DISSENTING OPINION OF JUDGE SCHWEBEL

The Judgment of the Chamber in my view is sound in two paramount respects which have important implications for the vitality and growth of international law in the areas of its concern.

First, the Judgment applies a rule of reason in its interpretation of the reach of the requirement of the exhaustion of local remedies. It holds not that every possible local remedy must have been exhausted to satisfy the local remedies rule but that, where in substance local remedies have been exhausted, that suffices to meet the requirements of the rule even if it may be that a variation on the pursuit of local remedies in the particular case was not in fact played out. It has of course long been of the essence of the rule of exhaustion of local remedies that local remedies need not be exhausted where there are no effective remedies to exhaust. It may be said that the Chamber has done no more than to reaffirm this established element of the rule. In fact it has reaffirmed it, but in doing so the Judgment makes a contribution to the elucidation of the local remedies rule by indicating that, where the substance of the issues of a case has been definitively litigated in the courts of a State, the rule does not require that those issues also have been litigated by the presentation of every relevant legal argument which any municipal forum might have been able to pass upon, however unlikely in practice the possibilities of reaching another result were. The United States of America submitted that the claims brought by it were admissible since "all reasonable" local remedies had been exhausted; in substance, the Chamber agreed, and rightly so. Its holding thus confines certain prior constructions of the reach of the rule of exhaustion of local remedies to a sensible limit.

Second, the Judgment largely construes the Treaty of Friendship, Commerce and Navigation between the United States and Italy in ways which sustain rather than constrain it as an instrument for the protection of the rights of the nationals, corporations and associations of the United States in Italy and the rights of nationals, corporations and associations of Italy in the United States. Arguments were pressed on the Chamber which, if accepted, would have deprived the Treaty of much of its value. In particular, it was maintained that the Treaty was essentially irrelevant to the claims of the United States in this case, since the measures taken by Italy (notably, the requisition of ELSI's plant and equipment) directly affected not nationals or corporations of the United States but an Italian corporation, ELSI, whose shares happened to be owned by United States corporations whose rights as shareholders were largely outside the scope of the protection afforded by the Treaty. The Chamber did not accept this argument. Nor did it accept the contention that the right to organize, control

and manage a corporation was limited to the founding of a company and the election of its directors and did not include its continuing management; nor that the right to control and manage was unaffected by the requisition of that corporation's plant and equipment. Nor did the Chamber find it necessary to take a position on the claim that the terms of the Treaty must be narrowly construed to embrace an expropriation but not a taking (it rather holds that "this question" does not "have to be resolved in the present case"). These and other preclusive constructions of the Treaty for the most part were put aside by the Chamber.

Moreover, the Chamber's Judgment does not impair the principle of "the most constant protection and security for . . . persons and property" which the Treaty prescribes, and the Treaty's provisions for "the prompt payment of just and effective compensation" for the taking of foreign property are left intact. The meaning of "just and effective compensation" put forth by the United States was not questioned. The United States maintained that, when a State deprives a foreign national of property rights in a business enterprise, "compensation should be based on the full value of the business". Normally, the United States pointed out, the value of a business takes into account its future earnings potential, but, in this case, the United States made no claim for future profits since ELSI was not profit-making. Given the fact of ELSI's requisition as long ago as 1968, and the contention of the United States that that requisition prevented ELSI's orderly liquidation, the United States proposed the book value of ELSI as of that time as the measure of its value, while taking care to emphasize that the United States does not in general view book value as a fair measure of the value of an ongoing enterprise, that, indeed, book value is widely rejected as a sufficient measure of the value of a business enterprise. While these principles went unchallenged, Italy maintained not only that ELSI was deprived of no rights under the Treaty but that in any event it was, in view of its condition, worth far less than book value.

In short, the pertinent provisions of the Treaty have been largely interpreted to give them effect rather than to deprive them of effect. The claims of the United States in this case have not been sustained, but that is not because the Chamber has found against the United States on the law of the Treaty; it has found against the United States on the practical and legal significance to be attached to the facts of the case.

I do not share all of the Chamber's findings, particularly in two salient respects. While agreeing with the Chamber's indication that, prima facie, the requisition of ELSI's plant appears to have deprived Raytheon and Machlett of their entitlement under Article III of the Treaty to "control

and manage" ELSI, I do not agree with the Chamber's conclusion that nevertheless Article III was not violated because, by the time of the requisition, its rights of control and management no longer existed either because the feasibility of an orderly liquidation of ELSI's assets by ELSI at that time has not been sufficiently established or because ELSI's state of insolvency by then entailed an obligation on ELSI to have petitioned for its bankruptcy. Furthermore, I do not share the Chamber's conclusion that the requisition was not an arbitrary act which violated the provision of Article I of the Treaty's Supplementary Agreement providing that the nationals and corporations of the parties "shall not be subjected to arbitrary . . . measures". I concur in the Chamber's classic concept of what is an arbitrary act in international law, but I disagree with its appraisal of the order of requisition and with its interpretation of the pointed holdings of the Prefect and the Palermo Court of Appeal.

Before explaining why I believe these conclusions of the Chamber to be in error, it may be useful to set out certain broader considerations of the purposes and purport of the FCN Treaty to which the Chamber has in my opinion paid insufficient attention.

The Integral Character of the Treaty and its Supplement

A treaty, in the words of Article 2 of the Vienna Convention on the Law of Treaties, may be embodied "in a single instrument or in two or more related instruments". The Treaty of Friendship, Commerce and Navigation between the United States and Italy consists of a treaty, protocol, additional protocol, and exchanges of notes signed on 2 February 1948, which, in the case of the protocols, expressly provide that they "shall be considered as integral parts of said Treaty", as well as an Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the United States and Italy signed on 26 September 1951, which equally provides that it shall "constitute an integral part of the said Treaty . . .".

Because of the content of the customary law of treaties reflected in the quoted provision of the Vienna Convention, because of the express provisions of the treaty instruments just quoted, and because of the meaning of the term "integral", i.e., composed of constituent parts making a whole, it is clear that the FCN Treaty and its Supplementary Agreement must be read together as the integral whole which they are proclaimed to be. The Chamber recognizes this conclusion (though counsel for the Respondent maintained that Italy did not). The Chamber could hardly do otherwise. It itself is a creature of a treaty, its Statute, which, the United Nations Charter provides, "forms an integral part of the present Charter". It would be hard to conceive of an argument that nevertheless the Statute and Charter

are not to be interpreted together, as a single instrument forming an integral whole, and harder still to imagine that the Court could accept such an argument.

The Circumstances and Intentions of the Treaty and Supplement

In its pleadings, Italy relied upon the rules of treaty interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties as reflective of customary international law, a position which was not questioned by the United States. Article 31 provides that, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." It provides that "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, ... its preamble ..." It specifies that there shall be taken into account, together with the context, "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". And it provides in Article 32 that:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> *(a)* leaves the meaning ambiguous or obscure; or
> *(b)* leads to a result which is manifestly absurd or unreasonable."

In the current case, the Parties attached radically different interpretations to the provisions of the Treaty and its Supplementary Agreement which were at issue between them. It is undeniable that, when their conflicting arguments are matched together, the meaning of some of the Treaty's provisions are ambiguous or obscure; indeed, each of the Parties maintained that the opposing interpretation led to results which, if not manifestly absurd, were unreasonable. Thus, according to the Vienna Convention, this is a case in which recourse to the preparatory work and circumstances of the Treaty's conclusion was eminently in order.

What were the circumstances of the conclusion of the Supplementary Agreement which forms an integral part of the Treaty itself? And what does the Treaty's preparatory work and processes of ratification demonstrate its purpose, or a paramount purpose of the Treaty, to be and what light do those processes shed on the interpretation to be attached to its provisions?

According to the content of the relevant Italian parliamentary proceed-

ings placed before the Chamber — proceedings which contain authentic evidence of the intentions of the Parties in concluding the Treaty and its Supplementary Agreement — Italy proposed conclusion of the Supplementary Agreement in order to meet the ascertained requirements of American investors for capital investment in Italy. The Italian Official Gazette reports, in respect of a Bill for the Ratification and Implementation of the Supplementary Agreement, that the purpose of the Agreement was to encourage "inflows of private capital investment into Italy" and "to create a situation in which foreign investment is secure . . ." (Counter-Memorial of Italy, Annexes, Doc. 9, pp. 1, 2.) It continues:

> "And 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 . . . we now have a much clearer idea of what American investors are looking for, and realize the need for a special treaty . . ." (*Ibid.*, p. 3.)

The report continues that the needs of American investors include:

> "protection of the rights of the American companies . . . in the companies in which they invest; possibility of repatriating invested capital . . . guarantees against discrimination; guarantees against political risks; . . ." (*ibid.*, p. 4).
>
> "What was therefore required was to guarantee the American investors of any of the aforementioned conditions not already guaranteed, as far as possible, while at the same time protecting Italian interests, above all by . . . obtaining direct, long-term as opposed to speculative, productive investment." *(Ibid.)*

The Supplementary Agreement furthermore was intended "to offer investors the maximum freedom of choice in respect of the companies . . . in which they have a financial holding . . ." (*ibid.*, p. 6).

In the debate in the Chamber of Deputies on ratification of the Supplementary Agreement, the spokesman of the Government observed that the first part of that Agreement "is certainly the most important" in referring *inter alia* to investors' "free transfer of capital . . . and their freedom to manage the companies which these natural or legal persons establish or procure" (*ibid.*, Doc. 11, pp. 20-21). One of the forms of American investment which the Agreement was designed to foster is "setting up an industrial plant in Italy under the direct control of the American parent companies . . ." (*ibid.*, p. 24).

The Report to the Senate of Italy summarized the Supplementary Agreement as having the following content:

> "The ruling out of any discriminatory treatment or arbitrary measures to the prejudice of citizens, juridical persons, or asso-

> ciations of Italy or of the United States which operate within the territory of the other State, the possibility of unobstructed control of enterprises, the most liberal possible treatment assured for the transferability of capital, [and] the fiscal concessions are all principles which, suitably supplementing those contained in the Treaty of Friendship ... aid the Italian economy [in particular], insofar as they are aimed at favoring the investment of U.S. capital in Italy." (Memorial of the United States, Annex 89, p. 4.)

The Report of the Secretary of State of the United States which was transmitted to the United States Senate in connection with its advice and consent to ratification of the Supplementary Agreement similarly described the Agreement as containing "amplifications" of the Treaty which, "by rounding out the comprehensive rules governing general economic relations established by that treaty, further encourage private capital investments" (*ibid.*, Annex 88, p. 2).

The truly complementary character of the Supplementary Agreement — the fact that it was designed to "further" encourage investment of private capital which the Treaty as concluded in 1948 was (among other purposes) designed to encourage — was made clear in the process of ratification of that Treaty. Thus the Report of the Committee on Foreign Affairs and Colonies of the Senate of Italy of 28 May 1949 states, in favouring ratification and implementation of the Treaty, that it took account of the Italian economy's "urgent need of foreign capital investment" (Counter-Memorial of Italy, Annexes, Doc. 7, p. 10). The Report observes that, by its terms, the United States have

> "above all attempted to protect themselves ... against the possible onset of discrimination against their interests and possible exclusions or limitations of activity in the Italian market" (*ibid.*, p. 14).

The Report summarizes the most important initial articles of the Treaty as granting "Full rights ... to organize, direct, and control companies ... and to enjoy protection from undue interference ..." (*Ibid.*, p. 7.) Among the Treaty's underlying principles, the Report states, is "in any case fair play" (*ibid.*, p. 4).

The Chamber's Judgment quotes the articles of the Treaty and the Supplementary Agreement at issue between the Parties. It may be added that the Preamble to the Supplementary Agreement speaks not only of the parties' desire to give "added encouragement to investments of the one country in the other country", but also speaks of "the contribution which may be made toward this end by amplification of the principles of equitable treatment set forth in the Treaty ...". Article III of the Supplementary Agreement further prescribes, "Regarding the transferability of capital invested by ... corporations of either High Contracting Party in the territories of the other ... the most liberal treatment practicable." And Article V provides that:

> "there shall be applied to the investments made in Italy the regula-

tions covering the special advantages set forth in the fields of taxation, customs and transportation rates, for the industrialization of Southern Italy . . .".

It should be noted that, in the entire, lengthy, detailed and repeated consideration of the ratification of the Treaty and its Supplementary Agreement by Italy, and its apparently effortless consideration by the United States, no trace of support may be found for the interpretation that the manifold rights so assured to an American investor in Italy and an Italian investor in the United States were conditioned upon investment being made in a corporation of the investor's nationality. On the contrary, it was assumed and indicated that the foreign investor shall enjoy the benefits of the Treaty and its Supplement, whether he invests in a corporation of his or the other party's nationality. Thus the Supplementary Agreement was meant to guaranty the protection "of the rights of American companies . . . in the companies in which they invest"; it was intended to offer investors "the maximum freedom of choice in respect of the companies . . . in which they have a financial holding"; it was designed to provide for investors' "freedom to manage the companies" which they "establish or procure", and one of the forms of American investment was to be "setting up an industrial plant in Italy under the direct control of the American parent companies . . .".

From the terms of the Treaty and its Supplementary Agreement, and in the light of the intent of those terms as that intent is shown by the quoted excerpts from the processes of the ratification of those instruments, it follows that Raytheon, in investing so heavily in ELSI, did so within a treaty framework which entitled it to expect that:

- it (and ELSI) would enjoy "the principles of equitable treatment set forth in the Treaty" ("in any case fair play");
- it (and ELSI's management) would enjoy "full rights" to organize, to direct, and to control ELSI; i.e., they would enjoy "freedom to manage" ELSI and "unobstructed control" of ELSI and "the maximum freedom of choice" in respect of ELSI;
- it would enjoy "the most liberal treatment practicable" in respect of the repatriation of its invested capital;
- it (and ELSI) would be "guaranteed against political risks"; and
- ELSI would have the benefit of the application to it of the regulations implementing the special advantages respecting taxation, customs and transportation rates for the Mezzogiorno.

The Violation of Raytheon's Right to Control and Manage ELSI

The pivot of the Chamber's conclusion that Italy does not stand in violation of Article III of the Treaty is that, at the time of the issuance of the order of requisition, the right to control and manage ELSI was no longer

in the hands of ELSI's directors or shareholders but should have been in the hands of a trustee in bankruptcy. The Chamber is correct in saying that the "core claim" advanced by the United States is that the requisition of ELSI was in breach of the right of Raytheon and Machlett to control and manage ELSI and, as a fundamental incident of such control and management, to liquidate its assets. Is the Chamber equally correct in concluding, because of the practicalities of ELSI's financial situation and the legalities of Italian bankruptcy practice, that Raytheon and Machlett in any event were no longer able, as of the date of the requisition, to exercise control and management of ELSI and thus were deprived of no right by an act that otherwise appears to be in breach of Article III of the Treaty?

I believe that this cardinal conclusion of the Chamber's Judgment is incorrect, for the following reasons:

First, it is clear, and accepted by the Chamber, that ELSI was closely advised at all relevant times both as to its increasingly precarious financial situation and the legal consequences of that situation. It and its shareholders acted not in disregard of accounting and legal advice but in accordance with it. The management and shareholders of ELSI were not advised, before the requisition took place, that ELSI was in a financial or legal state of insolvency and that it was therefore required to petition in bankruptcy or otherwise surrender control and management of ELSI. On the contrary, they were advised that ELSI, having regard to its financial situation and the requirements of Italian law, was entitled, as of March 1968, to engage in a liquidation of its assets, in a process to be managed by ELSI itself. This is of course not a decisive consideration, but it is a relevant consideration.

Second, in point of fact, as of the day of the requisition, 1 April 1968, no legal or practical steps had been taken to withdraw the right of control and management from ELSI's directors or shareholders and place it in other hands. Not only was ELSI apparently not in default; not only had ELSI most deliberately not petitioned for bankruptcy; no creditor or public authority took any step to force it into bankruptcy.

Third, in the months, weeks and days before the requisition, negotiations to prevent or forestall the closing of ELSI's plant and the dismissal of its workforce took place between the officers and shareholders of ELSI, on the one hand, and officials of the Government of Italy and of Sicily on the other. Those negotiations were not casual and routine. On the contrary, intensive negotiations involved not only lesser officials of the Italian Government but very senior officials, including the President of Sicily, Ministers of the central Government, and the Prime Minister of Italy himself. The Government of Italy was emphatically and graphically informed of the financial condition of ELSI and of the decision of its shareholders

not to invest further capital in its operations. The facts in these regards are summarized in paragraphs 26 to 28 of the Judgment of the Chamber; as the Judgment recounts, Italian authorities nevertheless continued to press ELSI not to close the plant and not to dismiss the workforce as late as 29 March 1968. ELSI was officially warned that, if the plant were to be closed, it would be requisitioned. Even after the requisition of the plant, Italy officially exerted extreme pressure upon ELSI to re-open it, the President of Sicily going so far in a written memorandum as to predict or threaten that liquidation of ELSI would be "absolutely impossible" as long as "the plant is closed". Far from taking the position that ELSI was obligated, by reason of its financial position and the requirements of Italian law, to have petitioned in bankruptcy before the date of the requisition, 1 April 1968, the President of Sicily as late as 19 April 1968 pressed ELSI precisely not to go into bankruptcy. Not only, he warned, would bankruptcy "morally blacken Raytheon's name in Italy and in Europe"; not only would bankruptcy "now" produce for Raytheon "nothing for the assets" and require Raytheon "to pay all the debts"; the Italian banks would force Raytheon eventually to pay ELSI's bank debt and in the meantime would block any foreign exchange permits for transfer of royalties to Raytheon earned by another Italian company in which it had shares, Selenia (Memorial of the United States, Annex 37, pp. 2, 3; Annex 38, pp. 1, 2). On the other hand, if ELSI were to re-open the plant, and if Raytheon were to co-operate with a provisional management company to be organized by IRI and the Region of Sicily, they would be

> "ready to help Raytheon in the meantime to liquidate ELSI through a useful sale in the shortest possible time ... taking into account the fundamental objective of Raytheon which remains after all the liquidation".

The Prime Minister of Italy, the President of Sicily, and the Ministers concerned of the Government of Italy, presumably acted, and surely must be presumed to have acted, in accordance with the law of Italy. They were aware of ELSI's large debts to Italian banks; they had been informed that ELSI had run out of money and consequently was about to close, or had closed, the plant. Far from indicating that ELSI was obliged to petition in bankruptcy or otherwise surrender control and management, far from indicating that the time for liquidation had passed, far from acting in accordance with such an understanding of the facts or of the law of Italy, they pressed its management to keep the plant open, to employ or re-employ the workforce, to maintain or resume production. That is to say, whether the experts on Italian law presented by Italy in this case are right as to the requirements of Italian law, or whether the experts on Italian law presented by the United States in this case are right as to those require-

ments, it is clear that the "living law" of Italy as of the time of the requisition was inconsistent with the pleading of Italy in the current case and with the acceptance of that plea by the Chamber. Should Italy in 1989 be heard to maintain the opposite of what the highest officials of its Government maintained in 1968? Is the Chamber on sound ground in pivoting its Judgment on such tremulous terrain?

Fourth, not only does the Chamber's cardinal conclusion conflict with the construction of Italian law by Italy's most senior officials at the critical time, it is not fully consistent with the holding of the Court of Appeal of Palermo on which the Chamber relies. That Court, as does the Chamber, concluded that ELSI's bankruptcy was caused not by the requisition but by its prior state of insolvency, finding that "the Company's state of insolvency was decisive and sufficient cause for its failure (Art. 5, Bankruptcy Law)". But did the Court of Appeal of Palermo consequently conclude or imply that ELSI or its shareholders did not enjoy the right to control and manage ELSI or enjoy other rights of ownership by reason of its insolvency immediately prior to the Mayor's intervention and hence were deprived of no such rights by the requisition? Not at all. On the contrary, not only did the Court of Appeal accept that it was "probable that the bankruptcy was requested by the Company itself with the intention of getting out of the very serious situation of operational unavailability created by the requisition". It held (overturning the lower court in this regard) the appeal:

> "to be justified as regards the damages derivable from the operational unavailability of the installation, plant and equipment which are the subject of the requisition order, as a result of the execution of that order".

It accordingly awarded damages for this incident of the requisition, a requisition which it repeatedly characterized as "unlawful". There is ample room to question whether those damages were adequate, but that is beside the immediate point, namely, that the reasoning and conclusion of the Court of Appeal of Palermo in this regard appear to be inconsistent with the Chamber's central reasoning and conclusion. To be sure, the question of depriving ELSI or its shareholders of their right to control and manage ELSI was not the question at issue before the Court of Appeal. The question rather was, what "damages" — and it is significant that the Court employed the very term "damages" *("danni")* — were due to ELSI or its representative (the trustee in bankruptcy) by reason of a requisition of its plant and equipment which had been found to be unlawful? The Court of Appeal held that "damages" were due for the period in which the plant and its equipment were not available to ELSI or its representative but were operationally unavailable by reason of the requisition. Thus the Court of Appeal imported that ELSI or its representative continued as of the date of the requisition and thereafter to have possessory rights in

ELSI's plant and equipment of which they had been deprived by the requisition despite its finding of ELSI having been insolvent before the requisition took place. If the Court of Appeal saw ELSI as deprived of no right by the requisition because such right had been dissolved by the prior fact of insolvency and its effects in Italian law, how could it have awarded what is described as "damages" deriving from the requisition?

Fifth, not only did the experts called by the Parties differ in their financial analyses and legal conclusions: the experts of Italy differed between themselves. So uncertain was the insolvency of ELSI as of the date of the requisition that the expert on accountancy who testified for Italy maintained that ELSI was then "on the verge of insolvency" — but not insolvent (at least, in practical terms). This was no slip of the tongue. In his prepared statement to the Chamber of the Court, that expert stated that ELSI "was on the verge of insolvency well before the requisition of the plant on 1 April 1968". He was closely questioned on this statement by the Chamber. He maintained that "the company, at 31 March, was on the verge of insolvency". The President of the Chamber persisted: "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." Italy's expert replied:

> "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."

Italy further introduced into evidence a letter of 9 May 1968 (i.e., after ELSI had filed for bankruptcy) written by the Mayor of Palermo to the Director General of the Nato Hawk Management Office in Paris. In speaking of the "irreplaceable" value of ELSI to Sicily's economic life because of its "equipment, facilities, highly skilled labour, a management staff, domestic and foreign commercial relationships . . .", the Mayor described Raytheon-Elsi's decisions to close the plant and dismiss the workforce as

> "more like an extreme effort to exert pressure on the central and regional government organs to get the partnership requested rather

than like an absolute need arising from an irreversible corporate situation"

— a statement which is inconsonant not only with Italian counsels' depreciation of ELSI's assets but inferentially with the conclusion that ELSI was insolvent in March 1968 and that its bankruptcy was inevitable.

Sixth, and most important, the question of whether ELSI was insolvent as of 1 April 1968 in the last analysis depended upon the policy of its principal shareholder, Raytheon. Raytheon had and has very ample resources relative to those at stake in ELSI. It certainly could have paid all of ELSI's debts and resolved any question of ELSI's insolvency. It cannot be maintained that Raytheon's policy was to pay all of ELSI's debts. If Raytheon had been prepared to continue to pour capital into ELSI, the question of its liquidation would not have arisen. ELSI's financial difficulties came to a head when Raytheon informed it that it was no longer prepared to invest capital in ELSI. It is clear, in particular, that Raytheon was not prepared to pay off the principal on loans which had been extended to ELSI which Raytheon had not guaranteed, though it was prepared, and proved to be punctilious in paying in full, the loans to ELSI which it had guaranteed. But that is not at all to say that Raytheon was not ready and willing to advance such further sums as might be required to permit an orderly liquidation of ELSI's assets.

The United States submitted evidence, which the Chamber accepted, showing that Raytheon had transferred to Italy fresh capital in order to pay off the claims of small creditors. It submitted evidence, which the Chamber has accepted, that Raytheon was prepared to purchase the outstanding accounts receivable of ELSI for 100 per cent of their value; a purchase which would have infused a large sum of cash into ELSI's virtually empty coffers. It further submitted evidence, which does not appear to have been challenged, that, in March 1968, the plant was operating (in so far as strikes permitted) and ELSI was filling orders and that, after the end of March, ELSI was prepared, even with its skeleton workforce, to complete work-in-progress and outstanding orders and to realize a considerable sum thereby. Most important of all, the United States has vigorously maintained that Raytheon was prepared to advance the resources to ELSI required to maintain a sufficient cash flow so that ELSI would have been enabled to implement an orderly liquidation; and the Chamber has accepted this critical contention.

Italy's counsel endeavoured to raise doubt about the existence of this last policy decision of Raytheon, and argued that the Applicant's counsel had presented this contention only at a late stage of the oral proceedings in this case, but not at the outset of them or in its written pleadings, and still less had this critical contention been earlier advanced, as surely it should

have been if it were in fact justified. This argument of Italy was unfounded, for not only had counsel for the United States made this contention early in oral argument but the trustee in bankruptcy had made it some fifteen years before, as is shown by the judgment of the Court of Appeal of Palermo. That Court observed that:

> "the appellant's line of argument is . . . the stockholders of Raytheon-Elsi, having made good for the losses of prior years would also take action to bring about an orderly and favorable liquidation of the Company, thus forestalling bankruptcy, which instead had become necessary as a result of the requisition order by the Mayor" (Memorial of the United States, Annex 81, p. 15).

It is clear that Raytheon's self-interest called for the adoption and implementation of a policy of providing ELSI with the cash flow required to make an orderly liquidation practicable. For one thing, the spectacle of a Raytheon-owned company going into bankruptcy was one which a leading international corporation of the standing of Raytheon must have wished to avoid — not at all costs clearly, but surely at some cost. Moreover, if the liquidation had been enabled to proceed and succeed by reason of injection of sufficient cash-flow funds, Raytheon not only would have been repaid its fresh advances but would have avoided being called upon to pay at least some and conceivably all of the large loans to ELSI which it had guaranteed. Since rational corporate policy dictated Raytheon's provision of sufficient cash flow, and since the presumption of the reasonable corporation should apply no less than that of the reasonable man, why does it not follow that, by the provision of cash-flow funds, together with the funds to be realized from Raytheon's purchase of accounts receivable and otherwise, ELSI would have been in a position to forestall bankruptcy and perhaps to have avoided it altogether?

The Chamber's Judgment accepts the critical contention that Raytheon would have been prepared to advance cash-flow funds while it nevertheless concludes that, as of the time of the requisition, ELSI was insolvent or, if not, was in any event fast slipping into bankruptcy. Why?

In my view, it reaches this inconsistent conclusion because it muddles time factors and facts.

It is the fact that ELSI, after the requisition, petitioned for bankruptcy, citing the requisition as its cause. That of itself hardly shows that the requisition was the cause of the bankruptcy; the Chamber's conclusions in this regard are clearly correct. Causation in a case such as this is a complex matter, and the requisition can at most only have been one of a number of causes of ELSI's bankruptcy (though it may well have been the immediately precipitating factor). But before the requisition, ELSI had not only not regarded itself as insolvent; not only was ELSI not seen or treated by all the authorities of Italy with which it was intensively dealing as being insolvent; not only had ELSI apparently not defaulted in meeting its obligations; but ELSI was actively planning for the sale of its assets. There was some evidence introduced of interest on the part of prospective foreign

purchasers. If the requisition had not intervened, and if ELSI's immediate cash-flow requirements actually had been met by Raytheon, thus buying time in order to sell, can it really be held that ELSI would have been forced into bankruptcy, at any rate *when* it was forced into bankruptcy? Surely, or if not surely, then probably, absent the requisition, ELSI would have been able to sell, or contract to sell, some of its assets (in addition to all its accounts receivable, and work-in-progress and inventory); and if it had realized on this ability, ELSI would have received returns which were considerable. Those returns might not have been sufficient to permit ELSI to discharge all of its liabilities as they accrued. But if they turned out not to have been sufficient, and if ELSI at some point had found it necessary to go into bankruptcy, or had been forced into bankruptcy, the losses actually suffered by ELSI and its creditors would have been materially less than they proved to be, and the sums which Raytheon was obliged to pay to ELSI's creditors to whom Raytheon had extended guarantees would have been materially less than they proved to be. This is so not only because such a bankruptcy would have come later than it actually did, absent the triggering factor of the requisition; without the requisition, a trustee in bankruptcy would have had access to the plant and been in a position to sell off its assets months before the actual trustee was able to have such access because of the requisition which blocked access for the six months that it was in force.

Moreover, if the requisition had not intervened and if Raytheon had been permitted to proceed with supplying sufficient cash flow, there would have been incentive for the banks in the time so bought to have reached a settlement with ELSI. For one thing, failure to reach a settlement, if bankruptcy ensued, would, under Italian law, have required the banks to pay back to the trustee in bankruptcy all that ELSI had paid to the banks in the prior year. More than that, it would have made sense for the banks to settle for 40 or 50 per cent of what was due to them than to have precipitated bankruptcy proceedings which eventually produced less than 1 per cent. Arguably the banks believed that, through litigation, they would recover 100 per cent by having Raytheon held responsible for debts of ELSI which Raytheon had not guaranteed. But under Italian law as it then was, such a suit could succeed only if Raytheon could be shown to be ELSI's sole stockholder. Raytheon had never been ELSI's sole stockholder. Until 1967, substantial equity was held by other Italian corporations and, in 1967, when Raytheon bought out that equity, care was taken to ensure that a fraction of the stock was held not by Raytheon but by a company, Machlett, which in turn was owned by Raytheon. Thus the outcome of litigation must have appeared problematical and, in the event, the banks did not succeed in Italian courts in holding Raytheon liable for ELSI's debts.

The Chamber's Judgment concludes that "the possibility" of an orderly

liquidation by ELSI "is purely a matter of speculation". I agree that an orderly liquidation would have been beset with uncertainties, but those uncertainties go not so much to ELSI's ability and entitlement to liquidate its assets as to the calculability of the damages which may be found to flow from the denial of that ability and entitlement by the requisition imposed upon ELSI.

In my view, it is unpersuasive for the Chamber to say, in effect, that ELSI would have gone into bankruptcy later if not sooner, and accordingly that the requisition did not matter. It is in this respect that I believe that the Chamber muddles what it finds to be the facts with time factors. At the time the requisition took place, it did matter, it did have the economic effects, or some of the economic effects, just described; and at the time it took place, it deprived Raytheon and Machlett of their right to control and manage and hence liquidate ELSI and it deprived ELSI of its right to be liquidated by a management responsible to Raytheon and Machlett. Accordingly the requisition placed Italy in violation of its obligation under Article III of the Treaty to permit Raytheon and Machlett to "control and manage" ELSI.

This conclusion is the more compelling when the meaning of the Treaty is interpreted in the light of the provisions and ratification processes set out in this opinion. Can it be said that the requisition, imposed as it was when it was, comported with the "full rights" of Raytheon and Machlett to "organize, direct and control" ELSI, that it comported with their "unobstructed control" and "maximum freedom of choice"? Was it consistent with "the principles of equitable treatment" which the Preamble to the Supplementary Agreement describes the Treaty as containing? Was the requisition consonant with assuring to Raytheon "the most liberal treatment practicable" in respect of the repatriation of its invested capital? Did it respect "the guaranty against political risks" which the Treaty as a whole was designed to provide? Not in my view.

The Arbitrary Measure of Requisition

Was the measure of requisition imposed by the order of the Mayor of Palermo upon ELSI "arbitrary" as that term is found in Article I of the Treaty's Supplementary Agreement?

The Chamber rightly concludes that, even if the requisition did not prevent Raytheon and Machlett from exercising "their effective control and management" of an enterprise, ELSI, which they had been permitted to acquire in Italy (see proviso *(a)* of Art. I, quoted in para. 120 of the Judgment), and even if the requisition did not impair "their other legally acquired rights and interests" in ELSI (proviso *(b)*), the question remains: was the requisition arbitrary? In my view, for the reasons stated in the previous sections of this opinion, the requisition did prevent Raytheon and Machlett from exercising effective control and management of ELSI,

and it did impair the legally acquired rights and interests of Raytheon and Machlett in ELSI. But even if, *arguendo*, the question of observance by Italy of its obligations under Article I is framed: "Was the measure of requisition imposed by the Mayor's order arbitrary?", that question is, it is believed, unpersuasively answered by the Chamber.

The Chamber acknowledges that the requisition was found to be improperly motivated by the Prefect of Palermo, and unlawful and indeed "a typical case of excess of power" by the Palermo Court of Appeal. It nevertheless concludes that, in these Italian administrative and judicial proceedings, the requisition was not held to be arbitrary, in terms or in substance. It further holds that, even if the requisition had been found in these municipal proceedings to have been arbitrary, that would not be determinative in international law: it would be no more than "a valuable indication". Still relying on its interpretation of what was held in Italian administrative and judicial proceedings, the Chamber holds that the requisition was not arbitrary in the international legal sense, because it was an act opposed to a rule of law rather than to the rule of law. It defines as arbitrariness a wilful disregard of due process of law; holds that the requisition was neither unreasonable nor capricious; and concludes that, since the Mayor's order was made in a context of an operating system of law and of remedies, it was not arbitrary.

The Chamber's reasoning thus turns on three propositions, all of which are in my view unfounded: first, that the Prefect and Palermo Court of Appeal did not find the requisition to be arbitrary; second, that the requisition, in international law, was neither unreasonable nor capricious; and third, that in any event the Italian processes of appeal and redress to which the order of requisition was subject ensured that the order was not arbitrary. These propositions will be considered in turn.

(i) *The rulings of the Prefect and the Court of Appeal*

The Chamber quotes from the Prefect's decision what it characterizes as "the principal passage which is relevant" in the following terms:

> "There is no doubt that, even though, from the purely theoretical standpoint, the conditions of grave public necessity and of unforeseen urgency warranting adoption of the measure may be considered to exist in the case in point, the intended purpose of the requisition could not in practice be achieved by the order itself, since in fact there was no resumption of the company's activity following the requisition, nor could there have been such resumption. The order therefore lacks, generically, the juridical cause which might justify it and make it operative."

It appears to conclude from this and other passages of the Prefect's decision that the Mayor's order of requisition was held by the Prefect to have been *intra vires*. What the Prefect held, however, was that the Mayor relied on provisions of law which, in conditions of grave public necessity and unforeseen urgency, entitle the Mayor to issue an order of requisition of private property; but in this case, the Prefect found, these conditions were present from "the purely theoretical standpoint", a finding which appears to mean that they were not actually present.

The Chamber reaches the opposite conclusion; quoting the foregoing passage of the Prefect's decision, it holds that the Prefect "did not find that those conditions were absent". In my opinion, the difficulty with the Chamber's conclusion is that — if one reads on — it emerges from the Prefect's decision that the conditions of grave public necessity and unforeseen urgency were indeed seen to be absent. The Prefect wrote: "Once the competence of the Mayor has been ascertained, it is necessary to ascertain whether in the situation there were the grounds for the exercise of the power." (Memorial of the United States, Annex 76, p. 10.) That statement is immediately followed by the quotation from the Prefect's decision which has just been reproduced. The Prefect's decision then continues:

> "In fact, the Mayor believed to be able to face the situation existing in Raytheon-Elsi's plant by means of an order of requisition, clearly without taking into consideration the fact that the situation of the company — for functioning-economical reason and for reason of market — was such as not to permit the continuation of the activity, unless by means of interventions by the responsible organs directed to solve the financial and industrial problems of the company.
>
> The requisition did not change anything in the situation of the company; this is proved by the fact that neither the stopped activity was resumed, nor, as a consequence of the order, more favorable conditions were created in the company. On the contrary, the situation of insolvency determined the declaration of bankruptcy of the company, with the consequence that the plant was taken away from the disposability of the Public Administration.
>
> It is also important to emphasize that the plant, at the time of the declaration of bankruptcy, was not working and that the employees were staying therein to protest for the nonresumption of the activity and for dismissal of the whole personnel.
>
> As far as the danger of 'unforeseeable acts of perturbation of the public order', that the Mayor wanted to avoid by means of the requisition, are concerned, the events subsequent to the requisition have clearly demonstrated the inefficacy of the measure; this is proved by the fact that the parades and demonstrations of protest followed one another, creating also a situation of perturbation of the public order,

> until the situation was faced by responsible organs of the Government and, even though with the delays which are unfortunately inevitable, was drawn toward a solution." (Memorial of the United States, Annex 76, pp. 11-12.)

That is to say, after having held that, "from the purely theoretical standpoint, the conditions of grave public necessity and of unforeseen urgency warranting adoption" of the order of requisition "may be considered to exist in the case in point", the Prefect goes on to examine what was the case "in fact" and concludes *(a)* that the order of requisition could not restore ELSI's plant to operation, that it could not solve the financial and industrial problems of the company; *(b)* the requisition order did not in fact cause the activities of the company which had been stopped to resume nor did it otherwise aid ELSI; *(c)* the plant remained closed and occupied by the former employees; and *(d)* public order was in any event disturbed, despite the requisition: in short, that the requisition order proved unjustified on all counts. What support do such holdings provide for the Chamber's conclusion that the conditions of grave public necessity and unforeseen urgency were not found by the Prefect to have been "absent"?

More than this, the essential point of the passage of the Prefect's holding which the Chamber quotes, and which is reproduced at the outset of this section of this opinion, is that the requisition could not achieve its intended purposes and therefore lacked justifying juridical cause. That is to say, the Prefect held that, since the order of requisition could not, was incapable of, achieving what it purported to achieve, it lacked the juridical motivation which might justify it and make it operative. That is not far from stating expressly that the requisition was ill-motivated and hence unreasonable or even capricious.

The Prefect's decision continues, in one translation provided by the United States:

> "We cannot refrain from stating that the order was issued — as it appears from the same order and as it has been observed by the appellant — also under the influence of the pressure created by, and of the remarks made by the local press; therefore we have to hold that the Mayor, also in order to get out of the above and to 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 some way."

The last phrase of the Prefect's decision, as quoted in the judgment of the Court of Appeal of Palermo, is otherwise rendered in the translation of that judgment supplied by the United States: "the Mayor . . . resorted to requisition as a step aimed more than anything else at bringing out his intention to tackle the problem just the same". The Prefect referred in this passage to the provision of the Mayor's order which read:

> "*Considering* also that the local press is taking a great interest in the situation and that the press is being very critical toward the authorities and is accusing them of indifference to this serious civic problem . . ."

In respect of the foregoing passage, the following question was put to Italy in the course of the oral proceedings:

> "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?"

Italy in part replied:

> "The answer is, that if the measure was taken solely '"to intervene in one way or another" . . . with a view not towards resolving a problem . . . but in order to appease press and public criticism or to win public favour "in any way"', then it probably would have been an arbitrary measure.
>
> But, if there were other substantial and sincere motivations behind the measure in addition to that of appeasing public opinion, i.e. 'to protect general public interest . . . and public order' it would then by no means have been an arbitrary measure."

This reply raises the question of whether a single, unseverable public act which in part has arbitrary elements and in part has not, is arbitrary, of whether an official act which is partially arbitrary in motivation (not to speak of implementation, as I shall), qualifies as arbitrary.

But what were the motivations of the order of requisition? Were they, as Italy claims, to protect the general public interest and public order? As just indicated, those claims apparently were not upheld by the Prefect. Apart from finding such factors to be present from "the purely theoretical standpoint", his holding that the requisition order in fact neither promoted the public interest nor promoted the preservation of public order does not support the substantiality of these motivations.

It cannot be doubted that an essential purpose of the requisition was to prevent ELSI from dispersing and liquidating its assets. This was made

perfectly plain by the statements of the President of Sicily cited above (and see paras. 28 and 34 of the Chamber's Judgment) as well as the Mayor's letter of 9 May 1968 which is explicit in referring to the dangers of the "dismemberment" and "dismantlement" of ELSI. The requisition order may well also have been designed to give an understandably concerned and critical public opinion the impression that the Mayor was attempting "to do something", or, as the Prefect put it, "to intervene in one way or another" so as to show the Mayor's intent "to face the problem", to take "a step aimed more than anything else at bringing out his intention to tackle the problem just the same". But those are hardly justifications which show that the act was reasonable rather than unreasonable, judicious rather than capricious. To prevent ELSI from selling — and probably dispersing in places other than Palermo — its assets may have seemed justifiable to the Mayor, who, in taking this decision, gave no sign of being aware of the existence of any rights which ELSI enjoyed under the FCN Treaty. It was not, however, a measure which could re-open the plant, re-start full production, and put ELSI's former workforce back to work, nor was it a precondition of Sicily's continuing, as it did, to pay their salaries (as Italy expressly conceded). Particularly in the context of the Treaty rights and expectations set out in this opinion, can action designed to prevent ELSI from selling its assets and repatriating any resultant capital be seen as other than arbitrary? The Chamber rightly holds that the

> "question of whether or not certain acts could constitute a breach of the treaty right to be permitted to control and manage, is one which must be appreciated in each case having regard to the meaning and purpose of the FCN Treaty".

Shall not what is "arbitrary" under the Treaty equally be considered in each case having regard to the meaning and purpose of the Treaty?

It is significant that the Court of Appeal of Palermo attached importance to the holding of the Prefect which appraised the Mayor's order as one which was responsive to press criticism and "mainly" intended to show his willingness to intervene "in one way or another". In characterizing that holding as "severe", and as "showing a typical case of excess of power" on the part of the Mayor "which . . . is a defect of legitimacy on the part of the administrative act", the Court of Appeal held:

> "the Prefect's decree works *ex tunc* and not *ex nunc* and hence deprives the requisition of the assets of the appealing Company, as performed by the administration, of any justification, which is why, in any case, there arises the problem of the damages that the Company may have suffered as a result . . . it is quite evident that — when the

> Prefect pointed out that '. . . the ultimate goal of the requisition could not have been attained in practice through the order itself' and that '. . . the order generically lacks the juridical cause that could justify it or render it operative' as was then amply demonstrated, concluding with the severe finding that '. . . the Mayor . . . resorted to requisition as a step aimed more than anything else at bringing out his intention to tackle the problem just the same' — he is obviously showing a typical case of excess of power which, as we know, is a defect of legitimacy on the part of the administrative act . . ." (Memorial of the United States, Annex 81, pp. 13-14).

If a "typical case of excess of power" does not connote a classic case of an arbitrary act, what does?

The holding of the Court of Appeal is instructive in a further respect as well. The order of the Mayor concluded: "With a subsequent decree, the indemnification to be paid to said company for the requisition will be established." As the Court of Appeal points out, such a subsequent decree never was issued by the Mayor; no compensation was offered to or paid over to ELSI for the requisition by the Italian administration. The Court of Appeal held that:

> "Now, apart from the consideration that the failure to determine this indemnity (no authority has ever proceeded to do that although this should have been done before the requisition came to an end), by itself would have been enough to recognize the unlawfulness of the requisition . . . one cannot fail to stress the incongruency of denying the Company — which had been subjected to this unlawful requisition — an indemnity which most certainly it would have been awarded if this same action had been taken lawfully by the administration." (*Ibid.*, p. 19.)

The Court is doubtless correct in holding that the Mayor's failure to pay compensation for the requisition compounded its unlawfulness. But does not the Mayor's failure to abide by his own decree suggest capriciousness in the process of requisition? It can hardly be seen as consistent with the due process which is the antithesis of what is arbitrary.

(ii) *The unreasonable and capricious nature of the requisition*

It has, it is believed, been shown in the foregoing section that the measure of requisition was unreasonable and capricious since, cumulatively:

- the legal bases on which the Mayor's order relied were justified only in theory;
- the order was incapable of achieving its purported purposes;

- the order did not achieve its purported purposes;
- the order, issued, as it specified, "also" because "the local press is taking a very great interest in the situation and . . . the press is being very critical toward the authorities and is accusing them of indifference to this serious civic problem", was in part designed to give an impression of the Mayor confronting the problem "in one way or another", rather than prescribing a measure which could have been responsive to the problem;
- the order accordingly was not simply unlawful but "a typical case of excess of power";
- a paramount purpose of the requisition was to prevent the liquidation of ELSI's assets by ELSI, a purpose pursued without regard to treaty obligations of contrary tenor (and the Treaty's obligations, Italy maintains, bound it not only externally but were self-executing internally);

- the Mayor transgressed the terms of his own order by failing to issue a decree for indemnification for the requisition and by failing to offer or pay that indemnification.

By its nature, what is unreasonable or capricious is subject in a given instance to a range of appreciation; these are terms which, while having a sense in customary international law, have no invariable, plain meaning but which are capable of application only in the particular context of the facts of a case. Given the facts of this case, it is concluded, for the reasons stated, that the order of requisition as motivated, issued and implemented was unreasonable and capricious and hence arbitrary.

(iii) *The process of appeal does not necessarily render a measure otherwise arbitrary non-arbitrary*

The weightiest reason advanced by the Chamber in support of its conclusion that the requisition was not arbitrary may be that it was reviewed administratively and judicially. Those review processes in this case must enjoy every presumption of being objective, not only, if principally, because they were processes of the application of the law of Italy through Italian administrative and judicial procedures, but because, in the event, they manifested objectivity, ruling in favour of ELSI's interests in principle, even if in practice ELSI or its creditors gained little financial satisfaction from them. To be sure, the Prefect's decision was seriously and unjustifiably delayed, and that delay was materially prejudicial to the interests of ELSI and its creditors. Nevertheless it remains the fact that, in this case, Italian administrative and judicial processes functioned. There is attraction in the argument that, since ELSI or its representative (the trustee in bankruptcy) had access to processes of justice, and since the procedures and results of that process cannot be seen as tantamount to a denial of justice, that is the end of the matter, that, even if the order of

requisition was arbitrary and hence initially engaged Italy's responsibility under the Treaty, that responsibility was never consummated by reason of the fact that, in the end, ELSI's case was dealt with by Italy's internal processes. Indeed, the conclusion that ELSI's case was dealt with is critical to the Chamber's conclusion in this case that the requirement of the exhaustion of local remedies was fulfilled.

Substantial as these considerations may be, I do not find them convincing, for reasons which are best explained in the light of the International Law Commission's proposals for codification of the law of State responsibility.

Articles 20 and 21 of the Commission's Draft Articles on State Responsibility provide as follows:

> "*Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct*
>
> There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.
>
> *Article 21. Breach of an international obligation requiring the achievement of a specified result*
>
> 1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.
>
> 2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation." (*Yearbook of the International Law Commission*, 1977, Vol. II, Part Two, p. 11.)

The Commentary to these articles explains that Article 20 concerns international obligations which require the State to perform or to refrain from a specifically determined action; these obligations are sometimes called obligations "of conduct" or obligations "of means". Such obligations are to be contrasted with the obligations "of result" described in Article 21. What distinguishes the first type of obligation from the second is not that obligations "of conduct" or "of means" do not have a particular object or result, but that their object or result must be achieved through action, conduct or means "specifically determined" by the international obligation itself, which is not true of obligations "of result" (*ibid.*, pp. 13-14). If a State fails to perform or to refrain from a specifically

determined action, that course of conduct of itself definitively gives rise to its international responsibility.

Is the obligation undertaken by the parties to the Supplementary Agreement not to subject corporations of either party to "arbitrary or discriminatory measures" within the territories of the other "resulting particularly in" — but not exclusively in — the detailed results set out in subparagraphs *(a)* and *(b)* of Article I an obligation of conduct or an obligation of result?

The particular objects of the obligation not to subject such corporations to arbitrary or discriminatory measures are very specifically set out. But the particular means of achieving these objects are not. Thus, in terms of the analysis of the Commission, the obligation of Article I would seem to be an obligation not of means but of result, as international treaty obligations concerning the protection of aliens and their interests normally are. Nevertheless, it does not follow in the current case that Italy is absolved of its arbitrary treatment of ELSI and the interests of its shareholders in ELSI by reason of the administrative and judicial proceedings which followed the requisition.

I so conclude because, to pursue the terminology of the Draft Articles of the Commission:

> "There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result, if, by the conduct adopted, the State does not achieve the result required of it by that obligation."

In the current case, Italy did not achieve the specified result, namely, relieving ELSI of the effects of the arbitrary measure of requisition. It did not achieve the specified result in general, or in respect of the very particular objects set out in subparagraphs *(a)* and *(b)* of Article I.

The Commission's Draft Articles indicate that it is not enough for the offending action of a State to be reviewed administratively and judicially. That action must be fully corrected, "the result required" must "be achieved". Can it be maintained that the measure of requisition imposed upon ELSI was fully corrected by Italian administrative and judicial proceedings, that the object of not subjecting ELSI to such an arbitrary measure was subsequently though not initially achieved?

The Prefect annulled the order of requisition. But the Prefect did not do so for some 16 months after its imposition. Italy in effect has maintained that it is normal for a Prefect not to open his "in" box for 16 months, that ELSI did not stamp its appeal "urgent", and that there is a process to activate an inactive Prefect which ELSI did not pursue. I share the Chamber's view that these arguments are unpersuasive. There was no convincing demonstration that such lassitude was the norm; evidence of orders of req-

uisition being overturned in days, not months, was introduced. ELSI's appeal was instinct with urgency, by its nature; and ELSI's situation and position, a principal pre-occupation of the local public and press, must have been known to the Prefect of Palermo. By the statutory time at which the Prefect could have been activated, ELSI was in bankruptcy and no longer able to invoke that procedure.

The Prefect's decision was important for the reasons which appear in the Chamber's Judgment and this opinion. But coming as late as it did, it could not and did not provide the result which Italy's obligation not to subject ELSI to arbitrary measures was designed to achieve. By the time 16 months had elapsed, ELSI had long since been effectively barred from collecting 100 per cent of its accounts receivable, receiving cash-flow support from Raytheon, completing work-in-progress and selling that work and inventory, and soliciting the sale of and showing and selling off its plant and equipment with a professional knowledge of its assets and their attraction to buyers which a trustee in bankruptcy could not be expected to possess. The Prefect would have had to have acted almost immediately — as other Prefects in some other requisition cases had been shown to have acted — if the requisition was to have been lifted before ELSI was forced into bankruptcy. But he did not, and, in the light of the predictions or threats made to ELSI and Raytheon by the President of Sicily (see para. 34 of the Chamber's Judgment), ELSI may have had scant reason to be confident that he would.

The Commentary of the International Law Commission cites a case in which it has been held that "the required result could be regarded as frustrated as soon as the law authorizing expropriation was enacted" because "the enactment of the law seriously reduced the commercial value of the foreigner's property" (*loc. cit.*, p. 26). In the light of the effects just recounted of the requisition on ELSI's situation, may it not similarly be concluded that the required result of holding ELSI free of arbitrary measures could be regarded as definitively frustrated as soon as the order of requisition was applied to it because its application "seriously reduced the commercial value" of Raytheon's interests in ELSI? The Commentary makes clear that, in order for a State to be absolved of a breach of an international obligation of result, of a breach which has begun or only been adumbrated, the required result must not have become "finally unattainable in fact by reason of that action or omission" which is provisionally in breach (*ibid.*, p. 28). For the reasons just set out, it may be doubted whether the result of making ELSI whole, of fully removing the effects of the requisition, was in fact feasible.

In order for the obligation of result to be met in the current case, Italian administrative or judicial recourse would, in the Commission's words, have had "fully to achieve the required result by new conduct which eliminates entirely and *ab initio* the incompatible situation created by its previous conduct" (*loc. cit.*, p. 28). Alternatively, it could furnish an equivalent result, as by rendering "full and complete compensation" for the breach (*ibid.*, p. 29). It remains to be considered whether the judgments of the Court of Palermo or the Court of Appeal of Palermo provided full and complete compensation.

In the proceedings before the Court of Palermo, the trustee in bankruptcy maintained that ELSI had been obliged to file for bankruptcy by reason of the situation created by the order of requisition; that, even after bankruptcy had been declared, the trustee could not take possession of the plant and equipment due to the order which remained in effect until 30 September 1968, which caused "unimaginable damages for the bankrupt company and, therefore, for the creditors"; that the order of requisition had been declared illegal by the Prefect; and that the Ministry of Interior and the Mayor of Palermo should be condemned to pay damages to the bankrupt estate of ELSI due to the illegal occupation of the plant. Such damages were claimed to be the considerable decrease in the value of the plant and its equipment which resulted from the difference between book value as of the date of the bankruptcy and the evaluation of the plant and equipment made by the court appraiser immediately after the six-month period of requisition had elapsed, i.e., 2,395,561,600 lire plus interest.

The Court of Palermo, after examining evidence of the financial condition of ELSI on the eve of the requisition, and observing that by that date ELSI's plant was for all practical purposes no longer in operation, concluded that the connection between the company's bankruptcy and the requisition was unfounded. It rejected the claim that damage was evidenced by the difference in evaluations described, or arose from the lack of access to the plant for the period of the requisition, since the bankruptcy was due to other, much more relevant causes; the evaluations on the credit side of the balance sheet were "relative"; and it was not proved that any damage flowed from lack of access to the plant by the trustee or from the occupation of the plant by workers or from negligent custody of the plant. That is to say, the Court of Palermo provided no compensation whatever for the requisition, because of its finding that it caused no damage whatever to ELSI.

The substantial judgment of the Court of Appeal of Palermo has been largely dealt with by the Chamber's Judgment and in this opinion. On the question of damages, the Court held that:

> "as regards the damages consisting in the fact that the order triggered the Company's bankruptcy, the negative conclusion arrived at by the

> Court [of Palermo] is amply and convincingly motivated . . . in any case . . . there is no proof whatsoever as to the damages incurred from that viewpoint".

The Court of Appeal attributed decisive effect to what it found to be the prior insolvency of ELSI and held that "it is then certain that the damages" claimed, since "they are connected to the bankruptcy", could not be considered to exist. There was no proof of the reliability of the figures shown in the balance sheet, nor proof that the reduction in value claimed by the trustee was caused by the requisition. No expert could, in 1974, establish the actual value of the plant and equipment on the date of the order of requisition.

Nevertheless, as noted above, the Court of Appeal found the appeal to be justified "as regards the damages derivable from the operational unavailability of the installation, plant, and equipment which are the subject of the requisition order . . .". It held that it was indisputable that, if the order of requisition had been lawful, it would have required the payment of an indemnity; it was the more incongruous not to pay an indemnity for an unlawful takeover. Deprivation of the enjoyment of an asset is an economic sacrifice which entails indemnification if lawfully carried out, and restitution of damage is required when it is unlawful. The requisitioning authority was responsible at least for the payment of the economic value of its possession of the requisitioned property. Moreover, "the delay in the process of taking possession by the receivers delayed the liquidation operations and hence the realization of the value of the requisitioned property to the evident damage" of the bankruptcy assets. The Court, "in the absence of proof as to any greater damage", equated damage to the amount of the interest at the rate of 5 per cent per year on the value of the requisitioned property, as that value had been determined by the evaluator appointed by the trustee, a sum which came to 114,014,711 lire, plus interest to run from the date on which the requisition expired.

May the measure and amount of compensation awarded by the Court of Appeal of Palermo be viewed as "full and complete compensation" which provides an equivalent result to ELSI's never having been requisitioned? Surely not. Whether or not the requisition was the cause of ELSI's bankruptcy — indeed, accepting that it was not "the" cause — the requisition inflicted uncompensated damage upon ELSI and its creditors, including *(a)* ELSI's practical inability to sell its accounts receivable for 100 per cent of their face value; *(b)* ELSI's actual inability to complete its work-in-progress and sell that work and its inventory for their value (in the event, work-in-progress was sold for materially less than its appraised value); and *(c)* ELSI's actual inability to arrange the showing and sale of its plant, product lines and equipment and its inability to bring to bear its knowledge of its assets and of the industry so as to raise the maximum return from the sale of those assets (including intangible assets).

It cannot be supposed that the sale of the company's assets in bankruptcy proceedings could have realized the full value of ELSI's assets. That would have been unlikely in any bankruptcy sale; it is the less likely to have been the case in the circumstances of the sale as it eventually took place. For the reasons just stated, the amount awarded by the Court of Appeal of Palermo cannot have filled the large gap between the amount realized in the bankruptcy proceedings and the value of ELSI's assets.

It may of course be maintained that, even in the absence of the requisition, ELSI would have gone bankrupt. That indeed is the essential conclusion of the Italian courts and of this Chamber. But this conclusion does not take account of the fact — or of what is believed to have been shown in this opinion to be the fact — that, if the requisition had not been imposed when it was imposed, ELSI would have been enabled to realize materially more from its assets than in fact was realized, even if, at some point, ELSI might have been obliged to go into bankruptcy.

It accordingly follows that ELSI was not placed in the position it would have been in had there been no requisition. The equivalent result was not attained by Italian administrative and judicial processes, however estimable they were. Thus, in my view, those processes do not absolve Italy of having committed an arbitrary act within the meaning of the Treaty's Supplementary Agreement.

(Signed) Stephen M. SCHWEBEL.