SEPARATE OPINION OF JUDGE ODA

I have voted in favour of the Judgment because I have concluded that Italy has not committed any breach either of the 1948 FCN Treaty or of the 1951 Supplementary Agreement, and that the United States of America's claim for compensation, arising from its allegations relating to such a breach, must accordingly be rejected. However, I came to this conclusion for reasons which are not entirely the same as those underlying the Chamber's Judgment, and feel that it is appropriate for me to state my personal views.

I

The legal proceedings instituted between 1968 and 1975 before the Prefect of Palermo and the Italian courts at three different levels (from the Court of Palermo to the Court of Cassation), that were brought to challenge the requisition order issued by the Mayor of Palermo on 1 April 1968, were initiated by ELSI or, later, by its trustee in bankruptcy, but *not* by Raytheon and Machlett as its shareholders (see Judgment, paras. 41-43). In those proceedings, it was accordingly that company — *not* its shareholders — which alleged that its rights had been breached by acts of the Italian authorities which had been directed against it.

For all that, the United States Government started, in February 1974, to negotiate with the Italian Government with a view to obtaining protection for Raytheon and Machlett (United States corporations) as shareholders, but *not* for ELSI (an Italian corporation) (see Judgment, para. 46). The action of the United States Government in bringing the present case against the Italian Government before the International Court of Justice resulted from its espousal of the cause of Raytheon and Machlett, the shareholders (see United States submissions: Judgment, paras. 10-11). It did *not* espouse the cause of ELSI.

II

The very concept of a joint-stock company embodies a distinction between the corporate entity and the assemblage of shareholders. The fundamental character of the company, particularly with regard to the shareholders' status, was so clearly expounded in the Court's Judgment in the case concerning the *Barcelona Traction, Light and Power Company, Limited (New Application)* that it is relevant to quote certain passages from that decision.

"41. . . . The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets.

42. It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve those of the shareholder too. Ordinarily, no individual shareholder can take legal steps, either in the name of the company or in his own name . . . [T]he shareholders' rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability.

43. . . . [A shareholder] is bound to take account of the risk of reduced dividends, capital depreciation or even loss, resulting from ordinary commercial hazards or from prejudice caused to the company by illegal treatment of some kind.

44. Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation . . . [N]o doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

. . . . . .

50. . . . It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares . . . that international law refers. In referring to such rules, the Court cannot modify, still less deform them." (*I.C.J. Reports 1970*, pp. 34, 35 and 37.)

Shareholders' material rights remain confined to the area of participation in the disposal of company profits and, in the event of liquidation, sharing in the residuary property of the company. They may protect those rights by exercising their formal entitlement to vote at shareholders' meetings, thus participating in the management and operation of a company. Indeed, shareholders' rights in relation to the company and its assets are limited as a corollary of the shareholders' limited liability.

Italian company law is drafted in accordance with these general prin-

ciples (Italian Civil Code *(Codice civile)*, Arts. 2350 and 2351) as is the company law of other countries (cf. Federal Republic of Germany: Company Law *(Aktiengesetz)*, Arts. 12, 58 (4), 271; France: 1966 Law on Commercial Companies *(Loi n° 66-537 du 24 juillet 1966 sur les sociétés commerciales)*, Arts. 174, 347, 417; Japan: Commercial Code *(Shoho)*, Arts. 241, 293, 425; Switzerland: Code of Obligations *(Code des obligations)*, Arts. 660 and 692).

As the Court explained in 1970, such rights — which have been described as the "direct rights" *("droits propres")* of shareholders — do not connote any right of action on behalf of the corporate entity. On the contrary, they rather constitute rights vis-à-vis that entity. It is in this latter respect that they are protected under domestic laws. If the company or its management fail to respect any of those rights, the shareholders will be entitled to seek certain remedies against the company. Interference with those rights by public authorities may likewise be subject to legal remedy. In other words, shareholders can institute proceedings in domestic courts if there are violations of their "direct rights" as shareholders, such as a denial of their right to benefit from the disposal of company profits or to participate in the shareholders' meeting. Again, a pertinent passage may be quoted from the above-mentioned Judgment:

> "47. The situation is different if the act complained of is aimed at the direct rights *[droits propres]* of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action ... But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company." (*I.C.J. Reports 1970*, p. 36.)

However, no infringement of any of these rights has been alleged in connection with the events that occurred in Sicily in 1968.

To look at the matter from a slightly different perspective, the shareholders may approve a policy at their meetings, and the company will be responsible for its implementation. While the company will thus be responsible to its shareholders for any failure in that regard, those shareholders cannot claim any rights other than vis-à-vis the company. Accordingly, if it is found that the policy has been thwarted by the controversial act of a third party, there may be grounds for deeming the rights of the company to have been infringed — but not the "direct rights" of the shareholders. It follows that they have no *jus standi* vis-à-vis the third party in question.

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That general principle of law concerning the rights or status of shareholders, which underlies not only Italian company law but also the company law of some other civil law countries, may not be altered by any treaty aimed at the protection of investments unless that treaty contains some express provision to that end. A question which should therefore be asked is whether Italy and the United States agreed, by means of the 1948 FCN Treaty or the 1951 Supplementary Agreement, to modify such a general principle of law or to grant any additional rights to foreign shareholders. It is difficult to see how an affirmative answer can be given to this question.

The 1948 FCN Treaty and the 1951 Supplementary Agreement guarantee certain rights to United States companies participating in business in Italy (and vice versa). These rights, to which the United States refers in passages of both the Memorial and the Reply that relate to the status of United States companies, are here set forth in full:

(a) "The ... [United States] ... corporations ... shall enjoy, throughout [Italy], rights and privileges with respect to organization of and participation in corporations ... of [Italy] ..." (Art. III (1), first sentence.)

(b) "The ... [United States] ... corporations ... shall be permitted, in conformity with the applicable laws and regulations within [Italy], to organize, control and manage corporations ... of [Italy] for engaging in commercial, manufacturing, processing ... activities." (Art. III (2), first sentence.)

(c) "[The United States corporations] shall receive, within [Italy], the most constant protection and security for their ... property, and shall enjoy in this respect the full protection and security required by international law." (Art. V (1), first sentence.)

(d) "The property of ... [the United States] corporations ... shall not be taken within [Italy] without due process of law and without the prompt payment of just and effective compensation." (Art. V (2), first sentence.)

(d') "The provisions ..., providing for the payment of compensation [as referred to in *(d)* above], shall extend to interests held directly or indirectly by ... [the United States] corporations ... in property which is taken within [Italy]." (Protocol, para. 1.)

(e) "The ... [United States] corporations ... shall within [Italy] receive protection and security with respect to the matters enumerated in [*(c)* and *(d)* above], upon compliance with the applicable laws and regulations, no less than the protection and security which is or may hereafter be accorded to the ... corporations ... of [Italy] and no less than that which is or may

hereafter be accorded to the ... corporations ... of any third country." (Art. V (3), first sentence.)

(f) "The ... [United States] corporations ... shall be permitted to acquire, own and dispose of immovable property or interests therein within [Italy] upon the following terms ..." (Art. VII (1).)

(g) "The ... [United States] corporations ... shall not be subjected to arbitrary or discriminatory measures within [Italy] resulting particularly in: *(a)* preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, *(b)* impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made ... [Italy] undertakes not to discriminate against ... [United States] corporations ... as to their obtaining under normal terms the capital, manufacturing processes, skills and technology which may be needed for economic development." (Supplementary Agreement, Art. I.)

In fact, the granting of these rights to foreign corporations is not unique to the 1948 Treaty between Italy and the United States, as similar provisions are to be found (albeit with some variations) in the FCN treaties which the United States concluded successively with other countries in the post-war period. (The 1948 FCN Treaty with Italy was the second of such treaties to be concluded by the United States, being preceded by the treaty with China (1946) and followed by the treaties with Ireland (1950); Greece, Israel and Denmark (1951); Japan (1953); the Federal Republic of Germany (1954); Iran (1955); the Netherlands and the Republic of Korea (1956); and others.)

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My interpretation of those provisions is rather different from the one adopted by the Chamber in its Judgment.

Firstly, under Articles III (1) (first sentence) and III (2) (first sentence) of the FCN Treaty, United States nationals (corporations) are guaranteed the enjoyment of "rights and privileges with respect to organization of and participation in corporations" of Italy and are given the right to "organize, control and manage corporations" in Italy (cf., e.g., *Denmark-United States*, Arts. VII (2), VIII (1); *Japan-United States*, Art. VII (1); *Fed. Rep. of Germany-United States*, Art. VII (1); *Netherlands-United States*, Art. VII (1); etc.). Raytheon and Machlett certainly could, in Italy, "organize, control and manage" corporations in which they held 100 per cent of the shares — as in the case of ELSI — but this cannot be taken to mean that those United States corporations, as shareholders of ELSI, can lay claim to any rights other than those rights of shareholders guaranteed to them under Italian law as well as under the general principles of law concerning

companies. The rights of Raytheon and Machlett as shareholders of ELSI remained the same and were not augmented by the FCN Treaty. Those rights which Raytheon and Machlett could have enjoyed under the FCN Treaty were not breached by the requisition order, because that order did not affect the "direct rights" of those United States corporations, as shareholders of an Italian company, but was directed at the Italian company of which they remained shareholders.

Secondly, the provisions of Article V (1), (2) and (3) (second sentence) of the FCN Treaty concerning the property of corporations as well as paragraph 1 of the Protocol qualifying Article V (2) of the Treaty (cf., *inter alia, Denmark-United States*, Art. VI (1), (3), (5) and Protocol, para. 2; *Japan-United States*, Art. VI (1), (3), (4) and Protocol, para. 2; *Fed. Rep. of Germany-United States*, Art. V (1), (4), (5) and Protocol, para. 5; *Netherlands-United States*, Art. VI (1), (4), (5) and Protocol, para. 6) similarly cannot be seen as entitling the foreign shareholders to "property" (*"beni"* in the Italian text), i.e., ownership of the company's assets or the company itself, or "interests ... in property" (*"diritti ... su beni"* in the Italian text).

Thirdly, the provisions of Article VII (1) of the FCN Treaty (cf., e.g., *Denmark-United States*, Art. IX (3), (4), (5); *Japan-United States*, Art. IX (2); *Fed. Rep. of Germany-United States*, Art. IX (2); *Netherlands-United States*, Art. IX (2)) cannot be interpreted as granting to foreign shareholders the right "to acquire, own and dispose of immovable property or interests therein" (*"beni immobili o ... altri diritti reali"* in the Italian text), which right is made solely available to a company.

Finally, the provisions of Article I of the Supplementary Agreement do not provide foreign shareholders with any special protection against the host country. It is the company, but *not* its shareholders, that is protected against any "arbitrary or discriminatory" measures by the host country (cf., *inter alia, Denmark-United States*, Art. VI (4); *Japan-United States*, Art. V (1); *Fed. Rep. of Germany-United States*, Art. V (3); *Netherlands-United States*, Art. VI (3)). In fact, whatever measures were deemed necessary to be taken by virtue of the requisition order of the Mayor of Palermo on 1 April 1968, it was ELSI, a company, *not* Raytheon and Machlett, its shareholders, that was subjected to the allegedly "arbitrary or discriminatory" measures by the Italian authorities.

Can it be presumed that any of these rights guaranteed to United States corporations under the 1948 FCN Treaty (which rights the Judgment extensively expounds in paragraphs 64-135) are relevant to those of Raytheon and Machlett as shareholders of ELSI? The Treaty guarantees the right of United States corporations to hold as much as 100 per cent of the stock of an Italian company. Yet there is no reason to interpret the

FCN Treaty as having granted to those nationals or corporations of one State party that hold shares in a corporation of the other State party any further rights in addition to those to which the same shareholders would have been entitled under Italian law as well as under the general principles of company law.

III

The real issue in the present case relates to ELSI as an Italian corporation controlled by United States corporations (Raytheon and Machlett) or as an enterprise in Italy in which those United States corporations had a substantial interest. If the FCN Treaty is to afford protection to the investments of nationals of one State party in the territory of another State party, this cannot be done by means of the provisions listed above. There are, however, certain provisions in the FCN Treaty which are specifically designed to protect the interests of United States corporations possessing stock or a substantial interest in an Italian corporation or enterprise or, more concretely, the interests of Raytheon and Machlett (United States corporations) as shareholders of ELSI (an Italian company):

(a) "[Italian] [c]orporations ... organized or participated in by ... [United States] corporations ... pursuant to the rights and privileges enumerated in this paragraph, and controlled by such ... corporations ... shall be permitted to exercise the functions for which they are created or organized, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to corporations ... that are similarly organized or participated in, and controlled, by ... corporations ... of any third country." (Art. III (1), second sentence.)

(b) "[Italian] [c]orporations ... controlled by ... [United States] ... corporations ... and created or organized under the applicable laws and regulations within [Italy] shall be permitted to engage in [commercial, manufacturing] activities therein, in conformity with the applicable laws and regulations, upon terms no less favorable than those now or hereafter accorded to [Italian] corporations ... controlled by ... [Italian] corporations ..." (Art. III (2), second sentence.)

(c) "[I]n all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control, [Italian] enterprises in which ... [United States] corporations ... have a substantial interest shall be accorded, within [Italy], treatment no less favorable than that which is or may hereafter be accorded to similar enterprises in which ... [Italian] corporations ... have a substantial interest, and no less favorable than that which is or may hereafter be accorded to simi-

> lar enterprises in which ... [any third country's] corporations... have a substantial interest." (Art. V (3), second sentence.)

Such provisions are not unique to this FCN Treaty but are also found in others (cf. *Denmark-United States*, Arts. VI (5), VIII (2); *Japan-United States*, Arts. VI (4), VII (1), (4); *Fed. Rep. of Germany-United States*, Arts. V (5), VII (1), (4); *Netherlands-United States*, Arts. VI (5), VII (1), (4); etc.).

Article III (1) provides *in casu* that the Italian company (ELSI) that was "organized or participated in" and "controlled" by United States corporations (Raytheon and Machlett) was to be permitted to exercise the functions for which it was created or organized upon terms no less favourable than those accorded to corporations that were "organized or participated in" and "controlled" by corporations of any third country.

Article III (2) provides *in casu* that the Italian company (ELSI) that was *"controlled"* by United States corporations (Raytheon and Machlett) was to be permitted to engage in commercial, manufacturing or other activities in Italy in conformity with the applicable laws and regulations upon terms no less favourable than those accorded to Italian corporations controlled by Italians.

Article V (3) provides that in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control, an enterprise in Italy (ELSI), in which United States corporations (Raytheon and Machlett) had a substantial interest, was to be accorded treatment no less favourable than that accorded to those enterprises in which Italian corporations or any third country's corporations had a substantial interest.

These three provisions are extraordinary provisions, intended to ensure that a firm such as ELSI can still be protected in Italy by the Treaty, despite the fact that it is an Italian company operating in that country. Yet they were ignored by both Parties in the proceedings and the Judgment contains scarcely any reference to them.

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It is a great privilege to be able to engage in business in a country other than one's own. By being permitted to undertake commercial or manufacturing activities or transactions through businesses incorporated in another country, nationals of a foreign country will obtain further benefits. Yet these local companies, as legal entities of that country, are subject to local laws and regulations; so that foreigners may have to

accept a number of restrictions in return for the advantages of doing business through such local companies.

The Italy-United States FCN Treaty, like some other FCN treaties as mentioned above, nonetheless guarantees security to local companies in which nationals of the other State party have invested, inasmuch as it provides that they must, by virtue of Article III (1) (second sentence), be given treatment no less favourable than that afforded to local companies "organized or participated in" and "controlled" by third-country companies while, by virtue of Article III (2) (second sentence), they are to be given treatment no less favourable than that afforded to local companies "controlled" by local nationals.

Moreover, in matters relating to the "taking of ... enterprises into public ownership and the placing of ... [them] under public control" (Art. V (3), second sentence), that Treaty also guarantees special protection to enterprises in which the corporations of the other State party have a substantial interest. In this respect I would like to point out, as a supplementary explanation, that the verb "take", as expressed by *"espropriare"* in the Italian text, is rendered in the 1956 FCN Treaty between the Federal Republic of Germany and the United States by the German verb *"enteignen"*, which militates against the acceptance of an interpretation of the requisition order of the Mayor of Palermo as amounting to a "taking" of property.

Such local companies or enterprises have dual characteristics in that they are both local corporations or enterprises and, at the same time, corporations specifically controlled by nationals (corporations) of the other State party to the FCN Treaty or enterprises in which those nationals (corporations) have a substantial interest. In view of these characteristics, the State party under whose law the company in question is incorporated is responsible to the other State party for guaranteeing that company's right to exercise the functions for which it was created, on the basis of the most-favoured-nation treatment, or to engage in its business transactions, on the basis of the national treatment; and the State party on whose territory the enterprise is located is responsible to the other State party for affording special protection to that enterprise in the event of its being placed under public control.

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One could well be led to wonder whether a foreign country (the United States) whose nationals practically controlled the corporation (ELSI) of the host country (Italy) or had a substantial interest in the enterprise (ELSI) in that host country could in fact espouse the cause of that com-

pany in a dispute with the latter country. This question brings one up against a paradox.

However, I believe that, by availing itself of Article III (1) (second sentence), Article III (2) (second sentence) and Article V (3) (second sentence) of the 1948 FCN Treaty (which provisions, as I repeat, are not unique to this Treaty), the United States could properly have espoused the cause of ELSI, an Italian company, against the Italian Government. This is why I have referred to these provisions of the FCN Treaty as "extraordinary" and why I believe that the complaint against Italy should have been presented to the Court only in reliance on those provisions which alone protect the interests of United States nationals (Raytheon and Machlett), as shareholders, albeit in an indirect way. The United States failed, however, to frame its Application along those lines, while non-relevant provisions were repeatedly invoked.

To recapitulate, ELSI (an Italian company) and, later, its trustee in bankruptcy, brought municipal legal proceedings to challenge the requisition order of the Mayor of Palermo. It took its case to the highest court in Italy and is accordingly considered to have exhausted all available municipal remedies. Thus the United States could have espoused the cause of ELSI on the grounds of "denial of justice" *if* the judgment of the domestic court of Italy at the highest level had been found to be "manifestly unjust" in its application of the FCN Treaty.

Neither ELSI, nor its trustee in bankruptcy acting on its behalf, so much as invoked the FCN Treaty in those municipal proceedings. (The assertion that the FCN Treaty is non-self-executing could not have been used by ELSI as an excuse for failure to invoke it before the municipal courts of Italy, since enabling legislation had been enacted in that country.) Nor has evidence been brought by the Applicant to show that, as a consequence of the requisition order of 1 April 1968, ELSI received less favourable treatment than any other Italian corporation controlled by nationals of any third country in exercising its functions, or less favourable treatment than that afforded any Italian corporation controlled by Italians; again, supposing that the present case relates to an enterprise placed under public control, no evidence has been brought to show that ELSI was accorded less favourable treatment than any other enterprise.

IV

In conclusion, it appears to me that some arguments employed in this case which has been brought to the Court by the Applicant in an espousal of the cause of Raytheon and Machlett are, unfortunately, based upon a misconception of the provisions of the 1948 FCN Treaty.

Even if the present proceedings had been brought in an espousal of

ELSI's cause, by applying the proper provisions which guaranteed ELSI the most-favoured-nation treatment or national treatment, the Applicant would have had to provide sufficient evidence to show that ELSI had been denied justice in the Italian courts. It has failed to do so.

(Signed) Shigeru ODA.