid.*, p. 225-226).

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 » (ci-dessus p. 331). 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"» (ci-dessus p. 331).

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. Matheson 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, se traduit par ceci: le mot anglais «taking» couvre également la réquisition (ci-dessus p. 330), 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 le 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 1er 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 affaire 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 le 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 (ci-dessus p. 330); 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'indemnité perçue par le curateur 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 reprise concerne la prétendue violation par l'Italie de l'article V, paragraphes 1 et 3, du 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 (ci-dessus p. 331-332).

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 (ci-dessus p. 226). 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 associés et non un droit de propriété ayant pour objet la société *(ibid.)*.

M. Matheson a qualifié cette proposition d'« untenable » (ci-dessus p. 331); 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 du cent pour cent des actions n'est pas la même chose que la propriété de la société: depuis l'arrêt *Barcelona Traction*, nous croyions 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'interprétation rigoureuse du traité, toute résistance ou opposition aux constructions sommaires de certaines thèses, recevait chez notre éminent adversaire un accueil non seulement froid, mais plutôt gêné: on nous a accusés parfois de faire du formalisme (ci-dessus p. 335). 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 idée 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 œuvre cette technique sans craindre de passer pour un formaliste.

L'audience est levée à 12 h 55

THIRTEENTH PUBLIC SITTING (2 III 89, 3 p.m.)

Present: [See sitting of 13 II 89.]

STATEMENT BY THE PRESIDENT

The PRESIDENT: As I said this morning, we have received a reply[1] by Italy to the questions[2] put by some Members of the Court, and one of the replies has documents[3] 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.

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[4] on the replies to questions that have been submitted by Italy, and the Italian delegation will have the opportunity to comment[5] on the United States reply[6] to the questions, in each case after the closing of the hearings.

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[1] See Correspondence, No. 85, *infra*.
[2] See pp. 276-278, *supra*.
[3] See p. 468, *infra*.
[4] See p. 472, *infra*.
[5] See p. 471, *infra*.
[6] See pp. 449-456, *infra*.

REJOINDER OF PROFESSOR GAJA

COUNSEL FOR THE GOVERNMENT OF ITALY

Professor GAJA:

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 (p. 285, *supra*), 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 *(ibid.)* 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, II, pp. 264-267).

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." (P. 284, *supra*.)

The only precedents invoked to support this proposition are the *Finnish Ships* and *Ambatielos* cases.

Let us first look at the *Finnish Ships* Arbitration Award. After giving his interpretation of the Court's Judgment in the *Ambatielos* case, Mr. Matheson said:

> "Likewise, in the *Finnish Ships* 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 *RIAA*, p. 1490.) *(Ibid.)*

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" (p. 284, *supra*)?

There is a more recent arbitration case in point. It was quoted in the Rejoinder (**II**, p. 450) but totally ignored by the Applicant. The Award was 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*, p. 304, at p. 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" (p. 284, *supra*; also p. 287, *supra*), one cannot escape the conclusion that the 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" (p. 285, *supra*). 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 (p. 285, *supra*) 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 somewhat 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; p. 159, *supra*).

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" (p. 289, *supra*) 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 (pp. 157-158, *supra*), 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 (p. 288, *supra*).

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, II, p. 267). 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 (pp. 161-162, *supra*). 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 focused 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 incurred 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 (pp. 286-287, *supra*; p. 450, *infra*). 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 (p. 161, *supra*). 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" (pp. 109-110, *supra*).

Could one seriously argue that the bankruptcy receiver was entitled to bring a claim for compensation because of an infrigement 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, Exhibit III-9, **II**, p. 310). Besides, the receiver did not and could not allege 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 whatsoever as to the damages incurred from that viewpoint" (Ann. 81 to the Memorial, I, p. 382).

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 (p. 287, *supra*). 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 courts alone can pronounce 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." (*P.C.I.J., Series A/B, No. 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'." (P. 288, *supra*.) 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." (*I.C.J. 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 (p. 286, *supra*). However, the reasons that I gave in my previous pleading to the effect that the opinion has been misinterpreted and is anyway immaterial (p. 164, *supra*) 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 courts' 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 (p. 163, *supra*).

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. 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 to the 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.

DÉCLARATION DE M. FERRARI BRAVO

AGENT DU GOUVERNEMENT DE L'ITALIE

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 Gouvernement 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 (**II**, pp. xiv-xvi). 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 excusons auprès du Greffe pour ce travail supplémentaire que nous lui avons imposé — c'était pour une raison très simple, que j'espère que 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 demandé 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 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 rendu 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.

Voila pourquoi la défense de l'Italie, qui déjà, à cause du régime linguistique de la Cour, a dû travailler, tout au long de la présente affaire, à la différence de la défense 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 règle 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 international, dans toutes ses règles — et notamment dans celle-ci —, a 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 jugés 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 donnée 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 cent pour cent et qui se sont vu débouter de leurs plaintes contre la compagnie américaine par les juridictions italiennes. L'IRI encore, par l'intermédiaire d'une de ses sociétés, achetait à un prix tout à fait raisonnable, mais en réalité à contre-cœur, les avoirs restants de l'ELSI.

Cet IRI donc, 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 qui ont causé des pertes à l'IRI elle-même et des avantages aux requérants 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 pas été la faute des actionnaires américains de l'ELSI ne s'est produit. Partant, même si, dans une hypothèse qui nous semble tout à fait absurde, quelque irrégularité était 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 regardant en arrière, je crois que ces trois semaines de plaidoirie 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. Chapter IX 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." (Ci-dessus p. 12.)

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 des changements des réalités économiques et sociales qui se sont produits 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 là, 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 des traités en question, l'Italie en tiendra dûment compte pour orienter sa propre pratique vis-à-vis desdits traités.

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 débarrassées 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 d'esprit 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. Elle 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 adjuge 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, aussi au nom des autres membres de la délégation italienne, je vous remercie de votre attention.

CLOSING OF THE ORAL PROCEEDINGS

The PRESIDENT: On behalf of the Members of the Chamber, I thank the Agents and counsel of both Parties for their assistance to this Chamber. Before closing these oral proceedings, and in order to facilitate the future work of the Chamber, I think it 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[1] 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 Chamber rose at 15.55 p.m.

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[1] See Correspondence Nos. 86 and 88, *infra*.

FOURTEENTH PUBLIC SITTING (20 VII 89, 10 a.m.)

Present: [See sitting of 13 II 89.]

READING OF THE JUDGMENT

The PRESIDENT: The present sitting of the Chamber formed by the Court to deal with the case concerning *Elettronica Sicula S.p.A. (ELSI)*, brought by the United States of America against the Republic of Italy, will in the nature of things be its final sitting, since its purpose is the reading in open court, in accordance with Article 58 of the Statute, of the Judgment of the Chamber in the case.

The facts of the case are complex, and many of them were the subject of controversy between the Parties. Accordingly the Chamber has had to devote a considerable part of its judgment to setting out the facts as it has found them, with an indication where necessary of the controverted issues. In order to keep the length of the present sitting within bounds, I shall not only omit, in reading the Judgment, the opening paragraphs giving the procedural history of the affair, but also the lengthy statement of facts. In its place, and in order to set the legal developments in the Chamber's Judgment in their factual context, I shall read a brief summary of the salient facts prepared by the Registry, but I should emphasize that only the Judgment itself constitutes the authentic findings of the Chamber.

[The President reads a summary of the facts stated in paragraphs 12 to 47 of the Judgment[1], and then reads from paragraphs 48 to the end[2], with some quotations omitted.]

I now call upon the Registrar to read the operative clause of the Judgment in French, the other official language of the Court.

[Le Greffier lit le dispositif en français[3].]

Judge Oda appends a separate opinion to the Judgment of the Chamber; Judge Schwebel appends a dissenting opinion to the Judgment of the Chamber.

In accordance with practice, the Judgment has been read today from a duplicated copy of the text, a limited stock of which will be available to the public and the press. The usual printed text of the Judgment will be available in a few weeks' time.

The Chamber has thus completed its task; and I declare the present sitting closed.

(Signed) José María RUDA,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

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[1] *I.C.J. Reports 1989*, pp. 23-41.
[2] *Ibid.*, pp. 41-82.
[3] *C.I.J. Recueil 1989*, p. 81-82.