INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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

(UNITED STATES OF AMERICA *v.* ITALY)

VOLUME II
Counter-Memorial; Reply; Rejoinder

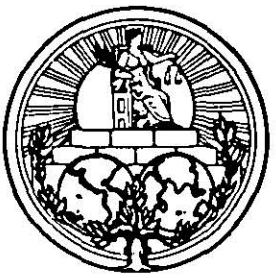
COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

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

(ÉTATS-UNIS D'AMÉRIQUE c. ITALIE)

VOLUME II
Contre-mémoire; réplique; duplique



REJOINDER OF ITALY

DUPLIQUE DE L'ITALIE

INTRODUCTION

1. The Admissibility of the Application and the Applicant's Allegations on the Merits: Some Introductory Remarks

First of all, the Italian Government reiterates its objection to the admissibility of the application for the reasons set forth in Part III of the Counter-Memorial[1] and further developed in Part III of this Rejoinder.

With regard to the facts, it may be useful to summarize at the outset the contentions made in the Applicant's Reply, which contains several discrepancies with respect to the Memorial.

The unlawful behaviour attributed by the Applicant to the Italian Government allegedly consists of four well-defined acts or omissions, namely: the requisition of the ELSI plant by decree of the Mayor of Palermo acting in his capacity of government official; the Prefect's delay in rendering a decision on the appeal; the failure of public authorities to protect ELSI's property from the factory workers' occupation; the interference in the bankruptcy proceedings in order to discourage private purchasers and allow IRI to buy up the plant at a price well below its fair market value[2].

All the above-mentioned behaviour is alleged to be the result of a diabolical plot hatched by the Italian public authorities at many different levels (Central Government, or at least several ministries, regional and local officials, State-owned companies, bankruptcy institutions, etc.) all done to take over a "technological jewel", i.e., ELSI, on the cheap.

This plot allegedly led to the bankruptcy of ELSI, which would otherwise have been wound up in an "orderly liquidation". It also meant that in the bankruptcy proceedings the realized value of the company's assets was much smaller than their true value so that Raytheon and Machlett suffered damage to the extent of the difference between the actual amount received and what would have been obtained if ELSI had been sold as a "going concern", or at least on the base of

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[1] Counter-Memorial submitted by Italy (Case concerning Elettronica Sicula S.p.A. (ELSI)), hereinafter referred to as "the Counter-Memorial".

[2] The Memorial submitted by the United States of America (case concerning Elettronica Sicula S.p.A. (ELSI)) (hereinafter referred to as "Memorial") also contained (I, pp. 65-66, especially at p. 66, note 1) a further accusation against the Italian authorities: publicly owned banks claimed that Raytheon, as "dominant partner", should pay ELSI's unsecured debts.

This reference has been dropped in the Reply submitted by the United States of America on 18 March 1988 (hereinafter referred to as "Reply") (see p. 365, *supra*) and it should be acknowledged that the Applicant no longer intends to pursue a claim on such point and the arguments supporting it. United States Government counsel has apparently realized that it would be absolutely untenable and contradictory to claim that the publicly owned Italian banks would go against their own interests and ruin someone who owed them money, thus losing all their unsecured loans. As chance would have it, the loss incurred by the banks would have been equivalent in economic terms (about 4,000 million) to the profit made by IRI according to the charges made by the Applicant (Memorial, Ann. 13, Sched. E).

its quick-sale value, in the frame of an orderly liquidation[1]. To be added to this are the legal costs incurred and the compound interest on both items.

As set out above, according to the United States Government the facts represent a series of violations of the 1948 Treaty of Friendship, Commerce and Navigation between the United States and Italy and of the 1951 Supplementary Agreement and thereby give the United States Government title to reparation of the losses allegedly incurred.

2. The Facts Represented by the Respondent

The Respondent has done more than merely indicate the gaps and inconsistencies in the version of the facts presented by the Applicant and its patently tendentious nature. The Italian Government has also attempted to clarify the order in which the facts actually took place.

For instance, with regard to the requisition decree, the Respondent illustrated its legal basis under Italian law and pointed out that its aim was not to deprive ELSI of the ownership of its plant but merely to regulate the use of the plant for a period of six months[2]. As far as the "orderly liquidation" is concerned, an outline has been given of the content of the decision taken by the ELSI board of directors on 16 March 1968 (i.e., two weeks before the actual requisition)[3], and confirmed by the shareholders' meeting of 28 March[4], i.e., immediate cessation of production, of all commercial activities and of employment relations as from 29 March[5]. Moreover, the Counter-Memorial examined expectable results of an "orderly liquidation" taking into account the precarious economic and technical conditions of ELSI[6]. Precise figures have been given to show how the chance of avoiding bankruptcy implied the need to get the banks to which ELSI owed money to accept the recovery of only 50 per cent of their credits[7]. Therefore, the fact that ELSI filed a petition for bankruptcy on 26 April 1968 was an inevitable consequence of its state of insolvency and not of the requisition decree. This was attested by the Palermo Court of Appeal in its decision of 23 November 1973[8].

With reference to the alleged manipulation of the bankruptcy procedure by the Respondent, it has been pointed out that, in Italy, this type of proceeding is carried out by a receiver appointed by the Court, who acts in co-operation with the presiding bankruptcy judge and also consults a committee composed of the creditors. All this contributes to ensuring that the proceeding is objective. Furthermore, the Counter-Memorial also analysed the way in which the bankruptcy auctions were organized and the prices fixed for the sale of the plant and

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[1] The quantification of the alleged damage has increased with time. While the Claim of the Raytheon Company and Machlett Laboratories, incorporated against the Government of Italy in connection with Raytheon-ELSI S.p.A. (hereinafter referred to as the "1974 Claim"), contained in Counter-Memorial, Unnumbered Documents, Vols. I, II, III, refers exclusively to the quick-sale value, and the Memorial to the book value and, in the second instance, to the quick-sale value, in the Reply the Applicant mentions a higher value, justifying the increase by the profits a "going-concern" would expect to make. These ever-increasing contentions ring particularly strange with reference to a company whose history is marked solely by losses growing from year to year.

[2] Counter-Memorial, p. 11, *supra*.

[3] Memorial, Ann. 31.

[4] *Ibid.*, Ann. 32.

[5] Counter-Memorial, p. 9, *supra*.

[6] *Ibid.*, pp. 4 ff. and 6 ff., *supra*.

[7] *Ibid.*, pp. 10-11, *supra*.

[8] Memorial, Ann. 81; see also Counter-Memorial, p. 16, *supra*.

equipment[1]. The conclusion was reached that the price paid by the purchaser was quite reasonable[2], even when compared with the estimated quick-sale value stated in the 1974 Claim by the Raytheon and Machlett Companies.

As to the occupation of the factory by the striking work force, it has been pointed out that it began in early March 1968, when the plant was under exclusive ELSI control, and not after the requisition. Moreover, the occupation did not prevent the winding-up operations from being carried out regularly[3].

As to the delay with which the Prefect of Palermo rendered the decision upholding the ELSI appeal against the requisition decree (22 August 1969), documentary evidence has been produced to show that the average length of such procedures is 12 months, which is not substantially less than the time actually taken in that case (16 months). It has also been pointed out that each petitioner has the right to make a special request that the decision concerning him be expedited. In the ELSI case, this was done only on 9 July 1969[4].

One further aspect has been stressed: starting from 30 September 1968 (i.e., from the day on which the requisition decree expired), ELSI lost control of the factory, as a result not of the requisition decree, but of bankruptcy. The delay in the Prefect's decision was therefore not detrimental in any way. Lastly, with regard to the Applicant's assertion that no adequate compensation was paid, it has been responded that, although the decree of the Mayor of Palermo acknowledged ELSI's right to such compensation, the actual payment of compensation was postponed pending the appeal to the Prefect of Palermo, and then the upholding of the appeal implied that the right to such compensation was replaced by the right to compensation for damages caused by the requisition. To this effect a sum of money was awarded by the Court of Appeal of Palermo in its decision of 23 November 1973, which was confirmed by the Court of Cassation on 26 April 1976[5]. The sum was actually paid to the receiver in the ELSI bankruptcy proceeding. Therefore, in the final analysis, it has to be acknowledged that the Respondent fulfilled its obligation to compensate the damage caused by the requisition of the ELSI plant.

3. The Applicant's Failure to Provide Evidence to Justify Its Claims

The Applicant and the Respondent have thus given the Court two widely differing versions of the facts relating to the present case. This means that the dispute between them concerns not only the different interpretation of Treaty provisions but, to an even greater extent, the different statement of the facts to which those legal provisions are to be applied. However, the comparison between the two versions in question cannot be based on the assumption that they have equal weight, and that the Court is called upon simply to establish which of the two parties can prove its arguments more fully and convincingly. This is not the case, because the Applicant, who claims to have been unfairly treated and therefore requests a reparation from the Respondent, must demonstrate that the facts on which its claims are based are true.

We know that, in international cases, it is very often impossible to identify an Applicant and a Respondent since the parties may have concluded a special arbitration agreement. Therefore, it is generally held that the problem of the burden of proof to be shared by the parties cannot be resolved in the same terms

[1] Counter-Memorial, pp. 18-19, *supra*.
[2] *Ibid.*, p. 20, *supra*.
[3] *Ibid.*, p. 15, *supra*.
[4] *Ibid.*, p. 17, *supra*.
[5] The English text of these decisions can be found in Memorial, Anns. 81 and 82.

as in a case heard before a national court. Nevertheless, it is to be pointed out that, in the present case, which has been brought before the International Court of Justice by a unilateral application, there is an Applicant and there is a Respondent. And as it is true that the Applicant has put forward certain claims, it is equally true that it must prove them.

It is interesting to note in this respect that when the Court has had to deal with a question involving the burden of proof, e.g., the *Corfu Channel* case — a case centred around an unlawful act committed in the territory of the Respondent (Albania) — the Court ruled that the sole fact that this State exerted control over its own territory did not mean that it was obliged to have a knowledge of all unlawful acts committed in such territory[1]. The judgment declared that the fact of controlling the territory *per se* "neither involves *prima facie* responsibility nor shifts the *burden of proof*" (logically, in the sense of freeing the Applicant from this burden). It is likewise significant that, in an order on the *Minquiers and Ecrehos* case, the Court, after considering the position of the two Parties (who were both claiming sovereignty over the same territory), and taking into account two articles of the special agreement concluded by them, stated that "each Party has to prove its alleged title *and the facts upon which it relies*"[2].

Lastly, it should also be noted that in its judgment of 27 June 1986 in the case between Nicaragua and the United States concerning *Military and Paramilitary Activities in and against Nicaragua*[3] the Court considered, among other points, Article 53 of its Statute with respect to the situation in which one of the parties does not appear and the other party requests its claims to be satisfied[4]. On that occasion the Court stated that

> "the Court must attain the same degree of certainty as in any other case that the claim of the Party appearing is sound in law and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence[5]".

Later in the same decision the Court stated that "it is of course for the Party appearing to prove the allegations it makes[6]".

In conclusion, therefore, even though both Parties are called upon to prove their respective claims in an international proceeding, it seems unchallengeable that in a suit in which the Applicant complains of being the victim of unlawful acts, of which it accuses the Respondent and for which it requests reparation, while the Respondent denies any breach of its obligations and merely requests that the application should be rejected, it is up to the Applicant to provide evidence to justify its claims.

4. In Particular, the Lack of Evidence concerning the Causal Link Between the Alleged Acts and the Alleged Losses

The nature of the present dispute leads to another important consequence concerning the evidence that the Applicant is obliged to provide. As was said, a series of events involving ELSI occurred in the years 1968 and 1969 for which, according to the Applicant, the Italian Government is responsible. However, although these facts have a chronological sequence, it still has to be proved —

[1] *I.C.J. Reports 1948*, p. 18.
[2] *I.C.J. Reports 1953*, p. 52.
[3] *I.C.J. Reports 1986*, pp. 14 ff.
[4] *I.C.J. Reports 1986*, p. 24, para. 18.
[5] *Ibid.*, para. 29.
[6] *Ibid.*, para. 30.

and this proof is necessary — that there is a causal link between them: in other words, it still has to be proved that there is any cause-and-effect relationship between them.

In particular, it must be pointed out that the most important circumstances giving rise to damage the Applicant has complained of were a direct consequence of the bankruptcy: the non-availability of the ELSI factory and plant after the requisition period (i.e., after 30 September 1968), the compulsory liquidation of the company's assets and the sale of the plant to the ELTEL company. It is a well-known fact that the bankruptcy proceeding was requested by ELSI. Therefore, the Applicant could attribute the above-mentioned circumstances to the Italian Government only by asserting that the filing for bankruptcy was caused by the requisition. However, this assumption must be supported by evidence, which has not been forthcoming. On the other hand, the Respondent's evidence to the contrary is substantial.

With reference to the general problem of the role of causation in the field of State responsibility, it is interesting to recall the principles adopted in the draft Convention on the international responsibility of States for injuries to aliens, established by the Harvard Law School in 1961[1]. Article 1, paragraph 1, of the draft stated the following principle: "A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes injury to an alien." In Article 14, paragraph 3, the concept of causation was defined in the following terms: "An injury is 'caused' . . . by an act or omission if the loss or detriment suffered by the injured alien is the direct consequence of that act or omission." Paragraph 4 added:

> "An injury is not 'caused' by an act or omission: *(a)* if there was no reasonable relation between the facts which made the act or omission wrongful and the loss or detriment suffered by the injured alien, or; *(b)* if, in the case of act or omission creating an unreasonable risk of injury, the loss or detriment suffered by the injured alien occurred outside the scope of the risk."

The restriction of indemnifiable damages to those which are the direct consequence of the wrongful act of a State coincides with the prevailing jurisprudence of international arbitration tribunals. This point will be further elaborated upon when we come to deal with the claim for damages presented by the Applicant. For the time being only two observations will be made: the only direct consequence of the requisition decree of the ELSI plant issued by the Mayor of Palermo on 1 April 1968 was its temporary unavailability to the company to which it belonged. For this reason, the damages granted by the Court of Appeal of Palermo (decision later upheld by the Court of Cassation) were limited to the consequences of this unavailability by its owner calculated as the equivalent of 5 per cent of the value of the requisition assets. As to the greater losses for which the Applicant is claiming compensation, they actually result from the bankruptcy for which ELSI itself filed a petition. They are only indirectly related to the requisition even if one accepted the Applicant's arguments that the unavailability of the plant was the cause of the insolvency (which is clearly disproved by the fact that ELSI had ceased all commercial activities as a result of the decision of 16 March 1968 of its Board of Directors). The truth is that there is absolutely no relation between the requisition decree and the fact that the company was liquidated for bankruptcy.

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[1] *American Journal of International Law*, Vol. 55, 1961, pp. 548 ff.

5. The Question of Attribution of the Alleged Acts to the Italian State

One further remark must be made concerning the way the Applicant has presented the facts concerning this case. We have already pointed out that, in the draft Convention on the responsibility of States for injuries to aliens, established by the Harvard Law School in 1961, one of the prescribed conditions for a State to be considered responsible for a wrongful international act is that the act or omission in question must be "attributable to that State". A similar provision is contained in Article 3 of the draft articles on the responsibility of States, the first part of which was provisionally adopted by the International Law Commission in 1980[1]. This text also contains detailed provisions regarding what may be termed "acts of State" under international law. While the first category of this kind of acts logically consists of the behaviour of any State organ deemed to be such under the law of the country (Art. 5), it is denied that the behaviour of a person or persons not acting on behalf of the State can be considered an "act of State" (Art. 11).

The reason for mentioning these two drafts is that the behaviour for which the Applicant considers the Italian Government to be responsible may indeed be partly attributed to the Respondent, but must partly be attributed to others. In fact, it is not denied that both the requisition decree issued by the Mayor of Palermo in his capacity of government official and the decision taken by the Prefect of Palermo on the appeal by ELSI can be attributed to the Italian State. The same cannot be said, however, of the alleged interference in the bankruptcy proceeding, in so far as it occurred through the action of the receiver (who, in fact, represents the creditors and acts in their interest) under the control of the bankruptcy judge. And above all it is denied that one can attribute to the Italian State any decisions taken by an IRI company (ELTEL) or by IRI itself outside the exceptional case of a specific government directive, as it was clearly shown that the IRI group is legally and effectively independent from the Government. With regard to the latter point, Article 7, paragraph 2, of the draft articles provisionally adopted by the International Law Commission considers as an "act of State" the behaviour of the organ of any agency which is not "part of the structure of the State or of a public territorial community", but is "empowered by the internal laws of the State to exercise powers of public authority in so far as the organ has acted in such a capacity in the case in point". It is easy to show in the present case that the organs of IRI or of companies associated with the IRI group have no powers to act as a public authority under Italian law and therefore have not acted in such a capacity.

The indifference of the Applicant about the existence of a causal relation between the alleged losses and the actions defined as wrongful, and about the limits within which such an action may be attributed to the Italian State is displayed in numerous assertions contained in the Reply. By way of example one may quote the passages contained on page 363, *supra*, where it is stated that the requisition "prevented Raytheon and Machlett from selling ELSI's assets and thus proceeding with the orderly liquidation as planned". It is added immediately afterwards that, despite the steps taken immediately by the two companies to have the requisition removed, "the Respondent refused to quash the order and indeed told Raytheon that it would continue indefinitely"[2]. It must be objected that: *(a)* it was not the requisition, having only six months' validity, that

[1] The English text of the draft Articles is in the *Yearbook of the International Law Commission*, 1980, II, 2, pp. 30 ff.

[2] Reply, p. 363, *supra*.

prevented the sale of the ELSI plant and the orderly liquidation of the company after 30 September 1968; *(b)* any impediment was due to the bankruptcy requested by ELSI, and it has yet to be proved that the latter was to be a consequence of the requisition; *(c)* it is completely untrue that the Prefect of Palermo refused to quash the requisition decree; indeed, its decision was to quash it; *(d)* it was never intended that the requisition should continue indefinitely: this would have implied a modification of the decree of the Mayor of Palermo fixing the term as six months from 1 April 1968, and such a modification was never made; *(e)* the declarations allegedly made by the President of the Sicilian Region on 19-20 April to the effect that the requisition would continue after its normal expiry were clearly made by a non-competent organ, as personal anticipation unwarranted and not confirmed by facts. They cannot be attributed to the Italian Government.

PART I. STATEMENT OF FACTS

1. Summary

In addition to the remarks already made in the Counter-Memorial, the following observations, concerning in particular:

(A) the requisition;
(B) the prefect's decision;
(C) the occupation by the work force;
(D) ELSI's situation and IRI's role:

are now submitted to the Court.

2. (A) The Requisition. Italian Practice concerning the Requisition of Plants

The adoption by the Mayor of Palermo, acting as a government official, of a decree for requisitioning the ELSI factory, which was then overruled by the Prefect, is the only allegation of fact made by the applicant Government. All the other allegations made by the Applicant are merely unproven assertions which may be rejected out of hand.

2.1. It was pointed out in the Counter-Memorial[1] and will be repeated here, that during the period of time under consideration, the requisition of plants by mayors was a common occurrence throughout Italy and was used mainly to protect the jobs and salaries of the employees of companies threatened with closure, so that the companies' financial difficulties would not have a negative effect on employment. Moreover, the requisition of plants was ordered to eliminate the negative effects on the local economy and on law and order deriving from a prolonged suspension of production in the requisitioned plant.

That this was a common practice among Italian mayors at the time during which also the ELSI requisition was decreed, is shown not only by judicial decisions concerning them, as mentioned in the Counter-Memorial[2] and which will be again described in detail in the following pages, but also by the discussions by scholars of the general problem of the mayors' power to requisition industrial plants.

2.2. It is no coincidence that an essay by Professor Bigliazzi Geri was published in 1969 which concluded that mayors actually do have the power of requisitioning industrial plants under Article 42[3] of the Constitution. In the essay some preliminary considerations concern the requisition decree by the Mayor of Monsummano (issued on 6 February 1964) of a plant, the closing down of which had led to the immediate dismissal of all the workforce. As the author pointed out, this decree was, as is known, not unprecedented, since there are reported cases of similar measures having been taken by mayors in similar situations[4].

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[1] Counter-Memorial, p. 13, *supra*.
[2] *Ibid.*
[3] See Doc. No. 33.
[4] Lina Bigliazzi Geri, "Urgente necessità, requisizione d'azienda e potere del sindaco", in *Democrazia e Diritto*, 1964, pp. 93 ff.

The Mayor of Palermo at the time, Dr. Bevilacqua, stated in his affidavit[1] that the requisition decree of the ELSI plant was in accordance with the policy followed by mayors of many Italian towns at that time in similar circumstances. He also explicitly mentioned the requisition decree by the Mayor of Florence issued shortly earlier with regard to the "Nuovo Pignone" Company.

It may be useful to describe the most significant cases in order to show that the Mayor of Palermo conformed to the practice followed by mayors in other parts of Italy, both before and after the period in question.

One typical instance is the "Marzotto case"[2], which gave rise to a complex judicial litigation originating from the requisition of a plant decreed by the Mayor of Pisa on 25 June 1968 in response to the fact that, in view of the serious crisis in the textile sector, activity had ceased pending structuring.

The underlying reasons for the Mayor's decree are clearly expressed in the decree itself.

At the beginning it is stated, that the management of the company had ordered production to be suspended indefinitely in one of its factories employing some 850 workmen and clerical staff. The measure was considered to be "socially unacceptable", to have caused a situation of severe hardship for the Marzotto employees and their families, and to have consequently strongly jeopardized the economy of the town. In view of the fact that the Marzotto plant at Pisa, which had been operating in the wool sector for several decades, employing well-trained specialist personnel, was one of the cornerstones of the economy of the town and the area surrounding it, the decree also pointed out that the suspension of activity would cause irreparable damage to the township, as the difficult general economic situation facing the town would not allow the dismissed Marzotto employees to find employment elsewhere. Furthermore, the various contacts with the management had not led to any positive results and it was not possible to forecast when the plant might open again. Thus, there was a serious state of public necessity, and urgent and exceptional measures had to be taken in order to avoid the definitive closure of the plant and to preserve the plant and equipment so that production could start again promptly.

A requisition in similar circumstances was decreed by the Mayor of Piteglio on 22 July 1968 concerning the Lima paper mills owned by "Stabilimento toscano carta e affini". This was taken in order to avert a situation which had much in common with the Marzotto case.

It is of great interest to read the grounds on which the requisition decree was issued, especially in view of the emphasis placed by the Mayor on the principle of the "social function" of ownership (Arts. 41, para. 2, 42, para. 2, of the Constitution)[3]. He described as "antisocial" the behaviour of the company, which he expressly defined as "socially unacceptable". The said principle was also indeed to explain the requirement of "urgent need". In this particular case, this need was identified as the serious hardship and irreparable damage the owners' attitude would cause to the employees concerned and consequently to the whole township. The terms "*public* interest" or "*public* necessity" (in Art. 7 of the Law No. 2248

[1] See Affidavit of Dr. Bevilacqua, doc. No. 2. That this was not an exceptional measure and that many other such urgent measures were taken by Italian mayors in similar circumstances is also confirmed by Dr. Ravalli, the Prefect of Palermo at the time of the events in question, in his Affidavit, doc. No. 8.

[2] For an accurate reconstruction of the dispute, see Bigliazzi Geri, L., "L'affare Marzotto", in *Riv. giur. lav.*, 1968, I, pp. 415 ff. For the text of the Supreme Court decision see Counter-Memorial, doc. No. 23.

[3] See doc. No. 33.

of 1865[1]: "serious and urgent public necessity", or in Art. 834 of the Civil Code[2], with reference to expropriation, "in the public interest") were given the broad meaning of "general interest". Therefore, this was not intended as referring to the interest of the State or of public agencies, but also to that of a wider category of subjects, such as the employees and their families, and, by extension, the entire township.

Equally typical is the case of S.p.A. Torrington of Genoa, an associate of the international Torrington group, which manufactured needles for the textile industry.

The Torrington group came to Italy in October 1958 when it purchased the Aghi Zebra San Giorgio plant, which employed some 150 persons. The number of employees subsequently increased four-fold as a result of increased production, which was remunerative for a time.

However, also as the result of deteriorating working conditions (strikes and absenteeism), the economic situation took a turn for the worse in 1973-1975. Considerable losses were incurred and the company was wound up.

The trade union organizations decided to occupy the plant. On 6 November 1975 the Mayor of Genoa requisitioned the same plant.

The Mayor's decree explicitly stated that the prolonged suspension of production and the dismissal of the employees had had a serious effect on the economy of Genoa. Social tensions had been sparked off which would inevitably grow and even lead to specific problems of law and order.

While the Mayor's power to requisition plants was acknowledged in principle by the Consiglio di Stato, the requisition decree was set aside for reasons relating to the special circumstances of the case[3].

2.3. Another case which aroused much interest was that of the Societá Italiana Industria Zuccheri (S.I.I.Z.)[4].

By means of a decree of 16 July 1974, the Mayor of Chieti requisitioned the S.I.I.Z. sugar mill of Chieti Scalo for a period of 90 days. The management of the plant was entrusted to the Abruzzo Development Agency for the purpose of carrying out and administering the 1974 sugar beet campaign. It was the company which had the intention not to carry out the sugar beet campaign in the Chieti plant in 1974.

By means of the requisition, the Mayor intended to ward off the economic and social damage which would befall the employees if the company ceased its operations.

The use of the S.I.T.E. company may also be mentioned[5].

On 16 September 1974 the employees of the Padua branch, as a result of threats of dismissal to reduce staff, occupied the plant, thus preventing the construction activities from being carried on. On 29 September 1974, the Mayor of Padua ordered the requisition of the S.I.T.E. plant.

A further case concerned the Soc. Manifattura dell'Adda, whose plant was requisitioned by decree of the Mayor of Berbenno in Valtellina on 20 February 1975, in order to ensure the continuity of its production, which was considered essential for the economy of the area.

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[1] See Memorial, Ann. 34.

[2] See doc. No. 16.

[3] Decision No. 72 of Consiglio di Stato, dated 7 February 1978, in Counter-Memorial, Ann. 29.

[4] For further details see Decision No. 198 of T.A.R. of Abruzzo, dated 30 December 1974, reproduced in doc. No. 7.

[5] See also Counter-Memorial, p. 13, *supra*.

The Manifattura's difficulties, together with those of the Fossati plant in Sondrio, contributed to the serious economic and social crisis affecting the whole valley. Consequently, also in Berbenno it was necessary to evaluate the possible effects on law and order that such a state of uncertainty might have. While the administrative court upheld the company's appeal against the requisition, it nevertheless noted that the Mayor's concerns over a possible worsening of the situation and its possible repercussions on law and order were justified[1].

A further example is the case of the San Marco Company, the plant of which was requisitioned in 1975 for the purpose of ensuring, in the interests of local employment, the company's future activity and, thereby, to safeguard law and order[2].

During the same year, by a decree issued on 2 February 1975, the Mayor of Sondrio provided for the immediate requisition of the plant of S.p.A. Cotonificio Felice Fossati, in order to ensure the continuity of the company's activity, considered essential both for the area's economy and for the public interest[3].

For the same reasons, on 14 September 1974, the Mayor of Brindisi requisitioned the plant of Società Industriale del Mezzogiorno (SIDELM)[4].

At the end of 1973 the management of SIDELM acknowledged that considerable losses had been made in previous financial years. Furthermore, it expected the situation to worsen owing to unfavourable market conditions. The management therefore decided to wind up the company.

The plant was then occupied by the work force.

The prolonged negotiations and continuing occupation worsened the discontent of the work force and heightened trade union and social tension. The resulting situation led the Mayor to issue a requisition decree on the basis of Article 7 of Law No. 2248 of 20 March 1865, Appendix E. The requisition was of six months' duration; the management of the plant was entrusted to the Progresso e Lavoro Co-operative of Brindisi.

As reported by the administrative court in the decision on SIDELM's appeal[5] the decree stressed that, in view of public demonstrations and the spreading of inaccurate and alarming information in the press, "the situation had become untenable and unbearable". It also alluded to possible reactions by the trade union organizations and the employees, who had expressed their intention "to occupy the railway station very soon".

In the well-known Eridania Zuccherifici Nazionali S.p.A. case[6] the requisitions were made because the company intended to close down the plants, and consequently dismiss the work force. It was considered urgent to reassure the population concerning the future activity of the plants, which were an indispensable hub of economic life for the whole area and the intention was to protect law and order which had been jeopardized by the state of unrest reflected in all the productive and commercial sectors.

It may therefore be concluded that mayors had frequently resorted to the use of their power to requisition industrial plants for reasons of law and order or also in view of social unrest.

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[1] For the text of the full translation of the decisions of the administrative court, see docs. Nos. 9 and 10.

[2] Already cited in Counter-Memorial, p. 13, *supra*.

[3] See Decision No. 211 of T.A.R. for Lombardy, dated 30 July 1975, doc. No. 9; Decision No. 21 of the Council of State, V Section, dated 18 January 1977, in Counter-Memorial, doc. No. 28.

[4] Counter-Memorial, p. 13, *supra*.

[5] See *ibid.*, doc. No. 25.

[6] *Ibid.*, p. 14, *supra*.

The concept of "economic and social law and order" thus emerged. Indeed, the requisition of plants for reasons of "law and order" was used as a means of protecting public security in the economic and social sense.

The cases reviewed above show how the requisition decree issued by the Mayor of Palermo in 1968 was a measure that many Italian mayors have taken under similar circumstances.

3. Instances of Requisition of Plants in the United States

However, the criticism expressed by the United States Government over the fact that, even in such a difficult period for the Italian economy, the authorities of this country could, as an extreme remedy for particularly serious crises, have recourse to the temporary requisitioning of plants appears even more surprising in view of the fact that in the United States such a practice is anything but unknown.

> "The relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties, such as laundries, or coal mines, or railroads, may be subjected to public operation only for a short time to meet war or emergency needs, and can then be returned to their owners (. . .)":

this statement was made by the United States Supreme Court when, in 1951, it was called upon to decide on another case of temporary taking of a plant by the public authorities in the difficult years of post-war reconstruction[1].

The case in point is of particular interest for the present dispute as it concerned a coal mine where production was virtually blocked due to a strike and which, as a consequence thereof, the Federal Government had decided to requisition and to operate under its own responsibility for six months in order to avoid total paralysis of coal-mining activities in the country[2]. Far from considering the requisition as such to be unlawful, the Supreme Court merely addressed the question of the compensation to be paid to the owner of the mine as a result of the requisition by the Government. In this context, the Court attempted to rationalize the subject of requisition or "temporary takings" in the light of its abundant case law. As the Court stated,

> "[t]emporary takings can assume various forms . . . There may be a taking in which the owners are ousted from operation, their business suspended, and the property devoted to new uses (. . .). A second kind of taking is where, as here, the Government, for public safety or the protection of the public welfare, 'takes' the property in the sense of assuming the responsibility of its direction and employment for national purposes, leaving the actual operations in the hands of its owners as government officials appointed to conduct its affairs with the assets and equipment of the controlled company. Examples are the operation of railroads, motor carriers, or coal mines (. . .)[3]."

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[1] *Pewee Coal Company Inc.* v. *United States*, 71 Supreme Court, p. 670, at p. 673.

[2] The same mine has been subjected to a total of four separate temporary takings by the Federal Government, ranging in duration from three months to one year, although the reason was always the same, namely that "of ending strikes and restoring the production of coal in the national interest" (cf. *Pewee Coal Company Inc.* v. *United States*, 161 F. Supp. 952, at p. 955).

[3] 71 Supreme Court, 670, at p. 673.

Without making at this stage a detailed examination of the criteria used by United States courts when determining the compensation to which the owner is entitled in the case of the temporary taking of his plant by public authorities, it may be noted that it shows that only in a few cases the principle of "just compensation" has led to the granting of compensation equal to the "fair market value" of the property taken. In cases in which, because of the economic crisis and/or strikes in progress prior to the intervention of public authorities, the value of the requisitioned plant was reduced, the United States courts had no hesitation in allowing only compensation smaller than "fair market value".

What is here important is to show that the practice of requisitioning plants in cases of proven urgency and/or need to safeguard the general interests of the economy and social peace is a remedy that has been used also by the United States Government. Furthermore, while in Italy it is clear that the power of requisitioning of the public authorities only exists if and to the extent that it is expressly recognized by law, in the United States it is uncertain whether the authorization of the legislator is in any case required or whether the taking of private property for public use by an officer of the United States is admissible "as an act of Government" even in the absence of an explicit or tacit authorization by an Act of Congress[1].

4. (B) The Prefect's Decision

As already clarified in the Counter-Memorial[2], contrary to the Applicant's assumption, ELSI waited a good 19 days before making its appeal to the Prefect and more than one year before urging the Prefect to take its decision. The Prefect, as shown by the Affidavit of Dr. Ravalli[3], had formed the reasonable conclusion from ELSI's behaviour that the company had no strong interest in the result of the appeal.

This is confirmed by the fact that the company filed a petition for bankruptcy barely one week after lodging the appeal with the Prefect. Thus, a favourable decision of the appeal would not have had as the consequence the free management of the assets.

What the Applicant states on page 390, *supra*, of its Reply, namely that "if the requisition had been rescinded, the bankruptcy could have been avoided by ELSI", is totally inaccurate. It was ELSI's long-standing insolvency that led to its bankruptcy. Only if the state of insolvency had been uprighted — a neither unlikely event within those few days — bankruptcy could have been avoided.

The truth is that the Prefect's decision:

(a) was irrelevant to ELSI's state of insolvency, and indeed the company filed for bankruptcy without waiting for the decision on the appeal and without urging it; it was in any event irrelevant after the expiry of the six months, in view of the temporary nature of the requisition;

(b) was rendered within the period of time representing the average of this type of appeal[4];

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[1] For the negative case see *Youngtown Sheet Tube Co. et al.* v. *Sawer, Secretary of Commerce* and nine other cases, 103 F. Supp. 569, at p. 573; the case involved a requisition order issued by the Secretary of Commerce following an Executive Order by the President of the United States himself regarding the main steel factories in the country, which had been hit by a wave of strikes called for an indefinite duration.

[2] See Counter-Memorial, p. 16, *supra*.

[3] See doc. No. 8.

[4] Counter-Memorial, p. 17, *supra*.

(c) was taken as soon as ELSI (or the receiver acting on its behalf) urged the decision, after 14 months.

Therefore to argue, as the Applicant does on I, pages 64–65 of its Memorial, and pages 363 and 372, *supra*, of its Reply, that the decision was rendered by the Prefect only after ELTEL had acquired the company assets amounts to captiously exploiting a chance time sequence to obtain a facile effect.

It must likewise be stressed that the complete reading of the Prefect's decision, instead of a quotation of fragments out of context (as the Applicant does on page 384, *supra*, of the Reply), leads to the appreciation that the Prefect acknowledged that the Mayor was entitled to exert the powers of requisition in accordance with the laws referred to, although he actually quashed the order because in actual fact it was not possible to achieve the intended result, i.e., the reopening of the plant.

5. (C) The Occupation by the Work Force

The Applicant's assertions over the occupation of the plant are incorrect. The work force occupied the plant more than two weeks before the requisition, as is shown by a judicial decision and press reports[1] and not afterwards, as the Applicant would have it[2].

6. (D) ELSI's Situation and IRI's Role: the Applicant's Contentions

According to the United States Government, the Italian Government and IRI first boycotted the attempt to proceed with the "orderly liquidation" of ELSI, and then interfered with the bankruptcy proceeding so as to allow IRI to acquire the plant through one of its subsidiaries at a price lower than its fair market value.

This argument is based on the following three assumptions, which form the heart of the Applicant's presentation[3]:

* ELSI was a *going concern*, in good, although not perfect, financial health at the time of the events in question;
* the ELSI industrial complex was competitive and thus attractive to the market in that it was capable of the "manufacture of high quality and highly sophisticated electronics";
* finally, IRI or one of its subsidiaries is alleged to have "boycotted" the first three auction sales in order to decrease the market value of the plant which was subsequently purchased by ELTEL.

All three of the above contentions are totally gratuitous in that the United States Government does not produce a shred of evidence in support of them. Furthermore, they are not true. This objection, already expressed in the Counter-Memorial of the Italian Government[4], was not challenged in the Reply, as the passive repetition of the original arguments which have been proved unfounded cannot be taken as a challenge. Consequently, the Italian Government can

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[1] Cf. the decision of the Court of Palermo, in Memorial, Ann. 80, in particular at I, p. 374 and the article appeared in *L'Ora*, 10 March 1968, doc. No. 30.

[2] Memorial, I, p. 100. Reply, p. 372, *supra*, note 1. The distinction between actual and occasional sit-ins, which was suggested by the Applicant, lacks of any supporting evidence. The truth is that, the occupation having taken place in March, there was no reaction on the part of ELSI, which obviously had legal interest in the matter.

[3] See Reply, pp. 365 ff., *supra*.

[4] See Counter-Memorial, pp. 4 ff., *supra*.

justifiably claim that the basic premises of the application are not founded on evidence presented in either the United States pleadings, but is merely conclusory, assertive, and argumentative.

7. ELSI's Economic and Financial Situation

ELSI's crisis, which was stabilized when the events in question occurred, is evident from the very statements made in the Memorial and Reply of the Applicant Government, namely that:

(a) ELSI's debts, according to the Memorial, I, page 52, amounted to 16.66 billion lire;

(b) its assets, which had a book value of 17.05 billion lire, could not, as even Raytheon admits (Memorial, I, p. 52), be assigned a quick-sale value of more than 10.84 billion lire;

(c) there was consequently a negative balance of about 6 billion lire, and since Raytheon itself admitted that ELSI was unable to meet its obligations, it must be assumed that the part that could not be met amounted to at least 6 billion.

Nor can it be argued that the above-mentioned negative balance was due solely to the probable lower price obtained on the market in the course of a quick sale. Indeed, ELSI's state of insolvency would certainly have been known to a conscientious management since it had been in existence since late 1967. Three points are of interest in this regard:

(i) In 1967 ELSI incurred a loss of more than 2,000 million lire (after losing 326 million in 1962, 1,228 million in 1963, 284 million in 1964 and 361 million in 1965)[1] and was obliged to proceed to reduce and then increase its capital. Despite this, in 1967, ELSI again lost more than one-third of its capital, thus revealing beyond any doubt that it was incapable of producing even the minimum amount of income it needed to survive on the market. The disastrous trend that now begins to be outlined is certainly not compatible with the image of a "going concern" and solvent enterprise suggested by the Applicant Government. Furthermore, this was formally recognized by Raytheon management[2].

(ii) The ELSI financial reports leave ample space for doubt. Dr. Giuseppe Mercadante, who analysed them on behalf of the Bankruptcy Court, noted, among other things: the need for writing down stock for an amount "oscillating" between Lit. 1,500,000,000 and Lit. 2,000,000,000[3], the inclusion of non-existent assets in the balance sheet (for instance, an entry of Lit. 246,296,774 against a certain Neye Alfred Enateckmer of Quickborn (West Germany)), when the goods forwarded to this client had already been returned by the latter and were still held in customs[4]; and again direct "accommodation bills discounted with the banks" for an amount of Lit. 1,200,000,000[5]. Consequently, ELSI's true losses for 1967 alone, which are obtained by adding to the amount entered under this heading in the official balance sheet (Lire 2,681,300,000) the decreases in value

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[1] See Counter-Memorial, p. 4, *supra*.

[2] See Project for the Financing and Reorganization of the Company — 1967 Report prepared by Raytheon-ELSI S.p.A., Memorial, Ann. 22.

[3] See the Technical-Accountancy Advice on "Raytheon-ELSI S.p.A.", Counter-Memorial, doc. No. 36, at p. 214, *supra*, of the new translation presented by the Italian Government.

[4] *Ibid.*, p. 212, *supra*.

[5] *Ibid.*, p. 216, *supra*.

due to the above-mentioned items, actually wiped out the company's share capital, even though the latter had only recently been increased; all this in a company which, in order to achieve liquidity, had been obliged to discount "accommodation bills", i.e., bills that do not relate to any commercial transaction.

(iii) As indicated in the Affidavit of Mr. Joseph A. Scopelliti[1], already in early 1968 Raytheon had to transfer 150 million lire to the First National City Bank of Milan to cover the demands of an ELSI creditor who would not be fended off with vague promises of future payment. ELSI was therefore unable to meet even the smallest of its commitments with its own resources, thus revealing that its insolvency was not only economic, but also financial.

The concept of "orderly liquidation" sounds quite odd against such a background. This even more so, as also the concept of "going concern" mentioned by the United States Government displays some very peculiar features. The production lines were closed and, in early 1968, the only activity of ELSI was to complete a number of unfinished products. Moreover, on 2 March 1968, the workers actually began an occupation of the plant and the management deemed it prudent to remove all the accounting files from the head office and take them to a small office in Milan. Thus, the overall picture was as follows: the company had a chronic deficit; its production lines were shut down; its work force was occupying the plant; its management had practically disappeared.

8. The Responsibility for ELSI's Crisis

The economic and financial disaster described above may be attributed directly to erroneous company management and misguided speculation by Raytheon. It is important to state it, because the Applicant wrongly contends that "Raytheon and Machlett did nothing to create ELSI's financial problems".

Suffice it to recall a few financial figures:

(a) Dr. Mercadante, in his 1968 Report to the Bankruptcy Court, points out that, in the ELSI financial reports of the previous three years, the royalties paid to Raytheon, the costs of Raytheon technical assistance and Raytheon technical consultants' costs appeared to be blown up out of all proportion both in absolute terms and compared with the cost of surveys and experiments also paid for by the company. Dr. Mercadante's report states that it is not clear

> "why the company spent so much on studies, research and development (not counting amongst others the high cost for technical consultants) while paying royalties to its holding company which should have permitted a well-organized production adopting the production lines laid down by the same",

while "there are indications that the company, after a number of years' production, had not yet defined its production lines" and "that the main losses resulted in the SCD sector (electronic equipment), revealing it to be a complete failure and on which huge amounts of money had been spent;[2]".

(b) ELSI debts amounted to an average of 12 billion lire, on which it had to pay a huge amount of interest. In the previous three fiscal years[3], ELSI on average paid interest of 800 million lire per year (lire of the time), excluding the interest paid on medium-term loans. Taking into account the much smaller amount of equity invested by Raytheon, this means that ELSI was undercapital-

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[1] Memorial, Ann. No. 17, I, p. 186.
[2] See the Technical-Accountancy Advice of Dr. Mercadante, *supra*, at pp. 215-216.
[3] *Ibid.*, pp. 213-214, *supra*.

ized from the start and therefore doomed to go bankrupt unless it could obtain a resounding commercial and industrial success[1].

Dr. Mercadante pointed out that, if ELSI management had had "greater technical rectitude" it would not have allowed the "large costs" on surveys and research, etc., in view of the "fact that the overall aim of the company has not been achieved after so many years of activity"[2] and that these expenses were "not justifiable"[3].

One may add that obsolete equipment had been acquired by ELSI (e.g., the semiconductor production line, which proved to be the most ruinous)[4].

Some reasonably critical analysis of the matter is quite sufficient to close the argument of ELSI's "high quality" and "highly sophisticated" electronics (which, anyway, found no market) and to show that Raytheon and Machlett had more than some responsibility in creating financial problems for ELSI.

9. The Obligation to File a Petition for Bankruptcy

In its Reply, the Applicant Government stresses the fact that ELSI management was under no obligation simply to file for bankruptcy. To this effect it cites the opinion of Professor Franco Bonelli[5]. Yet, the contention is groundless. In 1967, Raytheon's official losses amounted to 2,681.30 million lire. According to Dr. Mercadante, a further sum of 1,200-1,500 million lire must be added for over-evaluation of stock and at least 300-400 million for non-existent credits. The situation must have been worse[6] since it would otherwise be impossible to explain the large gap of 6 billion lire between book value of ELSI's assets and the value acknowledged by Raytheon itself in the case of a quick sale. This leads to the following conclusions: *(a)* ELSI's capital (amounting to 4,000 million) was completely lost; *(b)* the failure to call a meeting to immediately restore share capital to the minimum level required by law or, alternatively, to wind up the company, actually represents an offence committed by the management (see Arts. 2447 and 2621 of the Civil Code[7]); *(c)* the management was liable for prosecution for simple bankruptcy (see Art. 217, Nos. 3 and 4 of the Bankruptcy Law[8]) since, notwithstanding the company's insolvency, no petition for bankruptcy was filed; and *(d)* the offence of misuse of credit (Art. 218 of the Bankruptcy Law), in so far as the management, by concealing the company's financial difficulties, continued to live off loans, including the 150 million received from Raytheon in early 1968 to pay off a recalcitrant creditor. Thus, it is clearly established that not having increased ELSI's capital, and having come to know that the shareholders had no intention of doing so, ELSI's management should have filed for bankruptcy[9].

Under these circumstances, the hypothetical "orderly liquidation", envisaged by the Applicant Government, could certainly not take place. In fact, things were quite different. After acknowledging that it was unable to pay its debts, as is

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[1] See Affidavit of Ing. Busacca, Counter-Memorial, p. 230, *supra*, and doc. No. 44.
[2] See Mercadante Report, p. 216, *supra*.
[3] *Ibid.*, p. 213.
[4] See Affidavit of Ing. Busacca, Counter-Memorial, doc. No. 44, and the Affidavit of Ing. Ravalico, doc. No. 14.
[5] See Reply, Ann. 1.
[6] See, for instance, on the state of the art, the remarks of Ing. Ravalico, doc. No. 14.
[7] See doc. No. 16.
[8] See Counter-Memorial, doc. No. 21.
[9] For these considerations and for the obligation of ELSI's management to file for bankruptcy, see the opinion of Professor Pier Giusto Jaeger, doc. No. 32.

clear from the fact that it was intended to satisfy unsecured creditors claims to the extent of only 50 per cent, ELSI was now trying to avoid bankruptcy in the hope that the creditors would accept large cuts. At the same time, contrary to the Applicant's contention, Raytheon never showed willingness to provide ELSI with sufficient liquidity to proceed with an orderly liquidation.

After all, an orderly liquidation, and not only in the Italian legal system, requires the 100 per cent satisfaction of creditors, while Raytheon and ELSI suggested 50 per cent.

In fact, the Applicant appears to consider the hypothetical "orderly liquidation" as a remedy which would be available also to an insolvent debtor, while under Italian law an insolvent debtor is from the outset under an obligation to file for bankruptcy, and therefore cannot maintain possession of its assets, manage them, and freely liquidate them.

Therefore, to speak of "orderly liquidation" as the natural way of winding up ELSI, and to criticize the failure to allow Raytheon to do so, is also the result of a distorted view of the applicable law to the case in point.

In this connection it is not inappropriate to recall that on 1 January 1968 President Johnson promulgated an executive order establishing a mandatory programme restraining US direct investment abroad[1]. Although not mentioned in the US pleadings, this programme had a broad and important negative effect on the ability of US businesses such as Raytheon to lend or invest additional funds and working capital to their foreign subsidiaries, or to perform guarantees of indebtedness of such subsidiaries[2].

The effect of the Regulations was particularly harsh on parents of subsidiaries such as ELSI, operating in Western Europe[3].

The effect of the Regulations was to force US parent corporations to offset their "direct investments" in their subsidiaries by making "long-term foreign borrowings" in the Eurodollar market[4]. However, in addition to the increased expense of any such borrowing, under the Regulations a repayment would eventually be "charged against" the permissible activity of the US parent in future years; in 1968 there was no way of knowing when and how this unprecedented and severe programme would be dismantled[5].

Most importantly, for a new guarantee of indebtedness of a foreign subsidiary to be authorized, there were requirements for certification that the parent company "has no reason to believe, under existing circumstances, that the affiliated foreign national will be unable to pay or otherwise satisfy such indebtedness without resort to performance under the guarantee[6]". No such certification could have truthfully been made as to ELSI. Concerning payments of pre-existing guarantees, the US parent would have had to "determine . . . in good faith that (its foreign subsidiary) . . . has not sufficient funds available to it to pay such indebtedness[7]".

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[1] See "Message to the Nation on the Balance of Payments" and Executive Order No. 11387, reproduced as Anns. (1) and (2) of Federal Reserve Bank of New York Circular No. 6090 of 4 January 1968; see doc. No. 25.

[2] See Regulations of the Secretary of Commerce, dated 1 January 1968 (CFR Title 15, Ch. X, Part 1000), reproduced as Ann. (3) of Federal Reserve Bank Circular No. 6090, and in particular Sec. 1000.312 *(a)* and *(e)* of the Regulations, doc. No. 25.

[3] See *ibid.*, Regulations Sec. 1000.319 *(c)*.

[4] See *ibid.*, Regulations Sec. 1000.504 *(b)*.

[5] See for example speech delivered by the Vice-President, Tax-Legal, of the National Foreign Trade Council on 9 October 1968, at pages 3-5: doc. No. 26.

[6] See General Authorization No. 1 of 22 January 1968, Sec. (2) *(a)* (1), contained in Federal Reserve Bank of New York Circular No. 6012 of 25 January 1968: doc. No. 27.

[7] *Ibid.*, Sec. 2 *(a)* (2).

The difficulties perceived by Raytheon in handling its overseas business in view of these regulations were mentioned neither in the Memorial nor in the Reply, *although doubtless they were a contributing (and governmental) cause of* Raytheon's announced intent to terminate ELSI's operations in 1968[1].

10. The Claims Brought by Italian Banks Against the Sole Shareholder of ELSI

Perhaps the stubbornness with which the Applicant Government claims that ELSI was entitled to proceed with an orderly liquidation and that the bankruptcy petition became necessary only as a result of the requisition decree and the consequent loss of free access to its plant, may find its reason in the fact that, perhaps unconsciously, it tends to argue in terms of the bankruptcy law of the United States. In fact, there are several basic differences between United States law and Italian law which will be clarified here in order to avoid further use of concepts which, in spite of their identical nature, have completely different meanings when referred to one legal system rather than to the other.

Unlike Italian bankruptcy law and that of the majority of other continental systems, all of which are notoriously "creditor oriented", the main characteristic of United States bankruptcy law has always been that of being "debtor oriented". In other words, in Italy, and in Continental Europe in general, bankruptcy is mainly considered as a sanction which befalls the insolvent debtor in order to safeguard the prevailing interest of the creditors in a prompt and equitable satisfaction from the proceeds of the sale of the debtor assets. On the contrary, in the United States bankruptcy is rather a means placed at the debtor's disposal, to discharge his previous debts and resume his activity on a fresh footing ("fresh start doctrine") irrespective of its insolvency[2]. Thus a bankruptcy petition may be filed also by a solvent debtor ("Voluntary cases": Sec. 301, Bankruptcy Act), whereas in case of insolvency, the creditors may file a bankruptcy petition against the debtor ("Involuntary cases": Sec. 303, Bankruptcy Act), but there is no obligation for the debtor to file a petition himself. Furthermore, even an insolvent debtor may choose between a bankruptcy petition under Chapter 7 of the Bankruptcy Act ("Liquidation") and a petition for reorganization under Chapter 11 of the same Act ("Reorganization"). In the first case, a trustee is appointed, who proceeds to liquidate the debtor's property and consequently distribute the proceeds among the creditors. In the second case the debtor, who normally retains his assets and continues to operate his business, prepares a "plan of rehabilitation" containing a complete list of creditors divided up into classes, indicating those

[1] *In material filed with the United States Securities and Exchange Commission for the* Fiscal Year Ended 31 December 1968 (Form 10-K Annual Report Pursuant to Section 13 or 15 *(d)* of the Securities Exchange Act of 1934, enclosing the Prospects of Raytheon Company dated 15 April 1968 (see doc. No. 24)), Raytheon said in respect of ELSI and its other foreign subsidiaries and affiliates that "The planned operations of these foreign companies are dependent, to an unpredictable degree, upon United States government *regulations on foreign investments* . . ." (p. 8 of Prospectus; p. 30 of filing); and in Item *(e)* of Part I of its 10-K filed for the fiscal year ended 31 December 1971 (see doc. No. 23) at p. 12, Raytheon wrote that "Continuation of the United States Foreign Direct Investment Regulation which became effective in 1968 might restrict the Company's ability to develop its international operations", showing that the problem with these regulations persisted for several years after 1968.

[2] "One of the primary purposes of the bankruptcy act is to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh . . .": *Local Loan Co.* v. *Hunt*, 292 U.S. 234, at p. 244. On this point, see, also for further references to case law, King-Cook, *Creditors' Rights — Debtors' Protection and Bankruptcy*, Matthew Bender, 1985, pp. 777 ff.; Epstein, *Debtor-Creditor Law*, 3rd ed., West Publishing Co., 1985, pp. 138 ff.; *Collier Bankruptcy Manual*, Matthew Bender, 1961, pp. 176 ff.

who will suffer impairment of their rights and those who will not, and how the payments will be made. The plan will be binding for all concerned if it obtains the approval of the majority of members of each class of creditors or, failing this, if it is considered "fair and equitable" by the competent bankruptcy court.

What are the inferences that can be drawn from this with regard to the present case?

First of all, there is no doubt that, at least as from March 1968, ELSI was to be considered as "insolvent" even under the United States bankruptcy law. Indeed, Section 19 of the Bankruptcy Act prior to the 1979 reform reads as follows: "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property . . . shall not at a fair valuation be sufficient in amount to pay his debts." ELSI had acknowledged its inability to pay the larger creditors more than 50 per cent from the proceeds of the sale of its assets. Yet, the company would have been "insolvent" also under the new criterion introduced with the 1979 reform (Sec. 303 *(h)*): ". . . the debtor is generally not paying such debtor's debts as such debts become due . . ."). In fact, at the beginning of March, ELSI was going to face a complete lack of cash, as was confirmed by the company management itself, and specifically by John D. Clare, who, at a meeting with the President of the Sicilian Region on 20 February 1968 openly announced that "*(a)* Feb. 23 — Board Meeting; *(b)* Feb. 26-29 — inevitable bank crisis; *(c)* March 8 — we run out of money and shut the plant" [1].

Under United States law, ELSI would, however, not have been obliged to file a petition of bankruptcy, notwithstanding its insolvency. The company would also have been free to choose between a (voluntary) bankruptcy petition under Chapter 7 and a (voluntary) petition for reorganization under Chapter 11. In the first case its assets would have been liquidated immediately, while in the second case ELSI would have been able to continue its activity, in the hope of convincing its creditors or, failing to get their approval, to have the judge impose on them the "plan of rehabilitation" providing for the 50 per cent payment of credits or even less. All this, of course, is only theoretical because, in practice, it is anything but certain first of all that United States banks, placed in the same situation as the Italian banks vis-à-vis ELSI, would have waited patiently as long as the latter did, instead of filing an involuntary bankruptcy petition as they were entitled to do. Moreover, in a reorganization procedure the confirmation of an advantageous plan of rehabilitation to a large extent depends on the actual capacity for recovery of the insolvent company and ELSI could hardly be said to meet that requirement . . . Be it as it may, it should not be forgotten that ELSI was a company incorporated under Italian law and as such was subject to the bankruptcy law of Italy and not that of the United States.

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[1] Cf. doc. No. 19, containing the original handwritten minutes of the meeting. The Counter-Memorial quoted the passage in the minutes of a meeting held on 20 February 1968, in which the President of ELSI, John D. Clare, was reported as having drawn "a precise time chart showing *(a)* Feb. 23 — Board Meeting; *(b)* Feb. 26-29 — inevitable bank crisis; *(c)* March 8 — we run out of money and shut the plant" (Counter-Memorial, p. 9, *supra*). By a letter of 13 January 1988 addressed to the Court's Registrar the applicant Government supplied a photocopy of the manuscript version of the same minutes along with an attempt to justify why a different text had been annexed to the Memorial. The Italian Government prefers to refrain from making any comment on this explanation, but wishes to point out that the photocopy of the manuscript version fully confirms the accuracy of the quoted passage. The President of ELSI really drew his "precise time chart" over a month before the requisition decree. If this fact was suppressed in a later version of the minutes, the only conceivable reason is that whoever altered the text of the minutes he thought that it could be embarrassing for Raytheon.

11. More. The "Lifting of the Corporate Veil" Doctrine in Italian and United States Law

Again with regard to possible misunderstandings that could arise over the present case as a result of actual or supposed differences between Italian law and United States law, the Respondent Government wishes to point out that the action brought by the Italian banks against Raytheon and Machlett, as the sole shareholders of ELSI, in order to recover the credits claimed from the latter, can in no way be considered as discriminatory, or worse, as the product of the umpteenth plot carried out against the two United States companies.

It has already been emphasized that judicial action of this kind is normal practice in Italy in view of the widespread acceptance in legal theory and practice of applying the principle of the sole shareholder's liability for the company's obligations, as established in Article 2362 of the Civil Code, also in the case in which a negligible number of shares are attributed to another partner who is a pure figurehead[1].

But since in its Reply the Applicant Government continues to include among the damages to be paid by the Italian Government also the legal costs incurred by Raytheon and Machlett in the suits in question[2], it is worth here, in addition to recalling the remedies concerning the situation under Italian law, to note that the result would be exactly the same if the case were considered under United States law.

In fact, also in the United States, the problem exists as to whether and to what extent shareholders are liable for the obligations of their corporation. The conditions required "to disregard the corporate entity", or "to pierce the corporate veil" in a given case are still controversial; however, all authorities agree that, in some circumstances and in some particular cases, the corporation may be disregarded as an intermediate between the ultimate person or persons or corporation and the adverse party (. . .)[3].

Generally speaking, the common significant factors which would justify disregarding a corporate entity have been under-capitalization, failure to observe formalities, non-payment of dividends, siphoning off of corporate funds by dominant shareholders, the insolvency of the debtor corporation at the time, non-functioning of other officers or directors, missing corporate records, use of the corporation as a front for the operations of the dominant shareholder[4]. The conclusion to disregard the corporate entity may not, however, rest on a single factor but often involves a consideration of a number of the above-mentioned factors; in addition the particular function must generally present an element of injustice or fundamental unfairness. Thus, to mention only those factors which are of particular interest in the present case, the courts are in general more willing to "pierce the corporate veil" when the defendant is a corporation rather than an individual, and are particularly likely to find the parent business entity liable if, for instance, the subsidiary and the parent are running parts of the same business, and the subsidiary is under-capitalized, and/or if the subsidiary has eventually been forced into bankruptcy[5].

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[1] See Counter-Memorial, p. 24, *supra*.

[2] Reply, p. 399, *supra*.

[3] Fletcher Cyclopedia Corporations (1983), I, pp. 388 ff. (with further references to both case law and scholarly writing).

[4] Fletcher Cyclopedia Corporations, *cit.*, pp. 428 ff. (with further references); Hamilton, *The Law of Corporations*, 2nd ed., West Publishing Company 1987, pp. 81 ff.

[5] Fletcher Cyclopedia Corporations, *cit.*, pp. 455 et seq. and pp. 472 et seq. (with further references); Hamilton, *The Law of Corporations*, *cit.*, pp. 91 et seq.

This being so, it seems clear that on this issue there are striking similarities between Italian law and the law of the United States or, more precisely, the law applied within each of the individual states of the Union. On both sides of the Atlantic Ocean there is no hard and fast rule as to the conditions under which the corporate entity may be disregarded; at the same time, according to both the Italian and the United States law, as a general rule, the "corporate veil" may be "pierced" and the liability of the shareholder(s) for the obligations of the corporation be affirmed, whenever the corporate fiction is being used by the corporation itself to defeat public convenience, justify wrong done either to third parties dealing with the corporation or internally between shareholders, or to perpetrate fraud or other reprehensible conduct.

This is not the place to express an opinion on whether or not the Italian courts were right when, although asked to do so by a number of banks having suffered substantial loss because of ELSI's insolvency, they repeatedly refused to "pierce the corporate veil" of that corporation and to allow the banks to recover their credits directly from its two shareholders. More than one distinguished scholar, when commenting on the decisions rendered, has argued that on that occasion the courts may not have taken into sufficient acccount the fact that ELSI was a typical example of a wholly owned subsidiary — Raytheon owned 99.15 per cent of the shares while Machlett, who held the remaining 0.85 per cent, *was just another wholly owned subsidiary of Raytheon* — which long before it went bankrupt was kept in a condition of clear undercapitalization by its parent company[1]. In the light of the foregoing remarks, however, it should be clear at least that there was absolutely nothing unusual in the fact that the Italian banks tried to recover from Raytheon and Machlett what they had been unable to get from ELSI. Any competent lawyer in either Italy or the United States would have urged the banks to do so, and it may well be that in the United States the banks would have been more successful than they actually were before the Italian courts.

12. The Quality of ELSI's Plant and Production

The considerations made so far concerning ELSI's insolvency already contradict the contention that the company purchased by Eltel was an industrial jewel, to gain possession of which a sort of plot was hatched. Indeed it does seem strange that such a highly productive company should have such a negative economic performance and that its promoters should make the decisions they did (i.e., Raytheon decided not to invest further money in ELSI, while ELSI dismissed the entire work force).

In fact, the following has to be said:

(a) ELSI's production was of a low quality. The expert of the Bankruptcy Court, Dr. Mercadante, expressly mentioned in his Technical-Accountancy Advice goods being returned by customs and defective products left in customs, etc.[2];

(b) an unhappy site had been chosen for the plant, with some of the sections actually situated at different levels[3];

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[1] See, among others, Pellizzi, "Unico azionista e controllo totalitario indiretto", in *Giurisprudenza commerciale* 1981, II, pp. 615 ff.; S. Scotti Camuzzi, *Unico azionista, gruppi, "lettres de patronage"*, Milan, 1979, pp. 30 ff.

[2] See Technical-Accountancy Advice on "Raytheon-ELSI", S.p.A., Counter-Memorial, doc. No. 36.

[3] See the Affidavit of Ing. Cavalli, doc. No. 1 and the Remarks of Dr. Alessandro Alberigi Quaranta, in doc. 20.

(c) the way the plant was structured was completely negative, because it was badly built and there was no adequate planning[1];

(d) the production lines were lacking in concrete functionality. The products had no market attraction and the semiconductor production had turned out to be a failure. Only a small proportion of the television components which were produced could be absorbed by the television set market. Other devices for television were now obsolete as they applied to black-and-white TV, while colour was becoming increasingly popular in Italy. This is proved by the fact that when ELTEL purchased the company, in 1969, it changed its entire production[2].

It is probably worth reporting fully what was declared by Ingegner Busacca, who was working for ELSI at the time and was in charge of microwave-tube design, and by Mr. Ravalico, the manager of ELTEL. The words of those having actually experienced the events are self explanatory.

According to Ingegner Busacca:

"(. . .) As at 29 March 1968 Raytheon-ELSI had five production lines:

1. Semi-conductors.
2. X-ray tubes.
3. Black-and-white cathode ray tubes.
4. Telephone surge arresters.
5. Microwave tubes.

The company's technical and economic situation can be descibed as follows:

Semi-conductor line: the machinery was unserviceable and idle because it had been designed for germanium technology, which had been obsolescent for many years; an attempt was in progress to produce silicon diodes which, although technically valid, had no significant market.

X-ray tube line: the machinery was very old and the manufacturing processing was carried out at great risk to the operators. The product was quite good but there was no scope for the research required to develop it, for improvement to the plant or for winning a share of the market away from the large electromedical apparatus constructors, who had their own production lines.

The black-and-white cathode-ray tube line involved the majority of the active work force in operations, and ought to have been automated but it was not because black and white consumption was heading for certain decline. The processes were rather uncertain although the quality often happened to be good.

The telephone surge arrester line was based on the exploitation of a patent and utilized makeshift equipment and involved high risks, since Cobalt 60 radioactive material was included in the products during processing.

The microwave tube line was based on the market represented by the Hawk missile system and a small research activity had been started up.

On the whole the plant was to be considered uneconomical: the plant engineering and available technologies were generally obsolete. The ma-

[1] See the Affidavits of Ing. Cavalli, doc. No. 1, of Ing. Ravalico, doc. No. 14, and the Affidavit of Ing. Cammarata, doc. No. 13.

[2] See again the Affidavits of Ing. Busacca, Counter-Memorial, doc. No. 44, of Ing. Ravalico, doc. No. 14, and of Ing. Cammarata, doc. No. 13.

chinery was intensively exploited, old and hard to manage. The work force was comparatively unskilled. A negligible impulse had been given to independent research and there was no available plan to renew the production lines (even by means of licensing)" (. . .)[1].

According to Rag. Ravalico, on the other hand:

"(. . .) IRI 'interested' SIT-Siemens in proceeding with the acquisition of the bankrupt company, ELSI.

The term 'interested' is actually inexact, because no-one was 'interested' in ELSI because of its well-known technical obsolescence and commercial incompetence. But to prevent trade union unrest — the year was 1968 — and sit-ins in Via Veneto in front of IRI head office, it was necessary to 'take an interest in the business', mainly for reasons of law and order. I personally directed the take-over operations in my (. . .) official capacity.

After obtaining possession of the ELSI company, initially as lessees, we found the following situation:

1. The general facilities were inadequate, dilapidated and badly designed from the very beginning. The company had not grown according to an organic economic development plan. It had developed on a day-to-day basis. One of the consequences of this was that the production facilities had been sited haphazardly, in temporary structures, etc. As a result, most of the general facilities — after we had taken possession of them — were only scrap metal, and were sold off as such, because they necessarily had to be replaced by viable general facilities.

2. The production lines were all old, broken down and obsolete. The semiconductor line (the most bankrupt), the X-ray tube line, the microwave oven line, etc., which had been of inefficient production capacity *ab origine*, were all written off at once as scrap. It was not that they were obsolescent as a result of having been shut down pending the bankruptcy proceedings. They were obsolescent due to prior industrial and technical reasons. An attempt was made to salvage the TV cathode ray tubes line, and the line producing microwave tubes for military use. The first was a failure, and the second was successful thanks to considerable intervention.

The cathode (picture) tube line was organized using absolutely outdated technology, and it manufactured products that were completely useless on the market. These were black and white 23" picture tubes that were totally unsaleable on the Italian market in those years. And they were made using glass from Russia, with absolutely prohibitive transportation costs to Palermo, as one can well imagine. Since the technology then being used was no longer sound, an attempt was made to negotiate to be able to continue using RCA technology. But even this attempt proved negative.

It was not enough to change the technology: it was necessary to start *ex novo*, with huge new investments to cater for the demand of a market that was now moving towards colour TV. ELSI's commercial network was almost non-existent, and it had a bad commercial image.

The microwave tube line was continued, because the prospects existed for the products to be absorbed on the market, providing work for a few dozen members of the company's 1,000-plus workforce.

But it became necessary to renegotiate the assistance contracts with Raytheon, in order to be able to obtain the technical information and updates

[1] For the whole text of the Affidavit, see Counter-Memorial, doc. No. 44.

needed, in view of Raytheon's extremely, and quite unjustifiably, high royalties. After a short time, it became clear that this attempt could not proceed further, and it became necessary to think about starting up work on completely new products that would enable the company to retrain several hundred workers for new jobs.

3. The stocks were not able to cover even the cost of managing them. The stores were full of unsaleable picture tubes, above all, and old, wholly unusable materials that were for the production lines that were going to be sold off as scrap.

4. Through ELTEL S.p.A., which it controlled, SIT-Siemens had to invest over Lire 4,000,000,000 immediately in order to buy up Raytheon at the judicial bankruptcy auction held on 12 July 1969.

It later had to invest about 3,500 million between 1969 and 1972 to restructure the plant, general facilities, and the machinery and production lines, and to retrain the workforce.

5. ELTEL then moved the production of the electronic parts of the power units for the telecommunications facilities from Aquila to Palermo, at the former ELSI factory. The only way to keep the local jobs was to rebuild the whole factory, in practice, because as Raytheon had left it, the factory was absolutely useless in technical and production terms, and had only been taken over as a bankrupt concern on purely social grounds."

". . . *(e)* the ELSI company was lacking not only in industrial features but also with regard to its commercial functions. Among other things the oversized work force meant prohibitively high costs, such that the products, which were in any case delicate, were not competitive on the market; *(f)* the only real advantage ELSI had was its work force, even though it was too large for a company of that size. The work force appears to be technically well trained (although not everyone agrees with this: see Ing. Busacca)[1], and this explains why someone ultimately purchased the company in question. However, the existence of well-trained labour is not enough to render an off-market company attractive."

Furthermore, the company had ceased to be a going concern directly because of the ELSI management. The halting of the production lines took place in early March 1968[2]. Therefore, when the events lamented by the Applicant Government took place, ELSI was no longer a functioning company. Thus, the hypothetical orderly liquidation would therefore have involved not a company that was operating somehow or other, but the remains of a structure which had proved so uneconomical as to have been already closed down. All that was worth keeping, was the work force which the ELSI management had already proceeded to dismiss and who saw their jobs disappear.

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[1] Counter-Memorial, doc. No. 144.

[2] See the dismissal letter addressed to the employees of ELSI, dated 16 March 1968 (doc. No. 21) and to Ing. Busacca (doc. No. 22). It would be appropriate to point out here that a partial — and regretfully unfruitful — effort to make ELSI operative again was carried out by the Mayor of Palermo himself, through the assignment — conferred upon Ing. Laurin, an ELSI senior company director — to direct and take care of the plant during the requisition. This remark, already made at pp. 9 and ff. of the Counter-Memorial, is ignored in the US Reply.

12.1 ELSI's Requests for Benefits to Which It Was not Entitled

One further consideration is to be added. Again in its Reply the Applicant Government complains of the failure to grant benefits that were promised (it is not clear when or by whom), for which it blames the Italian Republic.

The truth of the matter is that either ELSI was entitled by law to such benefits, in which case it should have taken legal action if they were withheld (but this was not the case and ELSI did not in fact take any action), or it was not, as we shall now proceed to demonstrate; in the latter case, the only alternative was for ELSI to request that benefits to which it was not entitled be granted out of "benevolence". This is what ELSI asked, receiving the refusal that anyone requesting an illegal favour should expect to get.

Even for the type of production concerned, ELSI was not entitled to such benefits.

The Applicant complains of the failure to apply to ELSI's favour Article 1 of Law No. 835 of 6 October 1950 according to which the State Administration was under an obligation to reserve the "supplies" of materials provided for in legislative decree No. 40 of 18 February 1947 to existing industrial facilities in the *Mezzogiorno* (Southern Italy). In particular, according to Article 16 of Law No. 717 of 26 June 1965, in force at the time of the events, the Government was supposed to reserve 30 per cent of its supply contract for companies operating in the *Mezzogiorno*[1].

Under Italian law the supply contract is a contract by means of which one party (in the present case, the Government) purchases goods or services, on a continual basis, from another party for its own use and (in the case of the public administration) to carry out its statutory tasks. This means that the materials in question have to be purchased ready for use immediately, without requiring any further assembly or conversion. This obviously did not apply to ELSI's products, since they were simple components and not finished products, and were therefore of no use at all to the Government, who would have had to sell them to other companies to be assembled and used in different products. This is not allowed by Italian law, since it would mean that the Government would in some way act as a "go-between" between private companies.

It is for these reasons, which are seen to be based purely on legal provisions and do not include any intention to harass ELSI, that the Italian Government could not grant the benefits requested, as also Minister Andreotti pointed out in his speech in Parliament of 25 July 1968[2].

Again with reference to the benefits extended under Italian legislation to companies operating in the Mezzogiorno, the Applicant notes that also other norms involving special freight discounts for materials used or produced by such companies were not applied to ELSI.

However, also, the above norms were not applicable to ELSI's products, and for the same reasons previously outlined.

Article 15 of Law No. 717 of 26 June 1965 and the respective ministerial decrees implementing it, both dated 29 March 1967, provided for benefits in the following cases:

(a) raw materials and semi-finished products to be used for production purposes;
(b) building materials, machinery and anything else required for the reconstruction, transformation, extension and modernization of industrial plants;
(c) transport outside southern Italy of *finished* products.

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[1] The texts of the relevant rules are reproduced in doc. No. 34.
[2] See Memorial, Ann. 46.

Raytheon requested precisely the application of the benefits provided for in section *(c)* above, since, as was stated also in the Memorial, the size and weight of the products meant high freight costs.

However, as can be seen from the text of the provision, the only and decisive condition for its application was represented by the fact that the products concerned were *finished* products and therefore required no further assembly. This was not true in the ELSI case.

Therefore, it was not possible to grant even this benefit to ELSI.

It was therefore not that the Italian Government caused damage to ELSI but rather that ELSI was demanding benefits from the Italian Government in the form of "aid" beyond what it was legally entitled to. After realizing that it had made a bad investment and that it had mismanaged it, Raytheon in other words did its best to pin the cost of all its own mistakes on the Italian Government. To try and achieve this it exploited the need, which was particularly strongly felt in Italy at the time, to protect jobs. Failing to attain this objective, the decision was taken to close down the plant, an act which was also in line with the policy of general reduction of United States investments abroad.

13. The Terms of the Sale

The Applicant Government contends that "either as a total package or individually to maximize the realizable price"[1], "each product line could be sold as a separate package, including the respective technology, contracts, customer and supplier bases, and established name and reputation to buyers elsewhere in Italy, Europe or Japan"[2]. This inference is drawn by the Applicant Government from the Affidavit of Mr. Scopelliti. But what prospects could there have been for such a badly structured plant, production lines resulting in such large failures, products of such little worth that they were often returned to the seller (and in any case had no market appeal), technologies that proved to be so inefficient as to bring criticism also from the Bankruptcy Court expert Dr. Mercadante? In order to be able to reason from inferences, such as the likelihood of selling ELSI as a going concern[3], the inferences must be based on adequate premises. Otherwise they may turn out to be purely gratuitous. In the case in point, the necessary premises are not to be found, because the poor industrial performance resulting in the ELSI debacle, the production and marketing deficiencies observed, the structural shortcomings found in the plant, all add up to an overall picture of the Palermo plant such as to render improbable any course of action other than to sell the plant as a whole.

14. IRI's Role in the Acquisition of the Plant

In the light of what has been seen above, it has little meaning to speak of IRI's interfering with the bankruptcy proceedings. It is easy to prove the inaccuracy of the contentions presented by the Applicant Government in this context[4].

IRI was established by R.D.L. (royal-decree law) No. 5 of 23 January 1933, converted into Law No. 512 of 3 May 1933[5]. It was subsequently modified by R.D.L. No. 905 of 24 May 1937. An institution was set up, whose action would

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[1] See the Reply, p. 367, *supra*.
[2] Memorial, Ann. No. 17.
[3] Reply, pp. 368 ff., *supra*.
[4] See Memorial, I, pp. 58 ff.
[5] See doc. No. 31.

be directed mainly towards the technical, economic and financial reorganization of national industrial activities.

IRI became a public agency with a permanent structure, which was given the task of managing the shareholdings in its possession, of undertaking new industrial ventures, also in co-operation with private capital, and of carrying out initiatives in the field of vocational training.

The Institute's activity has therefore to be set in the broader framework of State holdings, i.e., of publicly owned shareholdings in profit-making companies.

It is true that IRI enjoys financial independence, having its own "endowment fund" (Art. 18 of the statute as approved by decree-law No. 51 of 12 February 1948)[1]. It directly owns the shares that it possesses, which differs from the case of the direct participation of the State, which become part of the latter's assets. IRI operates in accordance with the profitability criteria typical of a market economy. It has its own organizational structure, consisting of a President, a Vice-President, a Director-General, a Board of Directors, and a Board of Auditors.

In other words, the IRI group comprises a group of companies, which operate in accordance with the laws of the free market.

The "social" side of State holdings comes from the special attention focussed on the creation and preservation of jobs. However, the purpose of IRI is neither to salvage lame companies (for this purpose there is another agency in Italy, GEPI, for those cases in which the salvaging of a lame company presents particularly important social aspects) nor to engage in initiatives according to choices made by public authorities. Only occasionally IRI participated in the acquisition of unprofitable companies, acting on the instructions of the Italian Government.

In the telecommunications sector the IRI companies are grouped under STET, a joint-stock company quoted on the Milan Stock Exchange. Finmeccanica, with whom ELSI had meetings at the time it was seeking an Italian partner, is not a "division" of IRI, but a joint-stock company which, like STET, is wholly subject to the norms regulating private companies, and is quoted on the stock exchange.

Raytheon had already contacted IRI at a time when ELSI had not yet met its inevitable doom. However, IRI was not, and could not, be interested in entering into partnership with a company in such disastrous conditions. Subsequently, when deadlock was reached in the ELSI bankruptcy proceeding, IRI was obliged to intervene, mainly to safeguard employment and the situation of the Palermo workers who had been thrown out of their jobs.

The heart of the matter remains the question of whether the ELSI company was worthless or not. We have seen that the company had no value. This explains why the attempts by the political authorities, especially the local authorities, to find ways and means of salvaging it were unsuccessful. The cost of possible comprehensive solutions for running an obsolete plant was obviously too high for an organization that must compete according to the rules of the market. The formula of the sale of ELSI as a going concern is constantly repeated by the Applicant Government. The Reply goes as far as to state that, while the Italian Government had publicly announced its intention to purchase ELSI, ELTEL, an IRI subsidiary, "boycotted the first three bankruptcy auctions, seeking to buy only some of the assets at a lower price"[2]. However, this is contradicted both by the facts of the present case and by other events in which IRI has been involved.

Certainly, ELSI was of no interest to IRI as it was. This was confirmed by the fact that, after the purchase, ELTEL had to spend large amounts — as much as

[1] See doc. No. 28.
[2] Memorial, I, p. 58.

Lire 3,500,000,000[1] — to restructure the plant and completely change its production, even transferring to it some production lines which were previously operating elsewhere. After its purchase by ELTEL, the ELSI plant was converted for the production mainly of electronic control panels, a production line that was removed from the SIP plant in L'Aquila[2]. So IRI and its subsidiaries operating in the sector were in no way attracted by a "going concern" which, as has been shown, was not a going concern at all. What they actually purchased was the site on which the ELSI plant was located, taking over its oversized but qualified work force. It is therefore pointless to claim now that IRI plotted and conspired to obtain the production lines, which were dismantled, sold for scrap and replaced by others, or to obtain the technology, which was not used because, as well as obsolete, it was not relevant to the industrial aims then actually pursued. It is thus not surprising that IRI and STET were reluctant to take over a plant which they, like everybody else, knew to be useless as a specific operating structure and in the predictable need of productive reorganization.

Furthermore, if ELSI had been, if not an "industrial jewel", at least something with some market appeal, as the Applicant Government is now claiming, why was it that no bidder came forward, particularly when the bankruptcy auctions were deserted? The Reply uses the term "boycotting". IRI, however, has never had such powers. Recently, for instance, one of the IRI sectoral leader companies, Finmeccanica, which as we have seen was previously involved in discussions with ELSI, had to negotiate the reorganization of the Italian thermo-engineering sector with other entrepreneurs. As the newspapers reported, Finmeccanica and its subsidiary Ansaldo missed the boat: Franco Tosi and Asea Brown Boveri deemed it preferable to come to an agreement between themselves and to leave the State holding companies out of the new organization. No-one therefore stood in the way of other entrepreneurs plucking the ELSI apple if they had a mind to, just as no-one prevented Franco Tosi (a membeer of the Pesenti group) and Asea Brown Boveri from reaching an agreement cutting IRI out of the thermo-engineering sector[3]. In the case of ELSI, the absence of competitors wanting to buy the alleged "industrial jewel" cannot be ascribed to boycotting by IRI, which in any case has never been proved. It was much more simply due to the easily understandable fact pointed out earlier, i.e.. that no-one wanted the Palermo plant, either as a whole or in part. And to tell the truth, no evidence has even been produced of anybody else's interest being boycotted. What is true is that the bankruptcy auctions fall into line with what has already been demonstrated: ELSI was not a going concern but a ruined company, which nobody wanted. And when the group leader STET was obliged to intervene in order to save the jobs of the now unemployed ELSI work force, ELTEL had simply to make the best of a bad bargain.

15. Concluding Remarks

In actual fact the criticisms advanced by the Applicant Government are based on even more complicated considerations and use a rhetorical trick that can easily be exposed. Anyone reading the documents presented to the Court, starting with the latest one, can see that the Reply practically takes for granted what is set out briefly in the Memorial and explained at greater length in the 1974 Claim. In

[1] See Affidavit of Ing. Ravalico, doc. No. 14.

[2] See the Affidavit of Ing. Ravalico, doc. No. 14, and more generally, the Affidavit of Ing. Cammarata, doc. No. 13.

[3] On these facts and in particular on the disappointment of IRI for the agreement it failed to reach, see the article published in *Il Sole — 24 Ore*, 3 October 1987, doc. No. 29.

other words, by no longer going into the facts in detail, an attempt is made to give the impression that the alleged facts are obvious. On the contrary, these are merely assertions, or inferences, which are wholly unproven and actually do not stand to reason.

The 1974 Claim devoted considerable space (26 consecutive pages)[1] to describing, without proving, as must again be emphasized, a basically fraudulent plan to acquire the allegedly valuable ELSI plant at below its fair market price.

The contention of the United States Government is based on the following premises: the alleged existence of a sort of plot hatched by State holding companies, the Mayor of Palermo, banks and the bankruptcy receiver, focused on a valuable company, that IRI managed to acquire in an underhand way. As has been pointed out above, no such valuable company existed and therefore the hypothesis cannot be true. But the logical and legal coherence of the entire argument is also open to criticism.

The sequence of events that emerges from the outline of the facts contained in the 1974 Claim is as follows:

* on realizing that it lacked the capacity to attain a competitive size on the market, ELSI started looking for a possible Italian partner;
* IRI was approached, but was not interested;
* the banks, controlled by IRI, refused the proposals made by Raytheon and the ELSI management;
* the Mayor of Palermo issued the requisition decree;
* the bankruptcy trustee leased the plant to an IRI controlled company;
* an IRI subsidiary, ELTEL, purchased the plant after forcing the price down.

However:

(a) the need to find a strong partner is the first clue to the fact that ELSI by itself was not capable of attaining a competitive size. The tone used in the Applicant Government's Reply was one of substantial reproach to the Italian Government and IRI for not having rushed to ELSI's aid. No-one appears to have explained, however, why this should have been done, or, if it was true that ELSI was a valuable company, for which compensation is now being demanded, why the participation of a third party, i.e., of the State holding companies, was being begged;

(b) IRI's refusal was explained at the time by its lack of interest in investing in a company with a production like ELSI's; and in fact, when ELTEL, an IRI subsidiary, did purchase the company from the bankrupt's estate, it immediately set about changing the production lines[2];

(c) the banks' refusal to accept an "orderly liquidation" which would halve their credits is presented as an irrational and in any case spiteful attitude on their part, and basically attributable to IRI, by whom it is assumed that the banks were controlled, and through it, by the Italian Government. However:

(c1) when a debtor offers to pay only a part of his debts, he is the one who is normally reproached and not the creditor who refuses the deal. Furthermore, under the Italian Civil Code (see Art. 1181)[3], the creditor is entitled to refuse partial payment;

(c2) not all the banks to which ELSI owed money are controlled by IRI, which in its turn cannot be portrayed as an agent of the Italian Government, so

[1] See Counter-Memorial, Unnumbered Documents, Vol. I, p. 233, *supra* [pp. 41-67].
[2] See the Affidavit of Ing. Ravalico, doc. No. 14.
[3] For the English text of Article 1181, see doc. No. 16.

that the link between the behaviour of the banks to which the money was owed and the Mayor or the Prefect is non-existent; in this case it is hard to see what the Applicant Government has to complain about;

(d) in Italy there is the separation of powers, especially between the judiciary and the executive. Therefore, to assume that there could be a concerted attitude between the receiver appointed by the bankruptcy court, the Mayor of Palermo, and IRI is not only a contemptuous argument vis-à-vis the Italian judiciary, but also an argument quite out of place.

In all probability the matter is much simpler than the highly imaginative version served in the Memorial and Reply of the Applicant Government. The Respondent could simply rest its case on the statement that the Applicant Government has produced no evidence of linked behaviour, and linked unlawfully, between companies, local authorities and judges. And in view of the seriousness of such a charge, reasonable caution should be exerted when asserting that such links existed. However, the facts alleged have induced the Italian Government to go beyond a mere passive denial of the Applicant's arguments and to stress the enormity of the allegations.

ELSI was an unsuccessful deal, at least from 1962 on, or rather an unsuccessful speculation, because Raytheon believed it was possible to make a profit by shelving the State and local authorities with the costs of an obsolete company, thereby exploiting the need to create jobs in the *Mezzogiorno*[1]. According to Ing. Busacca, ELSI did not distinguish itself either for its technology, nor for the state of its plant. According to Rag. Ravalico, its products were obsolete and off market. According to Dr. Mercadante, ELSI's products were defective. According to its balance sheets, the company was undercapitalized. Obviously all it produced were losses, and more losses.

It was the obvious concern of the Italian local and central authorities to provide the maximum possible employment. In high unemployment areas like the *Mezzogiorno*, the closing of a company normally gives rise to tension and a necessary degree of solidarity. Raytheon was ready to take advantage of all this, both at the beginning, when it benefited from financial inducements, and in the end, when the wages of its 168 employees were paid by the Sicilian Regional Government. As part of the general pressure applied to save the company Raytheon contacted IRI. However, in view of the economic uselessness of the ELSI plant, IRI made the correct managerial decision not to have anything to do with it, fully aware that once it was caught up in the affair it would have trouble coming out of it unscathed. Raytheon then made another attempt using an illusory rehabilitation plan in which it claimed that the banks were prepared to accept 50 per cent payment. However, to anyone examining the matter thoroughly, it was clear that no such conclusion was warranted since the ELSI plant had no market value except on the scrap market (and most of the plant was actually sold off as scrap)[2] while no commitment to "cover" ELSI was forthcoming from the parent company (since the promises mentioned by the Applicant Government are only hypothetical). With no further hope of *(a)* receiving Government orders, as no reason exists for giving them to a company that produced badly, *(b)* of association with the State holding system, which had no reason to waste its money on a company that produced losses, and *(c)* of an agreed rehabilitation plan, which was intrinsi-

[1] Therefore, for instance, ELSI benefited from soft loans, which were provided for in the law: see Counter-Memorial, pp. 4 and 7, *supra*. The Reply, however, avoids any mentioning of these soft loans.

[2] See Affidavit of Ing. Ravalico, doc. No. 14.

cally unfeasible and in any case involved cuts in the creditors' share which the creditors would have no reason to accept, particularly since in Italy the bankruptcy proceeding is required by law: Raytheon stiffened its attitude in the hope that the State holding companies or the local political authorities would give in at the last moment (the payment of the wages of 187 employees by the Sicilian Region raised hopes of a possible bail-out)[1]. ELSI issued a communiqué, which was given wide circulation, to the effect that, as from 16 March 1968, the company would cease all activities and that as from 29 March the employees would be laid off. It is interesting to note the tone of the ELSI communiqué: it said in effect that Raytheon had invested many billion lire, and that the Italian Republic did not intend to mount any rescue operation. The only thing it omitted to communicate, and indeed tended to ignore, was the fact that the company was economically worthless and financially ruined, and that the Italian legal system does not consider that an insolvent debtor has the right to receive aid from anybody, particularly when he is responsible, as ELSI was responsible, for having wasted someone else's money (see the financing received) in products capable of making only losses.

As was to be expected, the ELSI work force staged several demonstrations[2]. On 25 March a general strike was actually called in Palermo to express solidarity with the ELSI workers. The local authorities were thus obliged to intervene. Raytheon, realizing that it now had the opportunity to blame others, and not its own errors, for the company's debacle, decided to speculate on the events. This was the beginning of the complaints.

It may be objected that this is only surmise. If it is, it is no different, however, from the surmise contained in the contentions of the Applicant Government, except for some fundamental aspects: the constant losses incurred by ELSI, out of all proportion to the capital invested, are an unchallenged fact; the ruinous state of the ELSI company is an unchallengeable fact, since it can be worked out from the figures and from the proposal to pay 50 per cent to the creditors; the state of obsolescence of the plant is equally unchallengeable, as it is confirmed in several Affidavits. The fact is therefore that ELSI and Raytheon were aware of the disastrous situation of the company and of the impossibility of presenting to the market a company that was losing money so fast. And yet, despite these facts, one still finds a request for compensation of a "full value" that has no connection at all with reality.

[1] On the attitude showed by ELSI's management in those critical days, see the article published in *L'Ora*, doc. No. 29.

[2] On this point, see also the Affidavit of Avv. Maggio, doc. No. 3.

PART II. THE JURISDICTION OF THE COURT

Since the two Parties expressly agree that the Court has jurisdiction over the dispute, under Article XXVI of the Treaty, "in so far as it relates to the interpretation and application of the 1948 Treaty and the 1951 Supplementary Agreement"[1], it is hard to see why the Applicant finds it expedient to point out that "the Respondent is now barred from raising an objection"[2]. Over many years of negotiation on the claims put forward by the United States Government on behalf of Raytheon and Machlett, no intention of raising an objection to the Court's jurisdiction with regard to an application based on the Treaty has ever been voiced by the Italian Government.

The Respondent Government only expressed the view that, given the new position taken by the United States Government on many issues in its Memorial, the Italian Government would have been entitled to insist that "the basic contentions concerning the interpretation or the application of the Treaty should have first been put forward in diplomatic negotiations"[3]. However, as the Counter-Memorial made clear, "in the interests of a complete settlement of the dispute, the Defendant Government refrains from putting forward" any request for the Court "to declare that the conditions set forth in Article XXVI of the Treaty have not been fulfilled"[4].

There is little accuracy in the Reply's contention that "the United States has repeatedly raised with the Respondent since 1972 the legal claims now before this Court"[5]. As a perusal of the Memorandum of Law presented in 1974 and of the Memorial shows[6], the Applicant Government has significantly altered its basic contentions concerning the Treaty and the Supplementary Agreement. This may be an embarrassing fact for the Applicant Government to acknowledge; it cannot be denied by noting that the same Government has persistently claimed compensation[7].

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[1] Counter-Memorial, p. 26, *supra*. In quoting this passage the applicant Government's Reply (at p. 373, *supra*) omits the words "in so far". The omission may be inadvertent, as the jurisdiction of the Court over the dispute clearly rests only on Article XXVI of the Treaty, which reads as follows: "Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, when the High Contracting Parties shall agree to settlement by some other specific means."

[2] Reply, p. 373, *supra*.

[3] Counter-Memorial, p. 26, *supra*.

[4] *Ibid.*

[5] Reply, p. 373, *supra*.

[6] See Counter-Memorial, p. 26, *supra*.

[7] The Reply (p. 373, *supra*), concludes as follows: "Since the Respondent has consistently refused to pay compensation for the damages suffered by the United States, the dispute has not been satisfactorily adjusted by diplomacy and is now properly before this Court pursuant to Article XXVI of the Treaty."

PART III. THE ADMISSIBILITY OF THE CLAIM

The Italian Government has contended in its Counter-Memorial that "the United States Government's claim is inadmissible in view of the fact that local remedies were not exhausted by the two United States corporations on behalf of which the claim is put forward"[1]. The Applicant Government attempts to justify the admissibility of its claim in its Reply[2]. However, the United States Government does not contest that the objection that local remedies were not exhausted may be made in relation to a claim under the Treaty. It is also common ground that, in order to establish whether local remedies have been exhausted, "the only possible test is to assume the truth of the fact on which the claimant State bases its claim"[3].

One of the Applicant Government's contentions is that "the Respondent is estopped from asserting that there exists any requirement to further exhaust local remedies"[4]. It is difficult to see on what basis the existence of an estoppel could be alleged. At no time did the Italian Government say that local remedies did not have to be exhausted. Nor could a waiver be implied in the alleged fact that "the Respondent made statements that it was willing to go to arbitration with the United States"[5]. Objections relating to non-exhaustion of local remedies have frequently been considered on their merits in arbitration decisions over claims put forward by a State against another State on behalf of individuals. As the Arbitral Tribunal said in the *Case concerning the Air Services Agreement of 27 March 1946 (United States* v. *France)*,

> "the rule of international law relating to the requirement of exhaustion of local remedies, when making a distinction between the State-to-State claims in which the requirement applies, and claims which are not subject to such a requirement, must necessarily base this distinction on the *juridical* character of the *legal relationship*, between States which is invoked in support of the claim. Consequently, with respect to the applicability of the local remedies rule, a distinction is generally made between 'cases of diplomatic protection' and 'cases of direct injury'[6]."

Moreover, far from being an unexpected issue, the question of exhaustion of local remedies had been discussed at length in the Memorandum of Law submitted by the Applicant Government in 1974[7]. It was reasonable for the same Government to take into account the fact that the issue would have to be considered in arbitration or judicial proceedings. The Defendant Government's constantly expressed view that the claim is unmeritorious certainly does not affect the application of the local remedies rule. As the arbitrator noted in the *Finnish Shipowners* case,

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[1] Counter-Memorial, p. 27, *supra*.

[2] Reply, pp. 374-377, *supra*.

[3] This passage, taken from the arbitral award in the *Ambatielos* case (12 *Reports of International Arbitral Awards*, p. 119), was quoted in the Counter-Memorial, p. 28, *supra*; the Reply, p. 374, *supra*, nt. 2, refers to the pages of the award containing the same passage.

[4] Reply, p. 376, *supra*.

[5] *Ibid.*, p. 377, *supra*. The Reply, p. 377, *supra*, also criticizes the Respondent for having failed to "suggest or request that Raytheon and Machlett enter Italian courts and sue on the basis of the Treaty". Does this imply that, according to the Applicant, a State is under an obligation to recommend legal action against itself?

[6] Decision of 9 December 1978, 54 *International Law Reports*, pp. 304 ff., at p. 324.

[7] Unnumbered Documents submitted by Italy, Vol. I, pp. 264-267, *supra*.

"every relevant contention, whether it is well founded or not, brought forward by the claimant Government in the international procedure, must under the local remedies rule have been investigated and adjudicated upon by the highest competent municipal court[1]".

The Applicant Government seeks support in the circumstance that "assuming for the sake of argument that an action based on the Treaty could be brought — the statute of limitations on that action has now expired"[2]. It is hard to see why the said circumstance should be relevant, as it is well known that the local remedies rule fully bars an international claim when local remedies which have not been exhausted become unavailable: the arbitration award in the *Ambatielos* case[3] provides a good example to this effect. In any case, the five-year deadline set by Article 2947, paragraph 1, of the Italian Civil Code[4] for claims relating to damages arising out of a wrongful act had already elapsed for any act committed in 1968 by the time the United States Government submitted its claim on 7 February 1974 on behalf of Raytheon and Machlett[5]. Therefore, any attitude that the Italian Government may have taken after that date can in no way be considered as the cause of the remedy not having been exhausted.

The very attempt to build an argument of estoppel on such a slender basis conveys the impression that, even in the Applicant Government's view, there are no substantial reasons for overcoming the objection to the admissibility of the claim. The objection rests on the fact that Raytheon and Machlett — apart from not taking adequate steps to prevent some of the measures that the Applicant Government assumes to be wrongful[6] — failed to bring an action against the Italian State claiming compensation for damages arising from the alleged wrongful acts committed by public authorities. The general rule in the Italian Civil Code concerning compensation for damages arising from wrongful acts — Article 2043[7] — is often invoked by individuals against the Italian State and substantial

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[1] Also this passage, which is taken from 3 *Reports of International Arbitral Awards*, p. 1503, was quoted in the Counter-Memorial, pp. 27-28, *supra*. The Reply, p. 374, *supra*, nt. 2, again refers to the pages of the award containing the same passage.

[2] Reply, p. 377, *supra*.

[3] See 12 *Reports of International Arbitral Awards*, p. 118.

[4] Under the said paragraph the deadline is five years from the day on which the wrongful act took place ("The right to compensation for damages arising from a wrongful act expires five years after the day in which the wrongful act took place").

[5] Unnumbered Documents submitted by Italy, Vol. I, p. 232, *supra*.

[6] For instance, Raytheon failed to appeal to the Court of Cassation against the decision by the Court of Palermo of 20 June 1969 concerning the terms of the fourth auction, while Machlett does not appear to have taken any steps to challenge the bankruptcy judge's decision.

[7] "*Compensation for wrongful acts*. Any act committed either wilfully or through fault which causes wrongful damages to another person implies that the wrongdoer is under an obligation to pay compensation for those damages" (the Italian text with full translation is reproduced in doc. No. 16).

With regard to the claim for compensation of damages arising from wrongful acts, which is available under Article 2043 of the Italian Civil Code, it is to be pointed out that Raytheon and Machlett, if convinced that the behaviour of Italian officers (the Mayor, the Prefect of Palermo, etc.) had been inspired by an intent of jeopardizing their interests in favour of IRI, could have also brought a criminal action against such authorities, in compliance with Article 323 of the Italian Criminal Code ("Innominate abuse of power") (see doc. 17). This criminal action, if successful, would also have implied, in favour of Raytheon and Machlett, a right to compensation, under Article 2043 of the Italian Civil Code (in the Italian legal system, damage caused by a crime always gives rise to the right to compensation according to Article 185 of the Criminal Code).

In other words there were two avenues available to the United States shareholders for seeking compensation: a criminal suit coupled with a civil suit or an independent civil suit,

sums have been awarded to the claimants where appropriate. In the present case — if one assumes, as one is supposed to do under the local remedies rule, that the Applicant Government's contentions are correct — Raytheon and Machlett suffered damages caused by Italian public authorities in violation of the Treaty and the Supplementary Agreement: the provisions of the Treaty and the Supplementary Agreement would have made it necessary for an Italian court to conclude — on the basis of the same assumption — that the Italian public authorities' acts were wrongful acts when applying Article 2043 of the Civil Code[1].

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both allowing the shareholders to invoke Article 2043 of the Civil Code.

The different opinions given in the affidavits submitted by the Applicant (p. 278, *supra*), except for several incorrect premises on which they are based (e.g., on p. 15 of the La Pergola opinion it is taken for granted that the requisition would have continued, which it did not; on p. 16 the Prefect of Palermo is said to have made a statement concerning the cause-and-effect relationship between requisition and bankruptcy which he never made and whose existence has never been proved) do not consider that, when a shareholder, as has been alleged in the present case, has suffered not only indirect damage resulting from damage inflicted to the company, but is instead the direct victim of a persecution by public authorities which causes him an immediate, personal and direct damage, he is entitled to *compensation under Italian law*.

In such a case, and irrespective of his nationality, any such shareholder can bring an action for damages against the public official responsible for such action, as well as against the branch of the public administration on behalf of which the latter was acting.

[1] In addition to the remedies referred to above, there were other remedies provided for by the Italian legal system and available to the two United States companies. Such remedies are offered by the bankruptcy legislation in favour of all the creditors of the bankrupt company.

(a) Raytheon was in fact a chirography creditor of ELSI for the sum of Lire 1,143,800,000 (see Memorial, I, p. 108 and Ann. 14), in addition to the sums guaranteed and paid as guarantor. However, this credit was never claimed in the bankruptcy proceedings (see Memorial, Ann. 26, I, pp. 238-239 and Ann. 30, I, p. 252) upon recommendation of the Raytheon counsel, who was obviously well aware of how much below the triumphant forecasts the true value of the bankrupt company's assets really was.

(b) As for the complaints about the unfavourable conditions in which the ELSI sale took place (the absence of any foreign companies at the auctions and the general complaints about "irregularities") that the allegations are groundless and the bankruptcy proceedings took place in full respect of Italian law.

However, it is a general principle of Italian bankruptcy legislation (Arts. 23 and 26 of the Bankruptcy Law: text reproduced in doc. 18) that all the acts of bankruptcy judges can be appealed against by petition to Courts, whose decisions can be reviewed by the Court of Cassation, according to Article 111 of the Italian Constitution. In fact most of the decisions of the bankruptcy judge were not appealed against and in any case the judicial review of the Court of Cassation was never asked for.

(c) With regard to the specific terms of the sale, Article 108 of the Bankruptcy Law states that they are set by the bankruptcy judge at the receiver's request and that the sale may be suspended when the price offered is much lower than the market price. In the case in point it was apparently not considered necessary to use these powers of suspension.

However, it is legally unchallengeable, and therefore an applied principle in the Italian legal system, that the sale order issued by the bankruptcy judge, who thereby obviously deems it not necessary to exert the powers of suspension, can be appealed against in a court of higher instance and, eventually, in the Court of Cassation.

The deadline for lodging an appeal is quite adequate and in any case such as to guarantee the right of defence of the parties concerned. The deadline is represented by the order transferring the assets to the purchaser, and is obviously subsequent to the date of the auction at which they were sold.

The appeal can be made by any of the parties interested in the correct conduct of the bankruptcy proceeding and in obtaining the highest possible proceeds from the sale. The two parties specifically concerned are the receiver and the bankrupt.

However, anyone, even third parties who are not involved in the proceeding but who consider that the auction price is too low with respect to the value of the assets, can make an appeal or request the suspension of the sale, even after the auction has been held,

No set of facts similar to that to which the United States Government's application refers was ever invoked before an Italian court. The receiver, when he brought an action for compensation[1], only complained of the requisition decree[2]. Nor did he invoke — or indeed could have invoked, as he was acting on behalf of ELSI, an Italian company under Article II, paragraph 2, of the Treaty — any provision in the Treaty or the Supplementary Agreement. Hence, the receiver's action can in no way justify the lack of initiative on the part of Raytheon and Machlett.

In order to contend that there were no local remedies available to Raytheon and Machlett the Applicant Government refers to three opinions: two given to Raytheon in 1971 and the third one, which is dated February 1988, given to the United States Government by Professor Elio Fazzalari, who had acted over 13 years as Raytheon's counsel in relation to the claim — a fact which is mentioned neither in the opinion annexed to the Reply nor in the Reply, but results from documents exhibited by the Applicant Government[3]. The two earlier opinions did not deal with the question of whether the Treaty could be invoked by Raytheon and Machlett before Italian courts. The Reply's assertion[4] that Professor La Pergola "considered in 1971 whether Raytheon could sue based on the Treaty" is unsound, not only grammatically. Professor La Pergola's opinion is a discussion of diplomatic protection of shareholders. In the English translation annexed by the Applicant Government to its 1974 "Memorandum of Law", the only argument given in the opinion with regard to local remedies runs as follows:

> "The bankruptcy status prevents any direct initiative by the company towards reintegration or restoration in a situation in which it would have found itself had it not been for the illicit action. On the basis of the principles confirmed by internationalistic jurisprudence, this constitutes another element permitting immediate protection of the shareholders by the State of which they are citizens. Hence, the question of exhausting internal remedies does not apply which remedies, in this situation, would not have been directly available to the shareholders. The latter have suffered a specific injury of their interests since the illegal conduct of the State made the liquidation impossible[5]."

On the basis of Professor Fazzalari's "independent" opinion, the Applicant Government puts forward only one argument in order to contend that the Treaty would have been of no avail to Raytheon and Machlett. The argument runs as follows:

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provided that they do so before the transfer order is issued. They are entitled to do this irrespective of whether they are willing to make a higher offer or whether they are reporting irregularities in the proceeding.

In the case in point, Raytheon made only a few, unsuccessful, appeals to the lower court and never went as far as the supreme Court of Cassation.

[1] Raytheon's counsel Giuseppe Bisconti argued in 1971 that there was no cause of action under Article 2043 of the Civil Code because "Italian law provides for a specific remedy against the requisition which is the aforementioned appeal to the Prefect" (Unnumbered Documents submitted by Italy, Vol. I, p. 278, *supra* [p. 160]). However, the receiver brought precisely such an action which was partly successful. The final decision in this case was given by the Court of Cassation on 26 April 1975. For the English translation of the decision, see Memorial, Ann. 82.

[2] For an English translation of the receiver's lawsuit see Memorial, Ann. 79.

[3] See Memorial, Ann. 13 (Schedule K) and Ann. 40 (Exhibit A).

[4] Reply, p. 375, *supra*.

[5] Unnumbered Documents submitted by Italy, Vol. I, p. 278, *supra* [p. 172]. The English translation of the full opinion has been omitted in Annex 3 to the Reply.

> "Although the Treaty and Supplement at issue here were incorporated into Italian legislative acts, the provisions argued before this Court are not complete enough to permit a suit for compensation by a United States national against the Government of Italy in Italian courts[1]."

In other, and perhaps simpler, words, the United States Government's contention is that Italian courts would have ignored all the provisions in the Treaty and the Supplementary Agreement which could have been invoked by the two United States companies notwithstanding the existence of specific legislation designed to ensure the application in Italy of the Treaty and the Supplementary Agreement[2].

The Reply does not quote, directly or indirectly, any single case in which Italian courts would have taken the view that any provision in the Treaty or the Supplementary Agreement is not self-executing. The Applicant Government attempts to diminish the importance of what the Reply calls the "only Italian case cited by the Respondent in support of its argument"[3]. This was a decision by the Italian Court of Cassation[4] in which Article V, paragraph 4, of the Treaty, which had been invoked before the Italian courts by a United States corporation, was applied to its benefit. The Reply's comment that there "were no damages awarded in that case"[5] is misleading, since no damages had been claimed; nor is the observation that the case "did not involve the Government of Italy"[6] any more pertinent: when a treaty provision is regarded as self-executing in the relations between private parties, it is certainly applied also in a case brought against public authorities.

The Italian Court of Cassation confirmed its attitude in favour of considering the Treaty provisions as self-executing when it applied Article XIV of the Treaty in a criminal case, *In re Walsh*[7]. In Italy, as the claimant Government rightly noted in another context[8] "[a]lthough the opinion of the Supreme Court is not binding outside the case in which it is rendered, it is highly persuasive authority in subsequent cases in Italian courts". Hence, the two decisions by the Court of Cassation mentioned above give a strong indication of what would have been the attitude of Italian courts if Raytheon and Machlett had brought a claim and invoked provisions in the Treaty and the Supplementary Agreement.

An attitude in favour of the self-executing character of treaty provisions was shown by the Italian Court of Cassation also when individuals invoked, in cases brought against public authorities, provisions of treaties like GATT which were taken not to be self-executing by some non-Italian courts. For instance, Decision No. 1455 of 21 May 1973, *Ministero delle Finanze* v. *S.p.A. Manifattura Lane Marzotto*, held that Article II *(b)* of GATT

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[1] Reply, p. 375, *supra*.

[2] The two legislative acts which provided the relevant "implementing orders" *(ordini di esecuzione)* were referred to in the Counter-Memorial, p. 28, *supra*.

[3] Reply, p. 376, *supra*.

[4] Decision No. 2228 of 30 July 1960, *The Durst Manufacturing Co.* v. *Banca Commerciale Italiana*. The text of this decision, to which the Counter-Memorial referred on p. 28, *supra*, is reproduced in doc. No. 11.

[5] Reply, p. 376, *supra*.

[6] *Ibid.*

[7] Decision No. 2579 of 6 December 1983-17 February 1984, *Commissione Tributaria Centrale* (1984), II-1143, reproduced in doc. No. 12.

[8] Reply, p. 376, *supra*, nt. 6.

"is immediately applicable, without the need for further legislative intervention, not only to the participating State but also to the subjects of the internal system, which gives rise directly to rights and obligations[1]".

The Reply[2] referred to a decision concerning Article 78, paragraph 4, of the Peace Treaty with Italy, which concluded that "the said Article constitutes a relationship enforceable in internal law"[3]. With regard to the same provision, in Decision No. 107 of 14 January 1976, *Ministero del Tesoro* v. *Mander Brothers Ltd.*, the Supreme Court stated that the said paragraph,

"in providing that the Italian Government be charged with the obligation to indemnify citizens of the United Nations for losses suffered, from wartime events, following injury or damages caused to their property in Italy, gives rise, along with an international obligation of the Italian State vis-à-vis the other Contracting States, to a direct legal relation of a binding character, between the first State and the individual citizens of the United Nations. Such relation, complete in all its essential elements, is immediately effective in the domestic legal system, without the further requirement of a normative act of integration or of implementation, and therefore, as was pointed out by the *Sezioni Unite* of this Supreme Court, it is actionable by the same citizens before Italian courts[4]".

This reasoning hardly supports the Applicant Government's assertion, with regard to the Treaty, that

"although there is provision in Article V for indemnification by the Government of Italy of those individuals or corporations who have been deprived of their property, that Article is still not sufficiently complete[5]".

The Reply's further contention that

"since Raytheon's and Machlett's claims are those of shareholders, Italian law would prevent a suit seeking compensation based on the illegal requisition because Italian law reserves such a right to ELSI alone, despite the existence of the Treaty[6]",

is an inaccurate rendering of Professor Fazzalari's "independent" opinion to which it refers: the final part of the opinion, in which the argument was put forward, was written on the basis of "[h]aving excluded that the treaty has introduced into the internal law claims and judicial remedies stronger and different from those already available in the Italian legal system"[7]. Hence, this argument,

[1] 96 *Il Foro Italiano* (1973), I-2444. English translation in 2 *The Italian Yearbook of International Law* (1976), pp. 383 ff., at p. 384. See doc. No. 5.

[2] Reply, p. 375, *supra*, and nt. 4.

[3] Decision No. 3592 of 13 November 1974, *Ministero del Tesoro* v. *Di Raffaele*. English translation in 2 *The Italian Yearbook of International Law* (1976), pp. 366 ff., at p. 368.

[4] 99 *Il Foro Italiano* (1976), I-2463. English translation in 3 *The Italian Yearbook of International Law* (1977), pp. 349 ff., at pp. 349-350. See doc. No. 4.

[5] Reply, p. 375, *supra*. Under Italian law, the fact that in some instances there may be a doubt as to whether a remedy exists before an ordinary court or an administrative court never implies that no remedy exists or that a provision in a treaty may be taken as not being self-executing. The decision quoted at note 3, *supra* was in favour of the competence of ordinary courts. No doubt, also a claim for damages under Article 2043 of the Civil Code should be brought before an ordinary court.

[6] Reply, p. 375, *supra*.

[7] *Ibid.*, Ann. 2, Part II.

whatever its merits, in no way affects the question whether the Treaty could be invoked before Italian courts.

The Counter-Memorial quoted a decision by the United States Court of Appeals for the Fifth Circuit, which held that the treaties of Friendship, Commerce and Navigation "are self-executing treaties"[1]. The Applicant Government has in no way challenged this appraisal of the attitude of the United States courts towards treaty provisions whose language is identical or similar to that of the provisions which could have been invoked before Italian courts. Nor has the Applicant Government given any compelling reason why Italian courts should have disregarded these provisions. The decisions quoted above point, on the contrary, to an attitude which is certainly not less favourable to the self-executing character of treaty provisions. Thus, Raytheon and Machlett, in seeking immediate recourse to diplomatic protection[2], did not use the local remedies available to them, as they were required to do under the local remedies rule. As was said by Mr. Becker, the Agent for the United States Government in the *Interhandel* case:

> "Even if by violation of a treaty an international wrong would have been committed, that wrong still would not be sufficiently definite and complete so as to give rise to a claim between States. In order to give rise to an international claim a treaty violation must have become definite and complete; it must have passed beyond the stage where domestic judicial action of a country can rectify the violation[3]."

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[1] The reference to the decision in *Spiess* v. *Itoh and Company*, 643 *Federal Reporter*, 2d Series, pp. 353 ff. (1981) was made in the Counter-Memorial, p. 29, *supra*, nt. 1.

[2] The request for an opinion on the admissibility of diplomatic protection (Unnumbered Documents submitted by Italy, Vol. I p. 278, *supra* [p. 161]) shows where their main objective was as early as 1971.

[3] *I.C.J. Pleadings, Interhandel* case *(Switzerland* v. *United States)*, p. 505.

PART IV. THE INTERPRETATION AND APPLICATION OF THE 1948 TREATY AND THE 1951 SUPPLEMENTARY AGREEMENT

1. Aims Pursued by the 1948 Treaty and Principles on Which It Is Based

In Part Five of the Reply, in which the legal basis of the claim of the United States is examined, some remarks are addressed in the first place to the question of the aims characterizing the Treaty of Friendship, Commerce and Navigation of 2 February 1948. The Italian Counter-Memorial[1] had stressed the importance that the object and purpose of a treaty have in the interpretation of its provisions in accordance with Article 31 of the Vienna Convention on the Law of Treaties[2]. The Counter-Memorial emphasized the great variety of aims pursued by the 1948 Treaty and showed that the provisions to which the Applicant refers cannot be interpreted solely as a function of the interests of United States investors in Italy.

In fact, as the Applicant asserts in its Reply, the Treaty provisions show that "both Parties were concerned with the property and interests therein of each Party's corporations in the territory of the other"[3]. However, for this very reason it is essential to ascertain accurately the extent to which the above-mentioned provisions refer to the property and interests owned by the Raytheon and Machlett corporations in Italian territory.

A further preliminary question is that of the principles on which the 1948 Treaty is based[4]. The Applicant argues that the principles of national treatment and of most-favoured-nation treatment are not the only ones applied in the Treaty[5]. This is not a pertinent criticism of our reasoning which consisted in pointing out that these are the only two principles explicitly mentioned in the Preamble to the Treaty[6]. The Applicant itself referred to an earlier case in which the Preamble was used by the Court to establish the object and purpose of a treaty[7]. This does not imply denying that "[t]he operative standard of treatment must be analyzed for each of the articles advanced by the United States"[8]. However, one should not neglect the significance of the phrase "in conformity with the laws and regulations in force", which qualifies the standard of treatment provided for in several articles of the Treaty.

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[1] Counter-Memorial, pp. 30-31, *supra*.

[2] The Counter-Memorial, on p. 30, *supra*, noted that "[a]lthough the 1969 Vienna Convention on the Law of Treaties does not apply to the interpretation of the Treaty and its Supplementary Agreement, the rules on interpretation included in the Convention are to be considered as corresponding to those applicable under general international law". This appears to be common ground between the Parties, as in the Reply the "United States agrees that the rules of the Vienna convention apply to the interpretation of this Treaty" (p. 384, *supra*, nt. 1).

[3] Reply, pp. 378-379, *supra*.

[4] See Counter-Memorial, pp. 34-36, *supra*.

[5] Reply, p. 379, *supra*.

[6] Counter-Memorial, p. 34, *supra*.

[7] Reply, p. 379, *supra*, nt. 2.

[8] *Ibid.*, p. 380, *supra*.

2. The Italian Nationality of ELSI

A fundamental problem is related to the status of the ELSI company, i.e., of the entity that, having decided to cease its activities, had its plant and equipment requisitioned and was subsequently declared bankrupt at the request of its management, its plant finally being sold. In this connection it has been pointed out in the Counter-Memorial[1] that, in accordance with Article II, paragraph 2, of the Treaty, ELSI, having been incorporated in Italy under Italian law, is an Italian company, notwithstanding the fact that in 1968 all its shares were owned by the United States companies Raytheon and Machlett. In view of its nationality, therefore, ELSI was not eligible for protection under the 1948 Treaty and the 1951 Supplementary Agreement between Italy and the United States with reference to its activities in Italy and the events concerning it which occurred in Italy. In this regard the Counter-Memorial cited the decision of the Supreme Court of the United States in the case of *Sumitomo* v. *Avigliano*[2]. In accordance with the Treaty of Friendship, Commerce and Navigation between the United States and Japan (in which Art. XXII, para. 3, corresponds to the above-mentioned Art. II, para. 2, of the Treaty between Italy and the United States), the Court ruled that since the Sumitomo Company was incorporated in New York under New York law "it is a company of the United States, not a company of Japan", and therefore could not "invoke the rights provided in Article VIII, paragraph 1" of the Japan-United States Treaty.

With regard to this case the Applicant only asserts in a footnote[3] that the argument presented by the United States before the Supreme Court in the case of *Sumitomo* v. *Avigliano* is not relevant to the present case since it "dealt with language particular to Article VIII (1) of the FCN Treaty". It is easy to reply, however, that the only argument of the United States mentioned by the Italian Government in its Counter-Memorial[4] was drawn from the brief submitted to the Supreme Court by the United States as *amicus curiae*, and consisted in the observation that, in accordance with the Treaty with Japan, "a company has the nationality of its place of incorporation". This obviously results from Article XXII, paragraph 3, and not from Article VIII (1) of the said Treaty. Anyway, what really matters is the passage taken from the Supreme Court's decision: the Applicant is referred to the quotation on page 36, *supra*, of the Counter-Memorial which was summarized above.

Certainly, Article II, paragraph 2, of the 1948 Treaty represents a provision which is very clear and cannot be ignored. Consequently, the heart of the matter is to establish whether — given the fact that ELSI was not eligible by nationality to invoke the Treaty with regard to Italian authorities, any rights and interests of the two United States shareholders in ELSI, namely, Raytheon and Machlett, are "specifically protected" by the provisions of the Treaty referred to by the Applicant, as is asserted by the latter. On principle, it is possible that certain provisions of an international bilateral instrument may be intended to protect specific rights or interests of the shareholders in a company. This was recognized by the Court in the *Barcelona Traction* case[5]. While the Applicant cites this well-known precedent[6], it fails to acknowledge that the Court's decision stressed the

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[1] Counter-Memorial, pp. 36-37, *supra*.
[2] See *ibid.*, p. 36, *supra*.
[3] Reply, p. 380, *supra*, nt. 1.
[4] Counter-Memorial, p. 36, *supra*.
[5] *I.C.J. Reports 1970*, p. 39, para. 58. See also p. 47, para. 90.
[6] Reply, p. 380, *supra*.

firm distinction between the company's rights and those of its shareholders[1]. This distinction was based on the nature of corporations' stock under domestic law: which was considered to be relevant also in international law in so far as the latter makes reference to the "rules generally accepted by municipal legal systems which recognized the limited company whose capital is represented by shares"[2]. *Inter alia*, the Court Stated that . . . "even if a company is no more than a means for its shareholders to achieve their economic purposes, so long as it is '*in esse*', it enjoys an independent existence"[3].

In fact this is the principle which, by means of provisions assigning the nationality of the companies to the one and to the other Party to the Treaty, is considered to be a fundamental starting point also by Treaties of Friendship, Commerce and Navigation. It is true that a small number of clauses adopt instead what the Court calls "the process of lifting the veil"; the Court stated that this process, "being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible *to play a similar role* in international law", with the result that "on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders"[4]. It is clear, however, that when certain clauses specifically protect the interests of foreign shareholders in a national company they must be interpreted restrictively and rigorously, as is in all exceptional rules[5]. The argument put forward by the Applicant according to which all the provisions of the 1948 Treaty and the 1951 Supplementary Agreements invoked by it are to be considered as instruments affording a wide range of protection for American shareholders of Italian companies does not appear to have any legal basis.

3. The Alleged Interference by Italy in the Management and Control of ELSI. Was Article III, Paragraph 2, of the Treaty Violated?

Let us now examine each of the claims advanced by the United States Government, in the order in which they appear in the Reply. The first wrongful act allegedly committed by the Respondent is to have interfered in the management and control of the ELSI Company. This alleged act would have taken place, according to the Applicant, first when it was decided to requisition the plant and equipment, further when the decision by the Prefect of Palermo on the ELSI appeal against the requisition order was delayed and, lastly, when the bankruptcy proceeding was thwarted. Italy is thus alleged to have violated Articles III and VI of the 1948 Treaty and Article I of the 1951 Supplementary Agreement.

Article III is divided into two paragraphs and there is no allegation that Italy did not comply with the first of these paragraphs in the case in point. Therefore, the Applicant has implicitly admitted that the Raytheon and Machlett companies enjoyed the right of holding shares in ELSI under conditions no less favourable than those granted to companies of any third country. The Applicant implicitly recognizes also that ELSI, which was controlled by the said two United States companies, enjoyed the right to exercise the functions for which it had been created in conformity with the Italian law and regulations, upon terms no less favourable than those accorded to corporations controlled by corporations of any third country.

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[1] *I.C.J. Reports 1970*, p. 34, para. 41.
[2] *Ibid.*, p. 37, para. 50.
[3] *Ibid.*, p. 36, para. 45.
[4] *Ibid.*, p. 39, para. 58. Emphasis added.
[5] Counter-Memorial, p. 37, *supra*.

The dispute concerns paragraph 2 of Article III which the Applicant interprets as permitting the United States companies to organize, control and manage Italian commercial and industrial corporations subject only to the requirements established by Italian law. This right is alleged to have been violated by the requisition decree.

Such a contention is unfounded. First of all, with regard to the interpretation of the relevant section of Article III, paragraph 2, it was emphasized in the Counter-Memorial[1] that the right of United States companies to "organize, control and manage" corporations and associations in Italian territory has been granted by the Treaty "in conformity with applicable laws and regulations" in Italy; in other words, without prejudice to the powers granted by law to the Italian authorities. In its Reply the Applicant admits that "the way in which management and control may be exercised is subject to the regulation under local law", although it adds that "the right to manage and control may not be abrogated entirely regardless of the treatment accorded to Italian nationals"[2]. Furthermore, Article III, paragraph 2, is deemed to include "certain minimum standards of protection under international law, including protection from unlawful interference with management and control"[3].

It seems clear that the rights in question are granted within the framework of existing Italian legislation. In the case in point, the right to organize Italian corporations and associations does not appear to have been taken into consideration by the Applicant. This is explained by the fact that ELSI was already organized when the Raytheon and Machlett companies became its shareholders. Control and management are instead concepts that refer to all those powers which may be exercised by majority shareholders, as member of the company's Assembly: i.e., to elect the members of other company organs, to approve of the financial report, supervision of company management. In effect, all these powers were exercised by Raytheon and Machlett from the time they became majority shareholders of ELSI. And this has never been challenged with reference to the activity carried on by these companies in the period preceding the requisition. As to the later period, if it is admitted that management and control are protected by the Treaty in conformity with the applicable local laws and regulations, all the interference the public authorities may exercise under these laws and regulations must be deemed to be compatible with the degree of protection afforded under the Treaty. Indeed such protection cannot be considered to be extended to the point that the United States shareholders are exonerated from the application of imperative measures, which are binding for all subjects; some of these measures may have an effect on the powers to manage and control an Italian company. In this regard it should be noted that the Italian legal provisions on the basis of which the requisition decree of 1 April 1968 was issued without doubt pursues public policy aims and could be characterized as police regulations.

What must be ruled out anyway, is that Article III, paragraph 2, includes a minimum standard of protection as established by customary international law. No such standard is in fact provided by its paragraph 2. Moreover, it has been seen that general international law gives no protection to foreign shareholders in national companies (there is no need to make any further reference to the *Barcelona Traction* case). Furthermore, the Applicant itself asserts that the standard in question includes the "protection from unlawful interference with manage-

[1] Counter-Memorial, p. 42, *supra*.
[2] Reply, p. 382, *supra*.
[3] *Ibid.*, p. 383, *supra*.

ment and control"[1], and certainly not protection from interference based on local laws.

It remains to compare the fact which the Applicant alleges to be unlawful with the provisions of Article III, paragraph 2. In the Counter-Memorial it was firstly noted that the requisition decree of 1 April 1968 did not affect the shareholders' control of the ELSI company, but only the company's control of the requisitioned assets[2]. Secondly, it was pointed out that the effect of this decree was only to temporarily suspend, and not to curtail definitively, the company's control of the requisitioned assets[3]. Thirdly, it has been emphasized that the invalidity of the requisition decree, as ascertained by the decision of the Prefect of Palermo, does not alter the fact that it was issued by the competent authority on a regular legal basis[4].

The Applicant contends in its Reply[5] that only the United States companies which were ELSI's shareholders had the right to decide upon its liquidation, and that the requisition deprived all potential purchasers of access to the plant, thus making it impossible to sell it as a going concern. Furthermore, according to the Applicant, the illegitimacy of the requisition in so far as it was not capable of achieving the purpose declared by the Mayor of Palermo would mean that it was not in accordance with Italian law. Lastly, the alleged interference by the Italian Government in the bankruptcy proceeding further diminished Raytheon and Machlett's right to receive any of the benefits of a normal bankruptcy sale.

These contentions appear to be largely irrelevant and in any case groundless. The unlawful act alleged to have been committed by the Italian Government is to have prevented the United States shareholders from managing and controlling the ELSI company. It has already been explained that the requisition of the ELSI company was directed towards its plant and equipment, which thus became temporarily unavailable to the owner. At the same time, the United States shareholders continued to exercise management and control over the company. This is shown by the fact that they allowed the Board of Directors to file a petition for bankruptcy during the period that the requisition was in force.

There are two logical and legal flaws in the arguments advanced by the Applicant: the tendency to confuse the rights of the shareholders, which are protected by the Treaty, with those of the Italian company ELSI, and the tendency to present as effects of the requisition what were in actual fact effects of the bankruptcy. If these two flaws are removed, the situation becomes clear. In particular: it is true that the shareholders had the right to wind up the company, but it was the bankruptcy petition resulting from insolvency and not the temporary requisition, which prevented this right from being exercised. With regard to the right of access to the plant by potential purchasers, suffice it to say that until 30 September 1968 this entailed obtaining the approval of the custodians of the requisitioned assets, and after that date, of the Receiver in the bankruptcy proceeding: in either case, however, the latter were replacing ELSI's company officials and not its shareholders. As to the rights of the Raytheon and Machlett Companies to receive any benefit from the bankruptcy sale, these could come into being only at the end of the bankruptcy proceedings. They could have no possible relation with the right to manage and control ELSI. In any case, the

[1] Reply, p. 383, *supra*, and nt. 2.
[2] Counter-Memorial, p. 43, *supra*.
[3] *Ibid.*
[4] *Ibid.*
[5] Reply, p. 381, *supra*.

"interference" by the Italian Government in the bankruptcy proceedings has not been proved.

Moreover, the temporary nature of the requisition cannot be overlooked when discussing the effects of the decree by the Mayor of Palermo on the availability of the requisitioned assets. The fact that these effects ceased on 30 September 1968 cannot be denied: it emerges from the text of the decree and was clearly taken by the Court of Palermo as one of the factors, when calculating the compensation to be paid to the ELSI bankruptcy Receiver. In its attempt to support its allegation that the requisition completely prevented the United States shareholders from managing and controlling ELSI, the Applicant has added to the requisition period that of the bankruptcy, without any concern for the fact that the latter was not caused by the Italian Government.

Finally, the circumstance that the requisition in question was considered to be illegitimate under Italian law does not produce a conflict between the said measure and the phrase "in conformity with applicable law and regulations" contained in Article III, paragraph 2, of the Treaty. As stated above, this phrase is used to impose a general restriction on the scope of the powers of managing and controlling Italian companies attributed to United States shareholders. Although the Prefect of Palermo ultimately quashed the Mayor's decree on the ground of its inefficacy in obtaining its stated purpose, the requisition was nevertheless the act of an authority duly empowered to take such a measure. In any case, Article III, paragraph 2, can certainly not be used to assert an obligation, under international law, for the Italian Government to respect the Italian laws governing requisition; the Italian Government is only under an obligation to recognize certain powers to foreign shareholders — in particular to manage and control Italian companies — within the framework of Italian legislation. Moreover, if it is correct that the requisition did not affect those powers, the issue of the specific relevance of the phrase "in conformity with applicable laws and regulations" cannot be of any use to the Applicant's assertion.

4. Was There a Violation of Article VII, Paragraph 1, of the Treaty?

It has already been recalled that, according to the United States Government, interference by the Respondent in the powers of management and control of ELSI held by the two shareholding companies allegedly violated Article VII of the 1948 Treaty, and paragraph 1 of this Article in particular. It was pointed out in the Counter-Memorial[1] that this provision grants to the nationals, corporations and associations of each Party the right "to acquire, own and dispose of immovable property or interests therein" in the territory of the other High Contracting Party, under condition of reciprocity. A preliminary objection addressed to the Applicant was that the ELSI plant belonged to ELSI, and certainly not to its United States shareholders; the only relevant assets possessed by the latter companies may be said to be the shares themselves.

The Applicant's Reply[2] is based on two points. On the one hand it points out that Article VII refers to "immovable property or interests therein", and asserts that the term "interest in property" is sufficiently broad to include also the hypothesis of property owned indirectly through a subsidiary company. Furthermore, the Applicant points out that even if Raytheon and Machlett could claim protection only for their shares, one should take into account the fact that their value was allegedly reduced to zero by the requisition.

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[1] Counter-Memorial, p. 41, *supra*.
[2] Reply, pp. 385-386, *supra*.

With regard to the first point it must be remarked that the terms contained in the English version of Article VII, paragraph 1, — "immovable property or interests therein" — corresponds in the Italian text to the words "beni immobili *o altri diritti reali*", thereby referring to the right of ownership of immovable property and to other absolute rights of a more limited extent. This must lead anyone interpreting them to exclude completely that the term "interests" can have in the Treaty the meaning attributed to it by the Appellant. The fact that Italian law does not recognize any "indirect" ownership of immovable property (of which the two United States companies would be the owners in the present case through an Italian subsidiary owned by them) leads to the conclusion that if the United States actually did intend, at the time of the 1948 Treaty, to protect property in the sense indicated by the Applicant, this intention did not emerge or prevail. This is shown by the difference observed in the two texts, which are equally authentic according to Article XXVII of the Treaty.

Therefore Article VII, by guaranteeing the availability to Raytheon and Machlett of immovable property *o altri diritti reali* in Italian territory, certainly protected the availability of the ELSI shares to them, but not that of the plant, of which the latter company was sole owner. As for the allegation that the market value of ELSI shares was reduced appreciably as a result of the requisition, it must be pointed out that the protection afforded to the United States shareholders under the 1948 Treaty could not be extended to the point of guaranteeing the market value of their investments!

5. . . . or of Article I of the 1951 Supplementary Agreement?

The alleged violation by Italy of the obligation to allow the United States shareholders of Italian companies to exercise the management and control of such companies is, according to the Applicant, an act which is incompatible also with Article I of the Supplementary Agreement of 26 September 1951 between the United States and Italy.

Under the provisions of this Article the nationals, corporations and associations of each Party "shall not be subjected to arbitrary or discriminatory measures within the territories" of the other Party whenever such measures would have the effect of: "*(a)* preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein". A different effect is considered in section *(b)*, but this will be discussed in the following paragraph. By requisitioning the ELSI plant, Italy is alleged to have violated the above-mentioned prohibition.

The first objection raised in the Counter-Memorial was that the requisition decree was addressed to the Italian company ELSI and not to its shareholders[1]. It was also pointed out that although the requisition temporarily deprived ELSI of the availability of the requisitioned assets (plant and equipment), it did not prevent management and control of the company from continuing to be freely exercised by the statutory company organs with regard to all aspects of management other than those requiring an immediate need to have access to the requisitioned assets[2]. The Applicant responded to these arguments above all by a dogmatic statement: "Raytheon and Machlett were most certainly 'subjected to' measures in Italy 'resulting in' the prevention of their effective control and management of ELSI[3]." With regard to the fact that the effective control and

[1] Counter-Memorial, p. 41, *supra*.
[2] *Ibid.*
[3] Reply, p. 384, *supra*.

management continued to be exercised by the company organs even during the requisition period, the Appellant preferred to make the apparently ironical remark that "the company organs could still function, but there was nothing left for them to control and manage"[1]. What was within the functions of these organs and was in fact decided by them were two acts of considerable importance: the appeal against the requisition decree and the filing of the bankruptcy petition!

In any case, even if the requisition measure adopted by the Italian Government had been addressed to the Raytheon and Machlett companies and not to the Italian company ELSI, it would have come under the provisions of Article I of the 1951 Supplementary Agreement only if it had had the characteristics of an "arbitrary or discriminatory" measure. In the Italian Counter-Memorial the interpretation of these two terms was discussed at some length[2]. It was pointed out that the term "arbitrary" only refers to a measure that is completely unjustified, which can be explained only as a means used by the authorities to damage and oppress a person subject to their power; subsequently, the term "discriminatory" was defined as covering any measure introducing an unfavourable distinction between the person to which it is applied and other subjects in a similar situation, for no other reason than to intentionally damage that person. The applicant replied that the arbitrary nature of the requisition in question is demonstrated by the fact that the Prefect of Palermo declared it to be illegitimate, on the grounds that any means that do not fit the expressed goal or are legally impermissible, or are allegedly arbitrary and unreasonable[3]. Furthermore, according to the Applicant, the requisition was discriminatory, because it was aimed at favouring an enterprise controlled by the Government[4]. The Italian Government insists on its point of view and will try now to illustrate it more fully.

A significant comparison can be made, as was already done in the Counter-Memorial, between the prohibition of "arbitrary or discriminatory measures" mentioned in Article I of the 1951 Supplementary Agreement between Italy and the United States, and the prohibition of "unreasonable or discriminatory measures" contained in other Treaties of Friendship, Commerce and Navigation stipulated by the United States (e.g., the Treaty with Ireland of 21 January 1950, Art. V; the Treaty with the Netherlands of 27 March 1956, Art. VI, para. 3). This points to a high degree of correspondence between the concept of arbitrary and that of unreasonable. But quite apart from this observation, the concept of "arbitrary measure" by the public authorities implies not only the absence of any reason, but the total lack of any justification and therefore the impossibility of including the act in any one of the categories adopted by the domestic legal system. Therefore, it is not enough for a measure to be illegal under such a system in order to be able to infer automatically that the measure is "arbitrary" in the light of an international treaty. It may well be that an act is formally illegal without being arbitrary. In the case in point, the requisition decree was quashed by the Prefect of Palermo on the grounds that it was not a suitable means of ensuring the safeguard of jobs for the ELSI employees. Nevertheless, common sense tells us that this does not make it an "arbitrary" act. The authority which issued the decree, the Mayor of Palermo, actually did have the power under Italian law to adopt emergency measures concerning private property[5]; he gave reasons for his decision and considered that the circumstances of urgency and

[1] Reply, p. 384, *supra*.
[2] Counter-Memorial, pp. 43-46, *supra*.
[3] Reply, p. 385, *supra*.
[4] *Ibid.*
[5] See Art. 7 of Law No. 2248 of 20 March 1865, Ann. E, Memorial, Ann. 34.

serious public necessity existed. The legality of his behaviour under any of these aspects was not criticized or reviewed by the superior authority. On the other hand, the difficult situation to which the reasons for his action are related — a situation characterized by the dismissal of the work force, social unrest, the possible damage to the regional economy, substantial risk for law and order — seems to indicate that, despite the formal irregularity of an improper use of power, the requisition decree was not the result of any intention by the administrative authorities to harass ELSI (or its shareholders), but was instead justified by a number of circumstances.

Last but not least, it is necessary to examine whether the measure in question can be considered discriminatory. It was already noted that, in the context of Treaties of Friendship, Commerce and Navigation, which are mostly based on the principle of national treatment, a discriminatory measure is essentially equivalent to a malicious distinction based on the nationality of the beneficiaries. According to McKean[1]:

> "the word discriminate alone is commonly used in the restricted sense of an unfair, improper, unjustifiable or arbitrary distinction, and it is this meaning that has come to be employed in international law".

The same author insists on the "special meaning" acquired by the term "discrimination" in international legal use, pointing out that "it does not mean any distinction or differentiation, but only arbitrary, invidious or unjustified distinctions". In the case in point, even if one assumed that the requisition had directly affected the United States shareholders, nothing authorizes one to believe that it may have implied the intention to apply a different and unfair treatment to the United States investors. It is recalled here that a large number of examples of the requisitioning of plants of Italian companies for reasons related to employment crises was mentioned in Part I of this Counter-Reply. On the other hand, the Applicant, realizing that it is impossible to assert that the requisition was "discriminatory" in the sense defined above, asserted the existence of discrimination in favour of the Italian company controlled by IRI, which purchased the ELSI assets at the bankruptcy auction. However, it seems unnecessary to dwell on this flight of fancy. It would mean that an alleged "plot" hatched by the Italian Government, the bankruptcy proceeding officials and the IRI group had already been arranged in view of depriving Raytheon and Machlett of their supposed technological jewel! Such a method of presenting the facts of the case is another clear example of the superficiality with which the Applicant has approached both the problem of the causal connection and that related to the notion of act of the State when speaking of the wrongful acts allegedly committed by Italy.

6. The Alleged Impairment by Italy of the United States Companies' Rights and Interests

The second act by the Italian Government deemed to have violated the obligations imposed on it by the 1951 Supplementary Agreement with the United States consists in the alleged impairment of the interests of the Raytheon and Machlett companies. This complaint is based on Article I of the Agreement, which has been examined above, with specific reference to Article I *(b)*. When read together, the provisions put nationals, corporations and associations of either High Con-

[1] The meaning of discrimination in international and municipal law, in the *British Year Book of International Law*, 1970, pp. 177 ff.

tracting Party in a position not to be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party, resulting in impairing the *other* legally acquired rights and interests in the enterprises "which they have been permitted to establish or acquire herein" or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise. The measure which the Applicant asserts to be incompatible with these provisions is again the requisition.

The main objection to this contention consists in the remark that, if the requisition measure was neither arbitrary nor discriminatory, as the Italian Government submits, none of the provisions contained in the said Article can be applied to the present case. Moreover, the Claimant asserts that all the rights and interests impaired by the bankruptcy fall within the scope of the above-mentioned Article I *(b)*. This makes it necessary to repeat once again that the bankruptcy, for which a petition was filed by ELSI, was not caused by the requisition. No proof whatsoever of a causal link has been produced by the Claimant because its argument is unfounded. In fact the bankruptcy was the result of ELSI's insolvency, which preceded the requisition. In any case, however, the action of the organs conducting the bankruptcy proceedings cannot be referred to the Italian Government, and this is even more true if one considers the actions of Raytheon's creditors! It is quite absurd that the Claimant should attempt to include within the scope of application of Article I *(b)* of the 1951 Supplementary Agreement, even the financial losses suffered by Raytheon in defending itself in the suit brought against it by the Italian banks to which it owed money!

7. The Alleged Italian Taking of Interests in Property of Raytheon and Machlett

According to the Claimant the third of the alleged wrongful acts by the Italian Government consists in the "taking of interests in property" to the detriment of the Raytheon and Machlett Companies. The provision invoked in this connection is Article V, paragraph 2, of the 1948 Treaty, with reference to paragraph 1 of the Protocol. Under Article V, paragraph 2, the expropriation of property belonging to national corporations and associations of either High Contracting Party within the territories of the other is inadmissible "without due process of law and without the prompt payment of just and effective compensation". The Protocol, which bears the same date as the Treaty, establishes in its first paragraph that

> "The provisions of paragraph 2 of Article V providing for the payment of compensation shall extend to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party."

In the Counter-Memorial three arguments have been clarified: firstly, that the effects of the requisition of ELSI assets were quite different from those of an expropriation; secondly, that on the basis of an interpretation which takes into account also the Italian text of the Protocol, the provisions of Article V, paragraph 2, shall extend to the *rights* and not to the mere interests of United States companies in property which is taken in Italy, lastly, that the Protocol cannot be interpreted as giving to the assets of an Italian corporation controlled by United States shareholders the same protection as is granted to a United States corporation under Article V[1]. The Applicant's reply to these arguments may be summa-

[1] Counter-Memorial, p. 40, *supra*.

rized as follows: a taking of property is generally recognized as including not merely outright expropriation but also any unreasonable interference with the use, enjoyment or disposal of property; the English term "interests" properly reflects the meaning of "*diritti*" (and in any case the Protocol refers to interests held directly or indirectly by nationals, corporations and associations of either Party in property taken within the territories of the other Party); lastly, the standard of protection guaranteed by the Protocol is exactly the same as that provided by Article V, paragraph 2[1].

The three arguments outlined above may be further elaborated upon. It is a known fact that, in his decree of 1 April 1968, the Mayor of Palermo provided for "the requisition with immediate effect and for the duration of six months, unless further extended, and without prejudice to the rights of the parties and third persons" of the ELSI plant and equipment. The decree referred to Article 7 of Law No. 2248 of 20 March 1865, Annex E, as well as to Article 69 of the regional law governing local authorities (Decree No. 6 of the President of the Sicilian Region of 21 October 1955). It must be pointed out here that a temporary requisition is quite different from expropriation, while the Italian text of Article V, paragraph 2, of the 1948 Treaty only concerns "beni espropriati" (*expropriated* property) and "esproprio dei beni" (expropriation of property). Furthermore, under Italian law, Article 7 of Law No. 2248 of 20 March 1865, Annex E, empowers the administrative authorities to "dispose without delay of private property in the case of serious public necessity", while making no reference at all to expropriation (which is regulated by another legislative act — Law No. 2359 of 25 June 1865). In its turn, Article 69 of the Decree of 21 October 1955 of the President of the Sicilian Region empowers mayors to take the steps deemed necessary to cope with emergency situations, again without mentioning expropriation. Therefore, if the characteristics of the case in point are compared with Article V, paragraph 2, of the 1948 Treaty, taking into account the Italian text, it is clearly to be excluded that this provision applies to the temporary requisition of the ELSI assets.

Logically, in order to introduce a claim based on Article V, paragraph 2, the United States would have to assert that only the English text of the Treaty should be considered, and also that the expression "taking of property" has actually such an extension as to include a temporary requisition. However, the dominance of the English text is denied by the above-cited Article 27 of the 1948 Treaty, according to which the Italian and English texts are "both equally authentic". Under Article 33 of the Vienna Convention on the Law of Treaties this means that, except in the case of specific mutual agreement to the contrary, "the text is equally authoritative in each language". However, Article 33, paragraph 4, of the said Vienna Convention establishes that when the comparison of identical texts reveals a difference in meaning which cannot be removed by applying Articles 31 and 32, "the meaning which best reconciles the texts, having regard to the object or purpose of the treaty, shall be adopted". In the light of this principle the only way to reconcile the English and Italian texts of Article V, paragraph 2, of the 1948 Treaty, is that to assume that a taking of property under Article V, paragraph 2, must be considered to occur only when it possesses the characteristics of a definitive deprivation of property. In Italian, this characteristic is indicative of expropriation and is found in the majority of cases where a "taking of property" in a wider sense is involved. This would lead to the exclusion from the scope of Article V, paragraph 2, of all cases of any temporary requisition "in use" such as that applied to the ELSI assets on 1 April 1968.

[1] Reply, pp. 388-389, *supra*.

However, even if one assumes that the use of the expression "taking of property" should be accepted (which would amount to subordinating the Italian text to the English text!), a requisition in use, which has the nature of a temporary form of government control over private property, could not be said to be equivalent in any case to a "taking of property" as set out in the English text of Article V, paragraph 2, of the Treaty between the United States and Italy. The vast amount of literature on the subject in English seems to indicate that the above-mentioned forms of control should rather be defined as "indirect takings"[1] and that only the interferences in physical property "which significantly deprive the owner of the use of his property" amount to a taking of that property[2]. One must rule out that an interference limited to six months, i.e., a short suspension of the availability of the assets, could be defined as a significant deprival of the owner's use of property.

In conclusion, there are good reasons for sharing the view expressed by the United States Arbitrator George Aldrich in the case *ITT-Islamic Republic of Iran*[3]:

> "while the taking of control over private property by a government does not automatically and immediately justify the conclusion that the property has been taken by the government . . . such a conclusion is warranted whenever events show that the owner was deprived of fundamental property rights and it appears that such privation is not merely ephemeral".

In the case in point, the deprival of the use of the ELSI plant for the duration of six months cannot be equated to the deprivation of fundamental property rights.

Certainly, the Mayor of Palermo was exercising a power granted to him for reasons of public necessity in order to remedy temporarily a situation of social unrest and to prevent disorders. In other words, he was using a regulatory power, more precisely a police power, and the exercise of such a power can hardly be assimilated to an expropriation measure[4].

In a study[5] based on practice, the following conclusion was reached:

> "A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called 'police power' does not preclude an international tribunal from making an independent determination of this issue. But if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive."

Even in the case law of the United States courts, there are some precedents that are interesting in the present context. In particular it is worth referring again to a case concerning the seizure of a coal mine by order of the highest authorities of the executive power, *Pewee Coal Company* v. *the United States Government*[6].

In its judgment of 30 April 1951 on that case, the Supreme Court said:

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[1] See Rosalyn Higgins, "The Taking of Property by the State", in *Collected Courses of the Hague Academy of International Law*, 1982, III, pp. 322 ff.

[2] *Ibid.*, p. 324.

[3] This opinion, concurrent with that of the Tribunal, is cited by Swanson, "Iran-U.S. Claims Tribunal: A Policy Analysis of the Expropriation Cases" in *Case Western Reserve Journal of International Law*, 1986, p. 327.

[4] *Ibid.*, p. 334.

[5] See Christie, "What Constitutes a Taking of Property under International Law", in the *British Year Book of International Law*, 1962, p. 338.

[6] See Part I, nts. 2 and 3, p. 428, *supra*.

> "Where President issued Executive Order directing Secretary of Interior to take immediate possession of all coal mines in which a strike or stoppage has occurred or was threatened, and to operate or arrange for operation of such mines, and the Secretary of Interior issued order for taking possession of mine and required mine officials to agree to conduct operations as agents for the government, there was a 'taking' of private property for public use with the meaning of the Fifth Amendment."

Thus, noting that there had been a strike, which had stopped the normal operation of a coal mine, the judgment stressed the fact that the order was justified by public use, that is to say, by a motive which is equivalent to the public purpose which justified the requisition decree adopted by the Mayor of Palermo on 1 April 1968.

In his concurring opinion in the same case, Judge Reed said that,

> ". . . the relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties (. . .) may be subjected to public operations *only for a short time* to meet war or *emergency needs*, and can then be returned to their owners".

About the issue of compensation to be attributed to the owners, Judge Reed, after considering the uncertainty of the measure of market value, concluded that: "The reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case."

Account should also be taken of a case decided on 29 April 1952 by the United States District Court in the *Youngstown Sheet and Tube Company* v. *Sawyer (Secretary of State for Commerce)* and others, in which an Executive Order issued by the President of the United States related to a dispute between a number of steel producing companies and their work force. The judgment noted that the dispute had not been settled by means of collective bargaining, or as a result of the efforts of the Government, and that the workers had therefore gone on strike. The Court also recalled the reasons underlying the President's Executive Order, stating, *inter alia*: "In order to ensure the continued availability of steel it was necessary that the United States take possession of and operate the plants." Another reason underlined the gravity of the situation, in that

> ". . . The breakdown of collective bargaining negotiations created an immediately impending national emergency because interruption of steel manufacture for even a brief period would seriously endanger the well-being and safety of the United States in a critical situation."

Thus, even if one assumes the requisition of the ELSI plant a taking of property, one could not deny that it was fully justified under the circumstances.

8. Discrepancy Between the English and Italian Texts of Article V, Paragraph 2, of the Treaty

Another problem arises, as it was previously noted, out of the discrepancy between the English and Italian texts of paragraph 1 of the Protocol of the 1948 Treaty in which the provisions of Article V, paragraph 2, are extended "to the rights *(diritti)*" (in the Italian text) or to the interests (in the English text) held directly or indirectly by nationals and corporations or associations of either Party in property taken in the territories of the other Party. Also in this case reference has already been made to Article 33 of the Vienna Convention on the Law of Treaties from which the conclusion was drawn that only the more restrictive

meaning corresponding to the Italian text may be taken as reconciling both texts. The Applicant has stressed that also the rights *indirectly* held by nationals of either Party are protected under the Protocol and considered that the United States shareholders in question held "indirect rights" over the ELSI plant, which could therefore be taken by Italy only in conformity with the provisions of Article V, paragraph 2. However, under Italian law, the shareholders can hold rights only towards the company and have no rights on the assets of the latter. The international significance of the distinction between the rights of a company and the rights of its shareholders appears to be supported by the above-cited *Barcelona Traction* judgment. "Indirect" rights of shareholders in a company can only be those which will accrue at a later step, for instance, after the company has been wound up, when the compensation initially granted to the company accrues to those who were shareholders in it. This is related to the interpretation of paragraph 1 of the Protocol as a norm essentially governing the payment of compensation for expropriated property; indeed, reference is made in the text to the provisions of Article V, paragraph 2, "which provide for the payment of compensation".

Nor can it be said that the provisions concerning the property of United States companies in Italy, contained in Article V, paragraph 2, can be extended to the United States shareholders of the Italian companies controlled by them. This does not amount to a discussion of the level of protection granted by the Protocol, which explicitly extends certain provisions of Article V, paragraph 2. It is an assertion that the owners of rights over the property taken, which are protected by paragraph 1 of the Protocol, do not include the United States shareholders of controlled Italian companies, but only refers to United States nationals, corporations and associations holding rights over the taken property other than ownership (e.g., usufruct). In other words, it is anything but certain that paragraph 1 of the Protocol is one of the rules intended to "lift the corporate veil" of an Italian company to which the taken property belongs. In any case, this is by no means explicitly provided for.

It should also be noted that no investigation of the conditions prescribed by Article V, paragraph 2 ("due process of law and prompt payment of just and effective compensation") was made in the Counter-Memorial for the simple reason that the plant requisitioned belonged to ELSI, which, as is known, was of Italian nationality and therefore not entitled to any protection for its property in Italy under the Treaty. Even if one assumed that they were recognized under paragraph 1 of the Protocol, the only relevant rights of the United States shareholders would concern the payment of compensation for the "expropriated" property. The advent of the ELSI bankruptcy after the requisition also had the effect that the compensation for damages awarded by the Court of Appeal of Palermo (in replacement of the compensation for the requisition of the plant) was paid to the bankruptcy receiver.

9. The Alleged Failure by Italy to Provide Protection and Security for ELSI

The last of the four unlawful acts for which the Respondent was allegedly responsible has been defined by the Applicant as "failure to provide protection and security", with reference to Article V, paragraph 1, and Article V, paragraph 3, of the 1948 Treaty. Paragraph 1 guarantees the protection and security of nationals and their property of either Contracting Party in the territories of the other Party. It also guarantees full protection and security as provided for under international law (with reference to property, these guarantees are extended from the nationals to corporations and associations). Paragraph 3 repeats the promise

of protection and security with respect to the matters enumerated in paragraphs 1 and 2 "upon compliance with the applicable laws and regulations" under conditions of reciprocity and most-favoured-nation treatment. The facts which, according to the Applicant, denote the violation of these norms by the Italian Government were essentially the occupation of the plant by the work force and the Prefect's delay in upholding the appeal made by ELSI against the requisition decree[1]. But in addition to these two circumstances, the Applicant also again raises the issue of the requisition, which referred to "the entire entity of ELSI". Furthermore, he complains in this respect of the failure to protect ELSI because "*the property of Raytheon and Machlett in Italy was ELSI itself*"[2].

In the Counter-Memorial it was already pointed out that the occupation of the ELSI plant by the work force began prior to the requisition[3] and that the Prefect's delay in rendering his decision on the appeal against the requisition lies *totally outside the scope* of Article V, paragraphs 1 and 3[4]. It was also pointed out that Raytheon and Machlett have no right to complain of any failure to protect ELSI and the ELSI plant because ELSI was an Italian company and the plant belonged to it[5]. In its Reply the Applicant argues that paragraphs 1 and 2 of Article V (referred to in para. 3) guarantee the protection and security of "persons and property", and not of immovable property[6]. This is correct, but is here irrelevant (also because it is obvious that immovable property represents a category of property). What does appear relevant and therefore must be repeated, is that, in the present case, the protection and security provided for in Article V, paragraphs 1, 2 and 3, could only refer to the property of the United States companies Raytheon and Machlett in Italy, but that this property obviously did not include ELSI or the equipment and plant of this separate corporation entity.

In conclusion, the reference to Article V, paragraphs 1, 2 and 3, in the case in point does not add any further arguments to the Applicant's defence. *It may* therefore be replied simply that the protection and security of the Raytheon and Machlett Companies, and of the property they possessed in Italian territory (i.e., money and ELSI shares) are basically extraneous to the subject of the present dispute.

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[1] Reply, p. 390, *supra*.
[2] *Ibid.*, p. 391, *supra*.
[3] Counter-Memorial, pp. 15 and 39-40, *supra*.
[4] *Ibid.*, pp. 17 and 39-40, *supra*.
[5] *Ibid.*, p. 39, *supra*.
[6] Reply, p. 391, *supra*.

PART V. ISSUES RELATING TO THE CLAIM FOR REPARATION

1. The Admissibility of the Request for Reparation

The Italian Government's Counter-Memorial highlighted the entirely subsidiary character of the comments expressed by the Respondent in relation to the claim for reparation advanced by the United States Government[1].

The Applicant takes for granted, in Part VI of the Reply, the responsibility of the Italian Government for its alleged "wrongful conduct", and therefore asserts to be entitled to compensation "in the full amount of the losses" resulting from that conduct[2].

On the contrary, the arguments put forward by the Respondent justify the assertion that no violation of the 1948 Treaty and of the 1951 Supplementary Agreement was committed by Italy with regard to the requisition of the ELSI plant, the bankruptcy requested by ELSI and its final liquidation; therefore, no reparation is due for the losses suffered by the United States shareholders of ELSI. This explains what was defined as the subsidiary nature of the Respondent's comments about reparation: they are made for the hypothesis that the Applicant's point of view would be accepted by the Court.

2. Decisions Handed Down by the Italian Courts

In the Italian legal system, an issue of compensation for damages resulting from the requisition was raised by ELSI and was settled by a judgment of the Palermo Court of Appeal, dated 24 January 1974, which was confirmed on a further appeal by the Court of Cassation[3]. As it was stressed earlier, the requisition decree of the Mayor of Palermo (1 April 1968) was appealed against by ELSI (on 19 April 1968), with the result that the Prefect of Palermo, by a decision of 22 August 1969, declared the decree to be illegitimate, because it did not fit the goal pursued[4].

In this regard, it must be underlined that the requisition decree only referred to the plant and the equipment belonging to ELSI, and not to the company as a whole. This is relevant, because it explains that the judgment of the Court of Appeal of Palermo could not, and at all events would not have been permitted to make a global assessment of the state of the company taken as a whole: in fact the claim submitted to the Court referred to a decree whose content was clearly defined.

Furthermore, it was logical that when establishing the amount of compensation, the Court should have worked on the basis of the value attributed to the assets by the Technical Consultant appointed by the receiver in bankruptcy. This value amounted to Lire 4,560,588,440[5].

Using this value as a parameter, the Court calculated the damages occasioned to the company over the six-month period during which the requisition decree

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[1] Counter-Memorial, p. 47, *supra*.
[2] Reply, p. 392, *supra*.
[3] Memorial, Anns. 81 and 82.
[4] See *ibid.*, Ann. 81, I, p. 385.
[5] *Ibid.*

was in force to be Lire 114,014,711. This was based on a rate of 5 per cent of the aforementioned value throughout the said period, plus interest accruing from 1 October 1968 when the requisition had ended.

3. Unlawful Conduct by the State and the Obligation to Make Reparation for any Damage

It was recalled from the outset of this Rejoinder, that no claim for reparation would have been advanced, unless a direct link is demonstrated to exist between the alleged wrongful act and the alleged damage, to the effect that the former was the cause of the latter. On the contrary, the foregoing account of the facts summarizing the dispute clearly shows that the conduct attributed to the Italian Government does not appear to be the cause of the alleged damage. The first conclusion to be drawn is therefore that these facts or acts — mainly the requisitioning of the ELSI plant, then the bankruptcy and the resulting liquidation — cannot be deemed to have given rise to responsibility on the part of the Italian Government, and to its alleged obligation to make reparation to the Government of the United States.

On this subject, there is a principle which is inherent in the general theory of responsibility, in domestic as well as in international law: the principle of causality. To be able to impute responsibility to a person or corporation, it is not sufficient that that person performed a specific action and that damage subsequently occurred. It is also essential to show that the action itself actually caused that damage. This is not merely a logical requirement, but a practical need, which is recognized and affirmed in municipal and international judicial practice.

There are quite numerous cases in which judicial decisions have stated that the causal relationship between a wrongful conduct and the damage is the essential condition for responsibility, and hence for the obligation to indemnify the injured State.

Examining the concept of causality has sometimes led the courts to see whether, in individual cases, the causality was adequate to justify a claim for reparation. The practice of adequate causality is based on the following consideration: only those conditions which made the damage probable, and hence attributable to the agent, at the very moment they came into being, may be considered as conditions of the damage. The adequate causality criterion is mainly applied in complex cases, where the judge has more freedom to evaluate the facts. It seems to be particularly appropriate for clarifying the many elements that are involved in the present case.

The Respondent certainly shares what the United States Memorial states[1], relying on the doctrine it refers to there (Reuter, Yntema): ". . . the injury for which reparation is due is that which is tied by a chain of causality to the wrongful act." But, this obviously implies that damage which is not tied by an adequate chain of causality with a wrongful act attributed to a State cannot justify a claim for reparation against that State.

4. Causality Nexus and the Measure of Reparation

About the measure of the reparation claimed for the alleged unlawful acts attributed to Italy, the United States Reply adds nothing particularly new, and mainly restates the argument set out in the Memorial. With reference to the "duty to pay", in particular, the United States do no more than restate general prin-

[1] Memorial, I, p. 106.

ciples, almost as if they were applicable without taking into account the specific facts of the present case.

According to the Reply, it is an established principle of international law that ". . . damages should be awarded . . . to compensate for all losses or injury caused by a State's wrongful acts"[1]; the conclusion is drawn that ". . . [a]ll of the injuries suffered by Raytheon and Machlett should be included in the measure of compensation"[2]. But it is an equally unchallengeable principle of international law that an injury shall be linked in some way to an act of the State having violated an international obligation — and the violation shall be proved as existing and attributable to that State — in order to entitle the injured State to reparation. As was stated by Anzilotti[3],

> "[on] the basis of the principle that in order to claim compensation for an injury, the injury must be the result of an unlawful act, it is necessary to see whether the causality relationship exists and the relevance of it in conjunction with the other causes".

In any case, it is essential to demonstrate that there exists a sufficiently close cause-and-effect relationship between the act alleged to be at the origin of the obligation to indemnify and the injury itself.

The international judicial practice is firm in excluding the obligation to make reparation for an injury that has not been "prouvé avoir été une conséquence réelle et inévitable"[4] of the injurious act, or when the latter act "was not in legal contemplation the proximate cause of such a damage"[5].

To more accurately appraise the United States claims and the specific aspects of this case, it is certainly an interesting exercise to recall some of the grounds on which international courts have ruled that a sufficient causality *nexus* between the alleged damage and a State's unlawful (or allegedly unlawful) act did not exist.

One of these reasons is that the act attributed to the State, while giving rise to a situation that was favourable to the occasioning of an injurious event, cannot be considered the direct cause because the event in question or the damage would have occurred in any case, due to other circumstances not attributable to the State.

In the *Rémy Martin* case[6], for example, the joint Franco-German Arbitral Tribunal refused to award damages for the lost profits to a French distillery as a result of an interruption of its activities following seizure by the German authorities during the war, because — even without the unlawful act of seizure — the distillery would in any case have remained inactive as it was impossible for it to receive during the war the French grapes needed for its products. The joint

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[1] Reply, p. 392, *supra*.

[2] *Ibid.*

[3] *Corso di diritto internazionale*, Padova, 1955, p. 431.

[4] "Proved that it had been a true and inevitable consequence" (unofficial translation), *Affaire Yuille et Shortridge* (21 October 1861), Lapradelle et Politis, *Recueil des arbitrages internationaux*, II, Paris 1932, p. 78.

[5] Mexico-U.S. Claims Commission, *Armando Cabos Lopez* case (2 March 1926), *Reports of International Arbitral Awards*, Vol. IV, p. 20. See also the arbitration decision in *Responsabilité de l'Allemagne à raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participe à la guerre* (30 June 1930), *Reports of International Arbitral Awards*, Vol. II, p. 1035; and the Italy-USA Conciliation Commission, *Hoffman* case (11 April 1952), *Reports of International Arbitral Awards*, Vol. XIV, p. 100.

[6] *Recueil des tribunaux arbitraux mixtes*, Vol. IV, p. 415; see also the *Lazare Dreyfus* case, *ibid.*, p. 393; the *Rousseau* case, *ibid.*, p. 379; and the *Lazare* case, *ibid.*, Vol. VIII, p. 495.

German-Romanian Arbitral Tribunal, in the *Carnabatu* case[1] also concluded that the requisition of an asset cannot be considered the cause of the loss of profits which might have been earned from selling that asset, considering that the state of war made the latter course of action impossible. Even more telling is the *Guillermot-Jacquemin* case[2], in which a French national sued for the return of two apartments in Rome which she had rented to an Italian public corporation and had been seized during the war. The Franco-Italian Conciliation Commission concluded that as rents in Italy had been frozen at that time by law, even

> "sans le séquestre et sans les mesures prises par le séquestrataire, M^me^ Guillermot-Jacquemin se trouverait, vis-à-vis de ses deux locataires, exactement dans la même situation que celle dont elle se plaint ... Tout lien de causalité fait donc défaut entre les restrictions que le Gouvernement français voudrait voir lever et les mesures prises par le Gouvernement italien à l'égard des deux appartements en tant que biens ennemis[3]."

5. Adequate Causality and the Obligation to Make Reparation

In certain cases, the reason why the causality link between the unlawful act of the State and injury caused to a private person has been deemed too remote has been the fact that the victim's own conduct (or a situation created by the victim himself) had exposed him to the influence of the unlawful act, which, without that conduct or that situation, would not have caused any injury at all. An example of this is the *Dame Simone Reverand* case[4], relating to a house that had been auctioned in Italy during the war as a result of allegedly unlawful obstacles placed in the way of the owner, a French citizen, and preventing her from transferring to Italy the necessary funds to pay the interest due on a mortgage on that house. Since "la situation pécuniaire de M^me^ Reverand était avant le 10 juin 1940 obérée à tel point que depuis mai 1939 elle n'avait pu acquitter les arrérages de sa dette hypothécaire"[5], the Franco-Italian Conciliation Commission concluded that "l'on ne peut soutenir dans ces conditions que c'est dû au fait de la guerre que l'intéressée s'est trouvée hors d'état de payer les arrérages en question"[6].

There are other cases, in which the refusal to grant compensation has been determined not only by "le lien trop lointain qui rattache la perte au fait générateur", but also "par le caractère *trop aléatoire* du bénéfice espéré"[7]. This happened particularly in cases where the damage for which compensation was

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[1] *Recueil des tribunaux arbitraux mixtes*, Vol. V, p. 228; and *Klotz*, *ibid.*, Vol. II, p. 758.

[2] *Reports of International Arbitral Awards*, Vol. XIII, p. 70.

[3] "Without the requisition and without the measures taken by the sequestrator, Madam Guillermot-Jacquemin would have found herself in exactly the same situation *vis-à-vis* her two tenants as that of which she complains . . . Any causal link is therefore missing between the restrictions which the French Government would like to see removed, and the measures taken by the Italian Government with respect to the two apartments as enemy property." (Unofficial translation.)

[4] *Reports of International Arbitral Awards*, Vol. XIII, p. 276; see also the *Roger Sudreaw* case, *ibid.*, p. 680.

[5] "The financial situation of Madam Reverand before 10 June 1940 was burdened with debt to such a degree that since May 1939 she had not been able to pay the arrears of her mortgage debt". (Unofficial translation.)

[6] "In this situation it cannot be maintained that it is due to the war that the party concerned found herself unable to pay the arrears in question." (Unofficial translation.)

[7] "The too distant link between the loss and the generating event" . . . "by the *too chancy* character of the benefit hoped for." (Unofficial translation), Lapradelle et Politis, *op. cit.*, p. 284.

claimed depended on loss of an income which was wholly contingent, even if the allegedly unlawful act on the part of the State had not been committed.

One may cite on the same line of thought, the *Rudloff* case, in which the umpire held that

> "le cas présenté ici n'est pas celui de la perte de profits prévisibles provenant d'une affaire en marche ou de bénéfices certains provenant d'un contrat inexécuté; c'est seulement le profit espéré d'une affaire aventureuse injustement empêchée dans son accomplissement par le gouvernement défendeur. Pour cette raison, les gains escomptés par les réclamants ne peuvent pas être retenus parce que ces derniers sont totalement impuissants à démontrer qu'un profit serait résulté de l'affaire[1]."

Similarly, the umpire in the *Rice* case concluded that

> "As to the portion of damages claimed which may be imagined to arise out of consequential damages, the umpire desires to lay down as one of the requisites for consequential damage that there must be a manifest wrong, the effect of which prevents the direct and habitual lawful pursuit of gain, or the fairly certain profit of the injured person, or the profit of an enterprise judiciously planned, according to custom and business. A mere device of speculation, however probable its success would have been or may appear to the projector, cannot enter into the calculation of consequential damages[2]."

All these conclusions were even more concisely summed up by the umpire in the *Mora and Arago* case, in the following words: "The loss is in the present case of a very speculative character as depending upon most uncertain contingencies[3]."

In other words, with all the differences possibly resulting from the different aspects of the cases in point, international arbitration awards confirm the need to take into account, when deciding on the obligation to make compensation and on the amount of reparation due, not only the link between each wrongful act attributed to the State and each injury for which reparation is sought, but also of the influence of circumstances or acts not attributable to the respondent State on bringing about that injury.

6. Methods for Assessing the Damage. They are Unsafe in the Instant Case

The Applicant shows little concern about the existence of an adequate causal link between the alleged unlawful acts which it attributes to Italy and the damage for which reparation is claimed. From the part of the Reply dealing with compensation it would appear that it was solely the Mayor's requisition decree that gave rise to the alleged injury[4]. This decree allegedly prevented the orderly liquidation of ELSI, forcing the company to ask for bankruptcy, and thus making Raytheon

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[1] "The case presented here is not that of a loss of the foreseeable profits of a deal in progress or of the certain benefits coming from a contract which has not been performed; it is merely the benefit which was hoped to come from an adventurous deal, the fulfilment of which has been unjustly prevented by the respondent Government. For this reason the profits expected by the claimants cannot be held back as the latter are totally unable to demonstrate that a profit would have resulted from the deal." (Unofficial translation.) The *Rudloff* case may be found in English in *Reports of International Arbitral Awards*, Vol. IX, pp. 244 ff.

[2] Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, IV, Washington 1898, p. 3248.

[3] Moore, *op. cit.*, IV, p. 3783.

[4] Reply, p. 392, *supra*.

liable for payment of ELSI's debts which had been guaranteed by Raytheon. Because of this decree, Raytheon suffered the loss of the loans made to ELSI[1], as well as the charge of all the legal and allied expenses relating not only to the bankruptcy proceedings and the present dispute, but also to the defence of Raytheon in civil suits instituted against it by some banks.

The previous pages have amply demonstrated that no evidence whatsoever was given of the chain of causality which the Applicant alleges. Furthermore, it must be recalled that this alleged chain of causality seems to be mainly based on the mere hypothesis that Raytheon would have been able to obtain a quite different financial result in the event of an orderly liquidation. The United States Government maintains that ELSI's creditors would have obtained total satisfaction if this had been possible, and Raytheon would have avoided the aforementioned repercussions stemming from ELSI's ruinous state. According to the Applicant, all this would have been possible because "had the Respondent not interfered with the liquidation, Raytheon and Machlett would have recovered the market value of ELSI as a going concern in 1968"[2].

In the previous pages, as well as in the Counter-Memorial, the Italian Government is confident to have fully demonstrated that all the allegations put forward by the United States Government against Italy are unfounded. We could therefore stop here, not seeing any purpose in commenting on the evaluation of damages which, in the opinion of the Respondent Government, did not exist or were not imputable to the Italian authorities' behaviour. However, for the sake only of wholeness, the Italian Government will offer in the following pages some few comments on the criteria used by the Applicant to evaluate the damages allegedly suffered by Raytheon and Machlett because of Italian wrongful acts.

The Applicant contends that the *whole* book value of ELSI would have been realized in the liquidation process, the book value being considered as the closest to its going concern value[3]. This seems hardly practicable for the purposes of evaluating the injury allegedly caused to Raytheon, because according to the principle accepted by international law judicial practice, the onus is on the claimant for reparation to prove that

> "soit en consultant le cours ordinaire des choses, soit en s'attachant aux affaires de la partie lésée ou des dispositions prises par elle, il est *probable — non pas seulement possible* — que celle-ci aurait réalisé tel ou tel profit si le fait illicite ne s'était pas produit[4]".

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[1] According to the Applicant, account should also be taken, when computing the damages, of what Raytheon would have earned as a result of the orderly liquidation. In the attempt of showing that the compensation requested is relatively modest, the Applicant stresses how their amount would at all events be insufficient "to recoup Raytheon's and Machlett's investment in ELSI, since they still would have lost over US$11 million in investments made since 1956" (Reply, p. 393, *supra*). On what conceivable basis should the Italian Government be liable for these sums?

[2] Reply, p. 393, *supra*.

[3] *Ibid.*, p. 395, *supra*. It should be noted that in the United States Government's view, unspecified "actions of the Respondent" "made it impossible for ELSI to become self-sufficient"; therefore it would have made it impossible to compute "the future profits of the company's continued operations" in the valuation of ELSI as a going concern.

[4] "Both by taking into consideration the ordinary course of events and by considering the business of the injured party of the provisions it took, it is *probable — not merely possible* — that it would have made such or such other profit if the illicit event had not occurred." (Unofficial translation.) The quotation is drawn from the arbitral award *Fabiani* case, to which the Applicant referred on several occasions in the Memorial and the Reply.

The hypothesis of realizing ELSI's *entire* book value through liquidation must, however, have appeared utterly improbable at the time, and even impossible to Raytheon itself, because ELSI's own management had envisaged a quick-sale value which was far lower than the book value, and insistently sought — without success — an agreement with ELSI's main creditors based on the payment of only 50 per cent of the amounts owing to them.

The truth, as demonstrated earlier, is that the scenario of realizing ELSI as a "going concern" was wholly at odds with reality[1]. In this connection, it is worth noting that, while the Memorial considered this as the most optimistic scenario, the Reply surprisingly credits it with being the only possibility! The proof that this does not correspond with reality, despite the contentions of the Applicant, may be found (beyond what is said in the relevant parts of the Counter-Memorial and this Rejoinder) in the fact that in the 1974 Claim, Raytheon's own valuation of ELSI fell very far short of the so-called "quick-sale" value.

Now, the United States Government contends that such valuation was the "worst case scenario" presented "for purposes of internal corporate planning by ELSI's shareholders"[2]. However, the United States Government now rejects what had been depicted as "a worst case scenario" by saying that it was used in the 1974 Claim *introducing* negotiations "in a spirit of compromise"[3]. This statement is really hard to swallow, and one cannot neglect considering that two different valuations — one by the bankruptcy receiver, and one by ELTEL — show far lower figures!

Having noted this, in passing, the onus is certainly not on the Respondent — who denies that anything unlawful has been done and hence rejects any obligation to pay any reparation for the alleged injury — to suggest any alternative method of valuation. As indicated already in the Counter-Memorial[4], Italy's remarks are offered solely as a means of showing up "the dubious contentions of law and the distortions of facts" in the Applicant's submissions.

7. Further Arguments on Refunding Legal Costs and Computing Interest

In addition to the considerations expressed in the Counter-Memorial[5], some further comments may be made on the issue of the legal expenses allegedly incurred by Raytheon. Despite what the United States Government maintains, the legal costs sustained by Raytheon for proceedings instituted in Italy against it by ELSI creditor banks cannot, at all events, be deemed to be "a direct consequence of the Respondent's actions"[6]. On the contrary, they were a consequence of ELSI's insolvency.

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[1] Claggett, "The Expropriation Issue before the Iran-United States Claims Tribunal: Is 'Just Compensation' Required by International Law or Not?", in 16 *Law and Policy in International Business*, 1984, pp. 884-885, referred to ". . . the settled and fundamental principle that the value of an asset depends not on its cost or past usefulness, but on its future usefulness". He further commented: "An asset may have cost millions of dollars to produce, or may have yielded tens of millions of dollars of profit in the past, but may have no present value if investors believe that the asset will produce no profit in the future."

[2] Reply, p. 396, *supra*. It is quite irrelevant to say that the quick-sale value does not reflect the full value of ELSI because it does not "take into account the significant intangible value of ELSI's business", considering that according to the Claimant, the intangible value is not even taken into account in the book value (p. 396, *supra*.).

[3] Reply, p. 396, *supra*.

[4] *Counter-Memorial*, p. 47, *supra*.

[5] *Ibid.*, p. 48, *supra*.

[6] Reply, p. 393, *supra*.

Anyway these costs, as granted by the Italian Court, must be considered as final, without any further possibility of claims on the part of the Applicant.

The need to take account of the Applicant's delay in submitting its claim to the Court, in order to decide whether or not the Applicant is entitled to interest on the amounts requested by it in reparation, is confirmed by international cases. It has been affirmed in international decisions that the failure of the allegedly creditor State to take action may affect the awarding of interest, or at least, the determination of the date from which the interest is calculated as accruing[1].

This appears to be fully justified if, in line with the prevailing doctrine, interest is considered as a possible element of the reparation and as such, as a lump-sum valuation of the loss of profit stemming from the fact that the unlawfully injured party could not dispose of a sum equivalent to the damage occasioned to it[2]. From this point of view, the computation of the interest must certainly take account of the obligation of the injured party, also sanctioned by international case-law[3], to reduce to a minimum the prejudicial consequences of the unlawful act of which it claims to be victim.

In practical terms, it should be noted that the decisions of international arbitration tribunals about interests were often influenced by considerations of equity. This happened especially in cases in which the amount involved would be far higher than the "principal" amount due in reparation because of the long period of time with regard to which the interest would have to be calculated[4].

Therefore, bearing in mind that international case law is virtually unanimous in refusing to acknowledge a right to interest — let alone compound interest[5] — the claim of the Applicant on this point is to be considered as lacking of a sufficient justification.

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[1] See the *Macedonian* case, Lapradelle et Politis, *op. cit.*, II, pp. 203-205.

[2] Anzilotti, "Sugli effetti dell'inadempienza di obbligazioni internazionali aventi per oggetto una somma di denaro", in *Rivista di diritto internazionale*, 1913, pp. 54 ff.

[3] See, for example, the *Coipwer* case, Lapradelle et Politis, *op. cit.*, I, p. 348. And the cases cited by Derains, "L'obligation de minimiser le dommage dans la jurisprudence arbitrale", in *Revue de droit des affaires internationales*, 1987, pp. 375 ff.

[4] See the *Macedonian* case and particularly the *Yuille et Shortridge* case, cited above.

[5] The Iran-U.S. Claims Tribunal "has never awarded compound interest", *Sylvania Technical Systems* v. *Iran*, *cit.*

SUBMISSIONS

The Italian Government makes the following submissions:

"May it please the Court,

To adjudge and declare that the Application filed on 6 February 1987 by the United States Government is inadmissible because local remedies have not been exhausted.

If not, to adjudge and declare:

(1) That Article III (2) of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 has not been violated;
(2) That Article V (1) and (3) of the Treaty has not been violated;
(3) That Article V (2) of the Treaty has not been violated;
(4) That Article VII of the Treaty has not been violated;
(5) That Article I of the Supplementary Agreement of 26 September 1951 has not been violated;

and, accordingly, to dismiss the claim."

18 July 1988.

(Signed) Luigi FERRARI BRAVO,
Agent of Italy.

DOCUMENTS ANNEXED TO THE REJOINDER OF ITALY

Document 1

AFFIDAVIT OF ING. CAVALLI, DATED 29 APRIL 1988

[Italian text not reproduced]

(Translation)

1. My name is Giacomo Cavalli. I was born in Brescia on 1 November 1928, and live in Via G. Garibaldi 16, Paderno Franciacorta (Brescia). I graduated from Padua University in 1954 in civil engineering, majoring in building construction.

From 1956 to 1977, I was employed by Società Italiana Telecomunicazioni Siemens S.p.A., where, during the relevant period 1969-1972, I was in charge of the company's building construction and maintenance sector. I worked, *inter alia*, on the construction or restructuring of the Castelletto-Settimo Milanese, Terni, Santa Maria Capua Vetere, L'Aquila 1 and 2, Carini (Palermo) plants, producing the working drawings and acting as works manager.

2. I began to take an interest in the Via Villagrazia, Palermo, plant as soon as it had been acquired by the SIT Siemens group company, ELTEL, which I presume occurred in 1969.

The initial impact was very dispiriting. I have rarely seen a plant of such dimensions, which had been expanded without any overall plan, with construction features that differed completely from one department to another, badly constructed and in an extremely poor state of repair despite the fact that it was of recent construction.

The company immediately embarked on an exacting restructuring programme, with the twofold aim of continuing to keep certain product lines in operation, organized on a more rational basis, and of adapting other areas for new products.

Work was required on every area of the plant, not only to adapt it to meet the various production requirements, but also to ensure that it complied with the most elementary standards of industrial safety and hygiene.

I recall the following, in particular:

3. It was necessary to remove the heating units from the various places in which they were installed, almost invariably in contravention of safety regulations, to new purpose-built premises.

4. As stated above, the plant had been built in several stages and without an overall plan. As a result, the air-conditioning system was split up into a large number of different units, making it difficult and uneconomical to run. The refrigeration units were all installed on the new premises, the air conditioning units were grouped together into only a few units, and the air ducts had to be re-organized to meet the new production needs.

5. The sanitation facilities were virtually entirely rebuilt, and were completed with changing rooms in compliance with occupational hygiene standards.

6. The plant's dining facilities were very unhygienic, and they had to be completely rebuilt, fitted with modern equipment for both preparing and cooking the food, and for conserving it in the refrigerators installed for the purpose.

7. The layout of the production departments was completely redesigned, eliminating a huge number of internal dividing walls, providing them with appropriate access doors and corridors to guarantee personal safety in the event of accidents or panic, for whatever reason. The previous layout was unimaginably irrational as far as safety considerations were concerned. It should be recalled in this connection, that the water supply system for fire-fighting was completely reconstructed, and numerous extinguishers were installed on the premises.

8. It should also be noted that there was not even the most rudimentary civil and industrial waste disposal system required by the laws in force at the time. Waste water was discharged directly into the Oreto River. Septic tanks were installed for the sanitation facilities and separating, deacidification and dilution tanks were built for the industrial liquid waste. A complete waste disposal plant was subsequently built.

9. The waterproofing of the roofs had to be completely re-done, since there were so many leakage points that it was not advisable to deal with them individually.

Nearly all the flooring had to be re-laid.

These were the main operations that I can recall over 16 years on, without any documentation available to me.

The restructuring work was carried out, as far as possible, using the plant's own labour force, because many of the production lines were out of use and whole departments had to be dismantled. The work covered a period of over 18 months. Specialized companies were called in only for the work requiring skilled workmen.

(Signed) Giacomo CAVALLI.

In accordance with Article 26 of Law No. 15 of 4 January 1968, the undersigned Dr. Maria Pezzi, Notary Public in Bedizzole, entered in the Roll of the Notarial College of Brescia, hereby declares that Ing. Giacomo Cavalli, born in Brescia on 1 November 1928 and living in Via Garibaldi 16, Paderno Franciacorte (Brescia), and who is known to me, having renounced the presence of witnesses, with my consent, made and signed the above declaration in my presence, after hearing my warning as to the penal consequences to which he would be liable in the case of untruthful declaration.

Brescia, 29 April 1988.

(Signed) Maria PEZZI.

Document 2

AFFIDAVIT OF DR. BEVILACQUA, DATED 29 OCTOBER 1987

[Italian text not reproduced]

(Translation)

1. My name is Dr. Paolo Bevilacqua. I was born at Pietraperzia (Enna) on 14 September 1923 and am resident at No. 6 Via Brigata Verona, Palermo.

I graduated in medicine at the University of Palermo in 1950.

2. In 1968 I was Mayor of the Municipality of Palermo, and in my resulting capacity of Government Official, I issued an order to requisition with immediate effect and for the duration of six months the plant and relative equipment belonging to Raytheon ELSI S.p.A.

The requisition order was issued in accordance with the powers granted to me under Article 7 of law No. 2248 of 20 March 1965, Appendix E and Article 69 of D.L. vo. P. Reg. No. 6 authorizing the Mayor to make provisions concerning private property.

3. The requisition order, which remained in force for six months, was issued in response to the serious consequences that the threatened closure of Raytheon, and the resulting loss of jobs, would have on both the economy and on law and order. At the time, Raytheon was in fact the largest company in the Palermo area in terms of number of employees (about 1,000) and any dismissals would have had disastrous consequences for an equivalent number of families.

The already precarious overall economic situation in the whole area would also have been further weakened.

4. Also the situation regarding law and order was a matter of concern: the workers' protest, supported by the trade unions, by the political forces and also by church representatives was growing as the days passed.

In view of the circumstances I deemed it necessary to issue the requisition order, also for the purpose of calming the growing discontent, which could otherwise lead to extremely dangerous situations.

6. Furthermore, the order itself was issued in accordance with the policy followed in those years by the mayors of many other Italian cities in similar situations and circumstances: only a short time earlier a similar measure had been taken in Florence for the "Nuovo Pignone".

7. My order, therefore, was not only justified under existing law but also by current practice. A further reason for issuing the order was also to avoid damage caused by the "non use" of the Raytheon industrial complex. Not only did the order contain a precise reference to the payment of compensation, but it also appointed someone to manage the company in the person of Ing. Profumo (and subsequently, Ing. Laurin, because of the latter's unavailability). I therefore had no punitive intentions vis-à-vis the company ownership; quite the contrary; my aim was to make it possible for normal company activities to be continued in order to safeguard jobs and to keep the plant serviceable.

8. The occupation of the plant by the employees (which started well before the requisition) turned out to be of a "co-operative" nature after the requisition and was no obstacle to the continuation of those activities which were possible under the circumstances.

(Signed) Paolo BEVILACQUA.

I, the undersigned Dr. Francesco Pizzuto, Notary Public in Palermo, entered in the Roll of the Notarial College of Palermo, hereby certifies that the declarant made the above declaration in my presence after being warned by me of the responsibilities and penal consequences involved in the case of false or reticent declaration.

I ascertained the personal identity of the declarant by personal acquaintance.

Palermo, 29 October 1987.

(Signed) Francesco PIZZUTO,
Notary Public.

Document 3

AFFIDAVIT OF AVV. MAGGIO, DATED 29 OCTOBER 1987

[Italian text not reproduced]

(Translation)

1. My name is Nicolò Maggio. I was born at Palermo on 3 September 1931 and am resident at 20 Via Madonie, Palermo. I graduated in Law from the University of Palermo on 21 June 1951. In 1968 I was a lawyer employed by the Municipality of Palermo, a post which I had held since 1957.

2. The trade union situation in March 1968 was serious because of the announced closing of the Raytheon-ELSI due to the company's insolvency and the management's intention in any case to transfer or close down the plant. The tensions among the workforce were echoed in the City as the social forces and trade union organizations had expressed their solidarity at all levels. This solidarity and the interest in the problem aroused in the entire city and in political and economic circles can be explained by the fact that, at the time, the plant employed one of the largest labour forces in the Palermo district. This led to industrial action and a general strike in support of the R.E. workers, who were defending their jobs, to demand that all suitable measures should be taken to avoid the closure of the plant, which, in an extremely civilized fashion and without causing any damage, was occupied by the plant employees themselves.

3. The requisition order was issued on 1 April 1968. I was appointed the Mayor's Representative, together with Dr. Armando Celone. Ing. Profumo was appointed custodian of the plant, but had to be replaced by Ing. Laurin as he was not to be found.

4. On the whole the plant workers were favourable to the requisition. They understood that it was aimed at getting the plant going again. There were no problems such as "hard" picketing, and so on.

5. The Nato HAWK system production line was reactivated. We proceeded regularly with the contracts on hand.

6. I never took part in talks with IRI or with any other possible purchasers concerning the transfer of ELSI. The Raytheon management continued to run all these meetings.

(Signed) Nicolò MAGGIO.

I, the undersigned Dr. Francesco Pizzuto, Notary Public in Palermo, entered in the Roll of the Notarial College of Palermo, hereby certify that the declarant made the above declaration in my presence after being warned by me of the responsibilities and penal consequences involved in the case of false or reticent declaration.

I ascertained the personal identity of the declarant by personal acquaintance.

Palermo, 29 October 1987.

(Signed) Francesco PIZZUTO,
Notary Public.

Document 4

DECISION N. 107 OF THE COURT OF CASSATION, DATED 14 JANUARY 1976, *FORO ITALIANO*, 1976, I, 2463 SS.

EXCERPTS

[Italian text not reproduced]

(Translation)

Corte di Cassazione; First Civil Section; Decision of 14 January 1976, N. 107

President Caporaso
Drafted by Carnevale
Public Prosecutor *Berri (concl. conf.)*

Ministry of Treasury *versus*
Company Mander Brothers Ltd.
(Avv. Testa, Biffi).

Appeal confirmed Rome, 27 April 1972.

Civil jurisdiction — War events — Injury or damages to assets of United Nations citizens — Italian jurisdiction — Subsistence.

(Law Decree N. 1430 of 28 November 1947, implementation of the Peace Treaty between Italy and the Allied and Associate Powers, signed in Paris on 10 January 1947, Arts. 78, 83.)

The Italian judge is competent for jurisdiction in connection with the claim for compensation filed by a United Nations citizen against Italy under Article 78, n. 4, of the Peace Treaty; he is directly legitimated to exercise such jurisdiction without being hindered by the possible concurrent resort — on the part of the citizen's State — to any remedies before the International Conciliation Commission provided for in Article 83 (1).

(Omissis.) The assumption underlying the alleged lack of *locus standi* of Mander Brothers in relation to the actionability of the claim to damages before Italian courts cannot be shared.

In accordance with generally recognized principles, an international treaty may directly attribute to subjects lacking an international status legal rights enforceable against one of the contracting States.

In such an hypothesis, where the abstract situation envisaged by the treaty as attributive of the individual right is complete in all its essential elements and the treaty itself has been implemented in the municipal legal system through one of the *ad hoc* procedures recognized in the domestic law of the State as to which right is to be enforced, there arise two distinct obligations to be charged to the State: one is effective on the international plane vis-à-vis the other Contracting State (or States) and its breach, in so far as it gives rise to an international responsibility, can in principle be enforced only by another State before the competent international jurisdiction; the other is effective in the domestic legal system vis-à-vis the protected subject, who is entitled to seek enforcement of the corresponding right before the Courts of the same domestic legal system.

The two forms of jurisdictional protection, operating respectively in the international legal system and in the municipal law of the burdened State, are, as a rule, concurrent in the sense that, except for the case in which the treaty expressly provides for the assimilation of the domestic remedies into the international ones, the protected subject may exercise against the burdened State the judicial remedies made available in its domestic legal system, independently from or concurrently with the resort on the part of its national State to the remedies provided for by the international legal system.

In applying such principles, the Supreme Court sitting in plenary meeting *(Sezioni Unite)* has recently held (judgment of 13 November 1974, No. 3592), with reference to the specific question herewith proposed, that Article 78, paragraph 4, of the Peace Treaty between Italy and the Allied Powers (the treaty was given effect in the domestic legal system with d.l. No. 1430 of 28 November 1947), in providing that the Italian Government be charged with the obligation to indemnify citizens of the United Nations for losses suffered, from wartime events, following injury or damages caused to their property in Italy, gives rise, along with an international obligation of the Italian State vis-à-vis the other Contracting States, to a direct legal relation of a binding character, between the first State and the individual citizens of the United Nations. Such relation, complete in all its essential elements, is immediately effective in the domestic legal system, without the further requirement of a normative act of integration or of implementation, and therefore, as was pointed out by the *Sezioni Unite* of this Supreme Court, it is actionable by the same citizens before Italian courts. To this effect no obstacle can be found in the jurisdictional competence, reserved by Article 83 of the Treaty to the Special International Conciliation Commission with regard to disputes arising from the above-mentioned Article 78, in that such international jurisdiction can be resorted to only by the Contracting States and by no means has been intended to provide a domestic legal remedy open to the individual citizens concerned.

The ruling established by this precedent, which fits into a consistent case law of this Court, must be firmly maintained in the present case also, as no argument has been put forth to justify the re-examination of its *ratio*.

With a second complaint charging the omitted and contradictory *ratio decidendi* on a decisive point of the dispute, as well as the violation and the incorrect application of Article 78 of the Peace Treaty . . . the appellant asserted, first, that the Court had not considered that seizure effected on the basis of wartime law in relation to the assets of the branch office of the English firm did not constitute a war event within the meaning of Article 78 of the Peace Treaty (as did destruction for wartime operations, pillage, and so on), but was an internationally lawful act; and, second, that the Court had omitted to adjudicate on a decisive point, namely, on whether the loss suffered by the Mander Brothers firm was dependent upon *conjunctural events, that is*, upon the interruption of all commercial relations between the Italian branch and the Home Office in England during the war, in which case, the damage would amount to a *lucrum cessans*, thereby falling outside of the scope of treaty provisions contemplating indemnification.

Neither of the two complaints attached to this second ground of the appeal are founded.

As to the first, it should be noted that the indemnity due to the Mander Brothers company is that provided by Article 78, paragraph 4, subpara. (I) of the Peace Treaty for compensation of losses and damages suffered by United Nations citizens as a consequence of the application of special provisions adopted with respect to their property by Italian authorities during the war.

Such indemnity, not being of a reparatory nature and not falling within the sphere of responsibility of the public administration for legal acts, fulfills the functions of restoring the economic interests upset by the execution of a measure adopted by the Italian State vis-à-vis the citizen who was formerly an enemy; and, in view of said function, the distinction between the lawful or unlawful character of the act that caused the loss becomes immaterial.

With regard to the other complaint, it is sufficient to note that the lower Court adequately examined the point proposed by the appellant and, on the basis of the results of the technical appraisal, which was performed in the proceedings before the Civil Court, concluded that the damages complained of by the Mander Brothers company consisted not in missed profits, but in the objective loss in the value of the firm's net assets consequent to the taking and evidenced by the comparison between the inventory of such assets at the time of the execution of the seizure and the situation ascertained at the date the properties were returned to the firm.

The appeal is thus unfounded as to all the grounds on which it was submitted and must therefore be rejected *(Omissis)*.

Document 5

DECISION N. 1455 OF THE COURT OF CASSATION, DATED 21 MAY 1973, *FORO ITALIANO*, 1973, I, 2443-2460

EXCERPTS

[Italian text and English translation not reproduced]

Document 6

DECISION N. 971 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF PUGLIA, DATED 17 DECEMBER 1974

[Italian text and English translation not reproduced]

Document 7

DECISION N. 198 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF ABRUZZO, DATED 11 DECEMBER 1974

[Italian text and English translation not reproduced]

Document 8

AFFIDAVIT OF DR. RAVALLI, DATED 18 DECEMBER 1987

[Italian text not reproduced]

(Translation)

1. My name is Giovanni Ravalli. I was born on 21 June 1909 in Monterosso Almo (Ragusa), and am domiciled in Rome, at No. 179 via C. Colombo. I graduated in Law from the University of Catania on 30 November 1930.

2. I became an official of the Ministry of the Interior in 1932, and was nominated Prefect in 1959, the rank with which I retired in 1974. Among other posts, I was Prefect of Palermo from 1964 to 1970, during the period in which the following events occurred.

3. The social and economic situation in Palermo and western Sicily became particularly difficult in 1968 after the earthquake in January that year; the situation was worsened also by the ongoing trade union action which, the following March, culminated in the occupation of the Raytheon-ELSI factory by the plant employees.

4. I was given verbal notification of the decision by the interim Mayor of Palermo to requisition the aforesaid plant just prior to the notification of the order to the parties concerned. It must be said that the measure was not an exceptional one since, during the same period, in similar circumstances, numerous other such urgent orders were issued by other mayors in Italy.

5. What usually happens in such cases is that the owner of the requisitioned company immediately appeals to the Prefect against the order. To my surprise, the Raytheon-ELSI Management did so only 19 days after the issue of the order.

Furthermore, to my knowledge the productive activities of the plant had already ceased and the problem facing the aforesaid Management was rather that of obtaining from the State sufficient aid to survive the serious economic crisis that had afflicted the company for some time. To this end, the Raytheon-ELSI company had made overtures to the local (Regional and Municipal) and central authorities, also after the issue of the requisition order.

6. The impression I got from the aforegoing was that both the appeal against the requisition and the bankruptcy petition filed with the Court of Palermo immediately afterwards were merely tactical moves aimed at influencing the Authorities, who were reluctant to accept the above-mentioned requests for aid. This is confirmed by the fact that neither the Company nor, after the declaration of bankruptcy, the Trustee, saw fit to make recourse to the intimation procedure provided for by Article 5 of the Consolidated Legislation of 3 March 1934 in order to have the Mayor's Order revoked until 9 July 1969. It was therefore possible to declare the order illegitimate only on 22 August 1969, that is, many months after the requisition had ceased to have any effect.

7. The occupation of the plant by the employees, which began before the order was issued, was mainly demonstrative in nature and caused no harm to persons or any material damage, nor did it have any repercussions on law and order.

Rome, 18 December 1987.

(Signed) Giovanni RAVALLI.

Notary Public
Rome, Via Capo Le Case, 3
Tel. 678.46.30

This eighteenth day of the month of December nineteen eighty-seven (18-12-1987), in Rome, Via Capo Le Case three, in my office, I, the undersigned Att.y Vincenzo Augusto Fiduccia, Notary Public resident in Rome and enrolled in the Notarial College of Rome, Velletri and Civitavecchia,

hereby certify

that Dr. Giovanni Ravalli, born at Monterosso Almo (Ragusa) on 21 June 1909, domiciled in Rome at No. 179 Via C. Colombo, retired Prefect, whose personal identity is known to me, the Notary Public, by direct acquaintance, having been warned by me the Notary Public in accordance with Article 26 of Law No. 15 of 4 January 1968, made the above declaration and signed it in my presence, to certify and authenticate which I have affixed my signature.

(Signed) Vincenzo Augusto FIDUCCIA.

Document 9

DECISION N. 211/75 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF LOMBARDY, DATED 16 JULY 1975

[Italian text and English translation not reproduced]

Document 10

DECISION N. 210/75 OF TRIBUNALE AMMINISTRATIVO REGIONALE OF LOMBARDY, DATED 16 JULY 1975

[Italian text and English translation not reproduced]

Document 11

DECISION N. 2228 OF THE COURT OF CASSATION, DATED 30 JULY 1960, *RIVISTA DI DIRITTO INTERNAZIONALE*, 1961, VOL. XLIV, PP. 117-119

[Italian text and English translation not reproduced]

Document 12

DECISION N. 2579 OF THE COURT OF CASSATION, DATED 6 DECEMBER 1983-17 FEBRUARY 1984, *COMMISSIONE TRIBUTARIA CENTRALE*, 1984, II, 1143

[Italian text and English translation not reproduced]

Document 13

AFFIDAVIT OF DR. CAMMARATA, DATED 26 MAY 1988

[Italian text not reproduced]

(Translation)

My name is Pio Cammarata, born in Palermo on 26 December 1937, a graduate in law, resident in Milan in Via Gavirate, 16. In 1968-1972 I was personally involved with the matters relating to the general secretarial work and operation of the SIT-Siemens management bodies, and was appointed by Head Office to represent the company in the procedure for the public auction sale of the Raytheon ELSI Company.

The joint stock company, Eltel Elettronica e Telecomunicazioni was incorporated specifically for this operation, with a share capital of Lire 1,000,000,000, which was subsequently increased to Lire 3,000,000,000.

During the period prior to this operation, I attended several senior management meetings to examine the request which the group had received to take over the Raytheon ELSI S.p.A. company.

From the very beginning, the information available on the products and the company's prospects led senior management to the conclusion that acquisition of the company was not a viable proposition.

Later, when the company was declared bankrupt, the official report from the Trustee in Bankruptcy was examined, and on-the-spot investigations were carried out to ascertain — *inter alia* — the assets.

Our own experts found that the expert's valuation was not realistic, and concluded that account had mainly been taken of the land available for building construction (!), while the facilities and most of the buildings needed to be completely rebuilt.

In short, it was deemed more viable to build a new factory *ex novo*.

However, for social reasons, it was decided to take over the factory and take on the employees of the former bankrupt company.

No other buyer bidded at the various attempted auction sales, and when I submitted my offer I was the sole bidder.

In my functions as Secretary to the Board of Directors and senior management, I later witnessed the difficult and costly process of restructuring the factory which, in order to be able to be started up in break-even, had to change its layout and product range completely.

(Signed) Pio CAMMARATA.

I, Massimo Mezzanotte, in my capacity as Notary Public, attest that the above signature was written in my presence by Dr. Pio Cammarata, born in Palermo on 26 December 1937, resident in Milan in Via Gavirate 16, whose identity I have ascertained, in my capacity as Notary Public.

Milan, 26 May 1988.

(Signed) Massimo MEZZANOTTE,
Notary Public in Milan.

Document 14

AFFIDAVIT OF RAG. RAVALICO, DATED 26 MAY 1988

[Italian text not reproduced]

(Translation)

My name is Ingo Ravalico, born at Wiener Neustadt on 14 June 1917, and resident in Milan in V. Monti 71.

From 1963 to 1975 I was the managing director of SIT-Siemens, now ITALTEL, and in that capacity I was the most senior person responsible for the manufacturing group belonging to SIT-Siemens.

IRI "interested" SIT-Siemens in proceeding with the acquisition of the bankrupt company, ELSI.

The term "interested" is actually inexact, because no-one was "interested" in ELSI because of its well-known technical obsolescence and commercial incompetence. But to prevent trade union unrest — the year was 1968 — and sit-ins in Via Veneto in front of IRI head office, it was necessary to "take an interest in the business", mainly for reasons of law and order. I personally directed the take-over operations in my aforementioned official capacity.

After obtaining possession of the ELSI company, initially as lessees, we found the following situation:

1. The general facilities were inadequate, dilapidated and badly designed from the very beginning. The company had not grown according to an organic economic development plan. It had developed on a day-to-day basis. One of the consequences of this was that the production facilities had been sited haphazardly, in temporary structures, etc. As a result, most of the general facilities — after we had taken possession of them — were only scrap metal, and were sold off as such, because they necessarily had to be replaced by viable general facilities.

2. The production lines were all old, broken down and obsolete. The semiconductor line (the most bankrupt), the X-ray tube line, the microwave oven line, etc., which had been of inefficient production capacity *ab origine*, were all written off at once as scrap. It was not that they were obsolescent as a result of having been shut down pending the bankruptcy proceedings. They were obsolescent due to prior industrial and technical reasons. An attempt was made to salvage the TV

cathode ray tubes line, and the line producing microwave tube for military use. The first was a failure, and the second was successful thanks to considerable intervention.

The cathode (picture) tube line was organized using absolutely outdated technology, and it manufactured products that were completely useless on the market. These were black and white 23" picture tubes that were totally unsaleable on the Italian market in those years. And they were made using glass from Russia, with absolutely prohibitive transportation costs to Palermo, as one can well imagine. Since the technology then being used was no longer sound, an attempt was made to negotiate to be able to continue using RCA technology. But even this attempt proved negative.

It was not enough to change the technology: it was necessary to start *ex novo*, with huge new investments to cater for the demand of a market that was now moving towards colour TV. Raytheon ELSI's commercial network was almost non-existent, and it had a bad commercial image.

The microwave tube line was continued, because the prospects existed for the products to be absorbed on the market, providing work for a few dozen members of the company's 1,000-plus workforce.

But it became necessary to renegotiate the assistance contracts with Raytheon, in order to be able to obtain the technical information and updates needed, in view of Raytheon's extremely, and quite unjustifiably, high royalties.

After a short time, it became clear that this attempt could not proceed further, and it became necessary to think about starting up work on completely new products that would enable the company to retrain several hundred workers for new jobs.

3. The stocks were not able to cover even the cost of managing them. The stores were full of unsaleable picture tubes, above all, and old, wholly unusable materials that were for the production lines that were going to be sold off as scrap.

4. Through ELTEL S.p.A., which it controlled, SIT-Siemens had to invest over Lire 4,000,000,000 immediately in order to buy up Raytheon at the judicial bankruptcy auction held on 12 July 1969.

It later had to invest about 3,500 million between 1969 and 1972 to restructure the plant, general facilities, and the machinery and production lines, and to retrain the workforce.

5. ELTEL then moved the production of the electronic parts of the power units for the telecommunications facilities from Aquila to Palermo, at the former ELSI factory. The only way to keep the local jobs was to rebuild the whole factory, in practice, because as Raytheon had left it, the factory was absolutely useless in technical and production terms, and had only been taken over as a bankrupt concern on purely social grounds.

(Signed) Ingo RAVALICO.

I, Massimo Mezzanotte, in my capacity as Notary Public, attest that the above signature was written in my presence by Mr. Ingo Ravalico, born at Wiener Neustadt on 14 June 1917, and resident in Milan in Via Vincenzo Monti N. 71, whose identity I have ascertained, in my capacity as Notary Public.

Milan, 26 May 1988.

(Signed) Massimo MEZZANOTTE,
Notary Public in Milan.

Document 15

DECISION N. 2293 OF THE COURT OF CASSATION, DATED 6 JULY 1968, *RIVISTA DI DIRITTO INTERNAZIONALE*, 1969, PAGES 328-331

[Italian text and English translation not reproduced]

Document 16

ARTICLES 834, 835, 1181, 2043, 2447, AND 2621 OF THE ITALIAN CIVIL CODE

[Italian text not reproduced]

(Translation)

834. Expropriation in the public interest. No one can be deprived in whole or in part of the property that he owns, except in the public interest, legally declared, and on the payment of just indemnity.

The rules concerning expropriation in the public interest are established by special laws.

835. Requisitions. When serious and urgent public, military, or civil necessity occurs the requisition of movable or immovable property (812) can be ordered. A just indemnity is due the owner.

The rules concerning requisitions are established by special laws.

(Translation)

1181. Partial performance. The creditor can reject a partial performance even though the performance is divisible, unless otherwise provided by law or usage (1314, 1315, 1384).

(Translation)

ARTICLE 2043. COMPENSATION FOR WRONGFUL ACTS

Any act committed either wilfully or through fault which causes wrongful damages to another person implies that the wrongdoer is under an obligation to pay compensation for those damages.

(Translation)

2447. Reduction of capital below legal minimum. If, by reason of the loss of over one-third of the capital, it falls below the minimum established by Article 2327, the directors (2380) shall without delay call the meeting (2365) to decide on the reduction of the capital and the concurrent increase thereof to an amount not less than said minimum, or on the reorganization of the company.

(Translation)

2621. False information and unlawful distribution of profits. Unless the act constitutes a more serious offence a punishment consisting of imprisonment for one to five years and a fine of four hundred thousand to four million lire is imposed on:

1. promoters, founders, managers and directors, general managers, auditors, and liquidators who, in reports, balance sheets, or other information concerning the affairs of the company, fraudulently represent facts which do not correspond to the truth about the formation or the financial condition of the company or who conceal, wholly or in part, facts concerning such condition;
2. managers and directors and general managers who, in the absence of or contrary to an approved balance sheet, or on the basis of a false balance sheet, in any way collect or pay profits which are fictitious or which cannot be distributed.

Document 17

ARTICLES 323 AND 185 OF THE ITALIAN CRIMINAL CODE

[Italian text not reproduced]

(Translation)

ARTICLE 323. ABUSE OF AUTHORITY IN CASES NOT SPECIFICALLY PROVIDED FOR IN THE LAW

The public official, who, abusing the powers inherent to his office, in order to damage or favour someone, commits any action which is not considered an offence in any law, may be punished with detention up to two years or with a fine from 100,000 Lire up to 2 million Lire.

(Translation)

ARTICLE 185. RESTITUTION AND COMPENSATION FOR DAMAGES

Under civil laws, any offence makes restitution compulsory. Any offence which has caused a material or non-material damage makes compensation compulsory for the offender and for the person who, under civil laws, are responsible for his/her deeds.

Document 18

ARTICLES 23, 25, 26, 108 AND 218 OF THE ITALIAN BANKRUPTCY LAW, ROYAL DECREE OF 16 MARCH 1942, NO. 267

[Italian text not reproduced]

(Translation)

ARTICLE 23. POWERS OF THE BANKRUPTCY COURT

The Court which has declared the bankruptcy is competent for all bankruptcy proceedings; it deals with the controversies relative to such proceedings, which do not fall within the field of competence of the delegate judge; it rules on the claims filed against the delegate judge's decisions. The Court may at any time hear in chambers the trustee, the bankruptcy and the creditors' committee, and replace the delegate judge with another judge. The rulings of the Court on the matters envisaged in this article are issued with decree, which is not subject to any appeal.

(Translation)

25. POWERS OF THE DELEGATE JUDGE

The delegate judge is responsible for the bankruptcy proceedings, supervises the work carried out by the trustee and, furthermore:

(1) reports to the Court on any matter for which a decision of the Court is required;

(2) issues — or urges the competent authorities to issue — urgent provisions for the preservation of the estate;

(3) convenes the creditors' committee in the cases provided for in the law and when he deems it appropriate;

(4) authorizes the trustee to appoint the persons required to deal with the bankruptcy, except for the case when he himself — by virtue of law — has the competence to appoint them;

(5) rules — as promptly as possible — on the claims filed against the trustee's deeds;

(6) authorizes — with a written notice — the trustee to participate in the proceedings both as plaintiff and as defendant; appoints the counsel and the attorneys; authorizes the trustee to carry out temporary tasks, save the cases provided for in Article 35.

The authorization must always be given for specific acts, and for each degree of the proceedings;

(7) supervises the work carried out in connection with the bankruptcy by an especially appointed person, removes him from the post — if necessary — and pays his fees, after consultation with the trustee;

(8) carries out — with the trustee's co-operation — a preliminary examination of debts, real rights of third parties and relative documentation.

The delegate judge's decisions are issued by decree.

(Translation)

ARTICLE 26. APPEAL AGAINST A DECREE OF THE DELEGATE JUDGE

Save contrary provision, an appeal against the decrees of the delegate judge may be filed to the Court within three days from the date of the decree, on the part of the trustee, of the bankruptcy, of the creditors' committee, or of anybody who may be concerned.

The Court rules with a decree in chambers.

The appeal does not suspend the execution of the decree.

(Translation)

108. *Procedures in the sale of real estate.* The sale of real estate must be carried out at an auction.

However, the delegate judge, — upon a proposal of the receiver, having heard the Creditors' Committee and with the consent of the creditors entitled to claim the assets of the bankrupt, with a right of preference on the real estate, — may order the sale without an auction, should he deem it more advantageous.

The auctions are carried out upon an order of the delegate judge, after a request of the receiver, and take place before the judge himself, except otherwise provided for in Article 578 of the Civil Code.

The judge in charge may suspend the sale, should he deem that the offered price is considerably lower than the just price.

An excerpt of the order providing for the sale is notified by the receiver to each of the creditors entitled to claim assets of the bankrupt, with a right of preference on the real estate, as well as to the mortgage creditors.

(Translation)

218. *Unlawful taking out of loans.* Any entrepreneur — running a commercial business — who takes out or continues to take out loans, without disclosing his financial difficulties, is liable to detention up to two years, unless the fact represents an even more serious offence.

Except for any additional penalties under Chapter III, Title II, Volume No. 1, of the criminal code, the sentence entails the prohibition to run a commercial business, and to hold any senior executive posts for any company up to three years.

Document 19

MINUTES OF THE MEETING OF 20 FEBRUARY 1968

[For the letter of the Deputy-Registrar, dated 13 January 1988, see **III**, *Correspondence, No. 42; for the letter of the Deputy-Agent of the United States, dated 13 January 1988, see* **III**, *Correspondence, No. 41; manuscript document not reproduced; for the typed version see Unnumbered Documents Attached to the Counter-Memorial of Italy, Exhibit II-15, p. 295,* supra*]*

Document 20

REMARKS OF DR. ALESSANDRO ALBERIGI QUARANTA ON ELTEL'S APPLIED RESEARCH POTENTIAL, DATED MAY 1971

[Italian text and English translation not reproduced]

Document 21

LETTER TO THE EMPLOYEES OF RAYTHEON-ELSI S.P.A., DATED 16 MARCH 1968

[Italian text not reproduced]

(Translation)

16 March 1968.

Raytheon-ELSI S.p.A.,
Via Villagrazia 79
Palermo

TO THE EMPLOYEES OF RAYTHEON-ELSI S.P.A.

It is with the deepest regret that the Management of Raytheon-ELSI S.p.A. announces that the Board of Directors has this day resolved to cease company activities. The decision of the Board, taken after consultation with the shareholders, is that production will cease immediately and that commercial activities shall cease and the employees be dismissed as from 29 March 1968, i.e., immediately after the meeting of shareholders called for 28 March 1968.

The majority shareholder, Raytheon Company, has asked the Management to make clear to Raytheon-ELSI employees the tireless efforts made to avoid the above-mentioned event.

During the first few months of 1967, after a second refusal by the Italian partner at the time to make a further financial contribution to ELSI, the Raytheon Company and its associate The Machlett Laboratories, Incorporated, embarked on a bold programme to provide for the future of Raytheon-ELSI. This programme involved the following activities:

1. Purchase of the remaining 20 per cent of ELSI equity, valued at Lit. 300 million.
2. A further contribution of Lit. 2.5 billion to ELSI share capital.
3. A further contribution of Lit. 1.5 billion in the form of bank loans to provide ELSI with the resources needed to continue operations.
4. Rescheduling of the payments due to Raytheon Company from Raytheon-ELSI for the previous sale of services to the former, currently amounting to Lit. 1.1 billion.
5. Boosting of ELSI management by the inclusion of a group of highly qualified persons selected from the Raytheon Company staff.
6. Search for new products for ELSI, in particular by attempting to get the Government to apply the "third-party law" in favour of ELSI and also by obtaining new products from Raytheon in America.
7. Search for a powerful Italian partner, particularly from among State-holding companies, capable not only of providing ELSI with financial support but also of enhancing the company's range of products from Italian sources, of helping it to obtain the benefits due to companies in the Mezzogiorno and, lastly, to provide for ELSI's future within the framework of the national five-year plan.

All ELSI employees must be aware of the combined efforts made by the US and Italian management group in Palermo to try and place ELSI activities on a firm long-term economic footing.

ELSI-Raytheon employees may not be aware of the great efforts continuously made over the past 12 months to obtain support for the company from the national and regional governments, and from Italian private industry. These efforts also included numerous visits to Italy by the Chairman of the Board of Directors of the Raytheon Company, Mr. C. F. Adams, for top level talks, as well as continuous efforts by the Chairman of the Board of Directors of Raytheon-ELSI and members of the Raytheon Europe staff in Rome. These attempts also took the form of meetings, often many meetings, with the Presidency of the Sicilian Region, ESPI, IRI, Finmeccanica, the Ministry of Industry, the Ministry of State Holdings and the Ministry of the Treasury. Furthermore, all possible efforts were made to gain the support of Italian private industry.

The Raytheon Company, together with the ELSI Management, have always believed — and even in this sorrowful moment continue to believe — that the inclusion of a strong Italian partner willing to contribute both in the form of new products and with sufficient amounts of fresh capital, accompanied by the assurances of the national Government that the function of the Raytheon-ELSI will be acknowledged in any long-term national programme, Raytheon-ELSI could have become a profitable and expanding company with a significant role to play in the five-year plan for the development of the Italian electronics industry.

This point of view has been fully documented in three reports drawn up for ESPI in May, July and December 1967, copies of which have been circulated among all the above-mentioned agencies, institutes and ministries, except the Ministry of the Treasury. These reports presented carefully researched programmes for the introduction of new ELSI products, together with financial forecasts showing that the company could achieve profitability with the help of a strong Italian partner and the addition of sufficient new investments. Much care was taken in these reports also to demonstrate the useful potential role that could be played by ELSI in the development of the Italian electronics industry.

The Raytheon Company invested many billions of lire to set up this industrial organization with its plants, trained personnel, products and markets. In view of the increasingly competitive markets it is unfortunately clear that the company cannot continue to exist without strong support from Italian sources.

The Management has clearly indicated the minimum indispensable aid which must be forthcoming from one or more strong Italian partners in order to guarantee the long-term economic health of the company. In recent weeks talks of greater than usual intensity have been held with many top-ranking members of the national and regional Governments. Unfortunately, these talks have not given rise to any positive offers capable of satisfying Raytheon-ELSI needs. In view of the circumstances, the Board of Directors, with great sorrow and disappointment, could only take the above decisions.

The Board of Directors.

Document 22

LETTER TO MR. BUSACCA, DATED 29 MARCH 1968

[Italian text not reproduced]

(Translation)

Raytheon-ELSI S.p.A.

[On the original the stamp with the date 29 March 68 is visible. *(Signed)*]

Dear Mr. Guido Busacca,

For many years Raytheon-ELSI has been suffering heavy losses. In their awareness of the company's importance for the people of Sicily and Palermo our shareholders have made contributions amounting to many billions of lire to promote the company's success.

Over the past 12 months the Management has made considerable efforts to obtain capital and new products from many government and industrial sources. Unfortunately these efforts have come to nothing. Raytheon-ELSI is therefore compelled to cease its activities as it is rapidly approaching a situation in which operating resources will be totally lacking.

As a consequence the Management is compelled to dismiss all its employees. Only a small number of persons will be retained to carry on all the tasks involved in managing the administrative, commercial and technical aspects raised by the cessation of the company's activities. This small number of persons will also be required to organize and see to the prompt payment of everything owing to the employees dismissed.

It is with deep regret that we hereby notify you of your immediate dismissal for the above-mentioned reasons. In order to help you find another job, the company agrees to exonerate you from any duties prior to or after the period of notification which would be worked in normal circumstances. Consequently, as from today, your services are no longer required as the company has no longer any work to offer.

You will be paid an amount in lieu of notification equal to your normal pay for the period of lack of notification. This period will be valid for the purpose of calculating your severance pay and any other sum owing to you, in accordance with existing legislation and agreements. It will be the Management's responsibility to inform you as soon as possible of the total amount owing to you, as well as of current provisions for its payment and of all the relative administrative procedures.

The Management wishes to express its appreciation for the work you have done for the company and sincerely hopes you will find a suitable new job in the near future.

Raytheon-ELSI S.p.A.

The Managing Director
(Signed)

The Managing Director
(Signed)

Document 23

SECURITIES AND EXCHANGE COMMISSION FORM 10-K — ANNUAL REPORT PURSUANT TO SECTION 13 OR 15 (D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED 31 DECEMBER 1971

[Not reproduced]

Document 24

SECURITIES AND EXCHANGE COMMISSION ANNUAL REPORT PURSUANT TO SECTION 13 OR 15 (D) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR THE FISCAL YEAR ENDED 31 DECEMBER 1971

[Not reproduced]

Document 25

FEDERAL RESERVE BANK OF NEW YORK CIRCULAR NO. 6090 OF 4 JANUARY 1968

[Not reproduced]

Document 26

SPEECH DELIVERED BY ROBERT T. SCOTT, VICE-PRESIDENT, TAX-LEGAL, NATIONAL FOREIGN TRADE COUNCIL IN PHILADELPHIA, PENNSYLVANIA, ON 9 OCTOBER 1968, AT THE EIGHTH ANNUAL TAX CONFERENCE, UNIVERSITY OF PHILADELPHIA

[Not reproduced]

Document 27

FEDERAL RESERVE BANK OF NEW YORK CIRCULAR NO. 6102 OF 25 JANUARY 1968

[Not reproduced]

Document 28

D.LGS. 12 FEBRUARY 1948, NO. 51, "APPROVAL OF THE NEW STATUTE OF ISTITUTO PER LA RICOSTRUZIONE INDUSTRIALE (I.R.I.)"

[Italian text and English translation not reproduced]

Document 29

"THE ONLY ANSWER FROM IRI AND FINMECCANICA IS: HANDS OFF GIE. ANSALDO IS BITTER OVER ITS REJECTION", *IL SOLE — 24 ORE*, 3 OCTOBER 1987

[Italian text and English translation not reproduced]

Document 30

"*ELSI* REPUDIATES UNION AGREEMENTS. REJECTS REQUESTS TO WITHDRAW DISMISSAL NOTICES", *L'ORA*, 10 MARCH 1968

[Italian text and English translation not reproduced]

Document 31

R.D.L. No. 5 of 23 January 1933 Setting Up of the "Istituto per la Ricostruzione Industriale", with Head Office in Rome

[Italian text and English translation not reproduced]

Document 32

Statement by Professor Pier Giusto Jaeger, Dated 17 June 1988

1. Since November 1974, I have been a Full Professor of Commercial Law at the University of Milan Law Faculty. Previously, I had been a Full Professor of Commercial Law at the University of Parma, School of Economics, having been appointed in 1968. In 1958, I graduated at the University of Milan Law School, and, afterwards, I received the post graduate degree of Master of Laws from the Harvard Law School.

I am founder and editor of the legal review *Giurisprudenza Commerciale*. I have written many articles and one book: *La separazione del patriminio fiduciario nel fallimento*, Milan, 1968, on bankruptcy law, besides many works and one Casebook on corporation law. I am admitted to practise before the Cassation Court of Italy, and I am a senior partner in a law firm in Milan, dealing mostly with corporate law and bankruptcy law. Among our clients, we counsel several large multinational corporations, such as Union Carbide, International Foods and Beatrice. I have followed some of the most important bankruptcy and arrangement proceedings which have taken place in Italy in the last ten years, such as Rizzoli-Corriere della Sera and Mach Oil Refineries, in the capacity either of lawyer or trustee and commissioner.

I have been retained to analyze some aspects of the case before the International Court of Justice between the United States of America and Italy, concerning Elettronica Sicula S.p.A. (ELSI), and to give my opinion on the question whether ELSI was in 1968 under a legal obligation to file a petition in bankruptcy or had at that time an option to proceed to a voluntary winding up. In order to render this opinion, I have reviewed the Memorial of the US Government, the Counter-Memorial submitted by Italy, the documents attached thereto, and the opinion given by my collegue and friend, Professor Franco Bonelli.

2. *The facts of the case.* The facts of the case are clear and undisputed. It has been ascertained that ELSI had lost most (if not all) its capital and was in the position to satisfy no more than 50 per cent of the amount owed to the unsecured creditors.

3. *No alternative between bankruptcy and voluntary winding up.* In this situation, it is my firm belief that the Board of Directors of ELSI should have filed a petition in bankruptcy, or at least, requested from the Palermo Tribunal to be admitted to the procedure of judiciary settlement *(concordato preventivo)*.

Bankruptcy *(fallimento)* and judiciary settlement *(concordato preventivo)* are the two procedures provided for by the Italian Bankruptcy Act of 1942, which have the same legal and economic basis, i.e., the insolvency of the debtor. There is another procedure, called "controlled administration" *(amministrazione con-*

trollata), which however needs another requirement, consisting in the "transient difficulty" of the same debtor to pay his current creditors. In other words, the debtor filing a petition to be admitted to the procedure of "*amministrazione* controllata" has to submit to the Tribunal a plan showing that within a certain period of time there is a reasonable probability that his financial "difficulty" will be overcome. Obviously this was not the case for ELSI, the crisis of which was permanent and bound to worsen, without any hope of improvement, as shown in the affidavits of Messrs. Cammarata and Ravalico.

On the other hand, the procedure of judiciary settlement can be requested by the insolvent debtor if he shows to be able to pay all his secured creditors and at least 40 per cent of the unsecured amount of debts. This procedure may be defined therefore as an alternative (in given cases) to bankruptcy, which however is not compulsory, because it requests the debtor's initiative. On the other hand, voluntary winding up does not request such an alternative. The demonstration of this point is rather easy.

First of all, these legal institutes have "very different purposes and effects: (voluntary winding up) leads to the dissolution of the corporate organization and assets and to the distribution of the resulting sum, after the creditors' satisfaction, among the shareholders, whereas (bankruptcy) has the only scope of a compulsory and *pro rata* satisfaction of the creditors" (R. Costi, *Chiusura del fallimento sociale per insufficienza dell'attivo ed estinzione della società, Giur. comm.*, 1974, I, pp. 327 ff.). Moreover one of the effects of bankruptcy is the legal liquidation of the corporation and, if insolvent, a corporation undergoing a voluntary winding up must be declared bankrupt.

The circumstance, to which Professor Bonelli seems to be inclined to recognize an amount of relevance, that some creditors may consider more satisfactory a settlement for 40 or 50 per cent of value rather than taking the risks connected to bankruptcy, is in my opinion, irrelevant.

The creditors mentioned in Professor Bonelli's opinion are the banks, which, however, have better reasons than that to avoid bankruptcy of their creditors, because the trustee is bound to obtain the annulment of payments obtained by them as preference before the beginning of the procedure.

4. *Cases in which it is legally compulsory to file a petition in bankruptcy.* According to Article 6 of the Italian Bankruptcy Act of 1942 bankruptcy *may* be requested by the creditors. Most authorities believe therefore, that the debtor has a legal possibility (or even the right) to be declared bankrupt, which means that the Board of Directors of a Corporation can never be blamed if, using their reasonable judgment, they file a petition in bankruptcy. There are some cases, however, in which this step becomes legally compulsory. Article 217, note 4, of the abovementioned Italian Bankruptcy Act makes it a criminal offence (and provides for the imprisonment of the debtor) the behaviour of the person who, not requesting his own bankruptcy, has caused his insolvency to be "more relevant" (if the bankrupt is a corporation, the same provision applies to its Directors).

It can be argued that it is not always easy to establish when this consequence has been caused by the fact that the debtor has omitted to file a petition in bankruptcy; but when the crisis met by the debtor is so heavy, that it is impossible to reasonably foresee any recovery (as certainly was ELSI's case), the Directors are bound to promptly and decisively act in order to avoid, through the bankruptcy, the aggravation of the insolvency.

Milan, June 17th, 1988

(Signed) Pier GIUSTO JAEGER.

I undersigned dott. Francesca Testa a Notary Public in Milan, Italy, do hereby certify this document was signed by Mr. Pier Giusto Jaeger born in Trieste, Italy, on 25 August 1936 resident in Milan, S. Damiano St., No. 4, Milan, Italy 22 June 1988.

(Signed) Francesca TESTA.

Document 33

ARTICLES 41 AND 42 OF THE ITALIAN CONSTITUTION

[Italian text not reproduced]

(Translation)

Article 41

Private economic enterprise is open to all.

It cannot, however, be applied in such a manner as to be in conflict with social utility or when it is prejudicial to security, freedom and human dignity.

The law prescribes such planning and controls as may be advisable for directing and co-ordinating public and private economic activities towards social objectives.

Article 42

Ownership is public or private. Economic commodities belong to the State, to public bodies or to private persons.

Private ownership is recognized and guaranteed by laws which prescribe the manner in which it may be acquired and enjoyed and its limitations, with the object of ensuring its social function and of rendering it accessible to all.

Private property, in such cases as are prescribed by law and with provisions for compensation, may be expropriated in the general interest.

The law lays down the rules and limitations of legitimate and testamentary inheritance and the rights of the State in relation to same.

Document 34

LAW NO. 835 OF 6 OCTOBER 1950, "RESERVATION OF SUPPLY AND MANUFACTURING ORDERS FOR GOVERNMENT OFFICES, IN FAVOUR OF INDUSTRIAL PLANTS IN THE SOUTHERN REGIONS AND LAZIO, AND DEFINITION OF THE AREAS TO BE CONSIDERED AS INCLUDED IN SOUTHERN ITALY AND THE ISLANDS"

ARTICLE 16 OF LAW NO. 717 OF 26 JUNE 1965, "REGULATION OF ACTIONS FOR THE DEVELOPMENT OF THE SOUTH"

[Italian text not reproduced]

(Translation)

LAW NO. 835 OF 6 OCTOBER 1950

Reservation of supply and manufacturing orders for government offices, in favour of industrial plants in the southern regions and Lazio, and definition of the areas to be considered as included in southern Italy and the islands.

1. Government offices are placed under the obligation of reserving the supply and manufacturing orders referred to in Legislative Decree No. 40 of 18 February 1947, to industrial plants, including small-scale and craft industries, in the provinces of Lazio, Abruzzo and Molise, Campania, Lucania, Puglie, Calabria, Sicily and Sardinia, and the territories of the island of Elba. The administrative bodies of the public railways and the navy are placed under the same obligation as regards the supplies covered by Legislative Decrees No. 374 of 14 June 1945, and No. 503 of 15 November 1946.

2. Government offices must publicly issue a separate call, reserved to factories and craft industries in southern Italy and the islands, for competitive bids for a quota of the supply and manufacturing orders of each financial year. This quota must not be less than one-fifth, with the exception of those supplies and manufacturing processes that technically cannot be divided up or that cannot be carried out by the aforesaid companies, as is to be fixed each year with a decree of the Prime Minister, in agreement with the Minister for Industry and Trade, after listening to the views of the governments and the boards of trade, industry and agriculture of the provinces in question. The aforesaid decree will be published in the *Official Gazette*.

The percentage that is excluded from the quota of one-fifth will, however, be recovered with a proportional increase in the manufacturing and supply orders that the companies in the regions referred to in Article 1 are able to fill, so as to reach a quota that is not less than one-fifth of the supply and manufacturing orders for each financial year.

LAW NO. 717 OF 26 JUNE 1965

REGULATION OF ACTIONS FOR THE DEVELOPMENT OF THE SOUTH

16. *Reservation of 30 per cent of the supply and manufacturing orders of government offices.* Without prejudice to the regulations contained in law No. 835 of 6 October 1950, and respecting the more favourable dispositions contained in the laws in force, the percentage of supply and manufacturing orders laid down in the aforesaid law No. 835 is raised to 30 per cent in favour of industrial and craft enterprises located in the territories listed in Article 3 of law No. 646 of 10 August 1950 and its later modifications and additions.

The same percentage is also applied to all the territories listed in Article 1 of law No. 835 of 6 October 1950 and its later modifications and additions.

The following are obliged to observe this quota: government offices, government agencies, and also State corporations indicated with a decree of the Prime Minister, issued following the proposal of the Minister for Special Measures in the South, in agreement with the Minister for Industry and Trade.

Each year the aforesaid government offices and agencies present the Minister for Special Measures in the South and the Minister for Industry and Trade with a report containing information on the overall assignment of orders for supplies and manufacturing, specifying the quota reserved to the industrial and craft enterprises located in the territories indicated in the first paragraph above.

Within six months of the entry of the present law into force, the procedures for applying the provisions contained in the present article are to be laid down in regulations for implementation issued following the proposal of the Minister for Special Measures in the South and in agreement with the Minister for Industry and Trade

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Document 35

LAW NO. 1589 OF 22 DECEMBER 1956, "INSTITUTION OF THE MINISTRY OF STATE ECONOMIC PARTICIPATION"

[Italian text not reproduced]

(Translation)

INSTITUTION OF THE MINISTRY OF STATE ECONOMIC PARTICIPATION

Article 1. The Ministry of State Participations in Industry is hereby instituted.

Article 2. All tasks and prerogatives which, in compliance with existing provisions, fall within the competence of the Ministry of Finance, are hereby devolved upon the Ministry of State Participations in Industry as far as participations so far managed by the former Ministry, and State-owned enterprises are concerned.

All tasks and prerogatives which, in compliance with existing provisions, fall within the competence of the Council of Ministers, the Presidency of the Council of Ministers, the Ministers Committees or the individual Ministries in connection with IRI (translator's note: Institute for Industrial Reconstruction), ENI (translator's note: National Agency for Hydrocarbons), and of all the other enterprises directly or indirectly State-controlled, are devolved upon the aforementioned Ministry. Such enterprises shall be indicated in the decrees issued by the President of the Council of Ministers, in agreement with the Minister for State Participations in Industry and the Minister involved.

The decrees shall be published in the *Official Journal of the Republic of Italy*.

All State-owned enterprises and participation shares referred to in the previous subparagraph are transferred to the Ministry for State Participations in Industry.

The tasks and prerogatives falling within the competence of the Ministries of the Treasury, Industry and Trade, in connection with the Fund for the financing of mechanical industry (FIM), are also devolved upon the new Ministry.

Article 3. The participations referred to in the foregoing article shall be inserted in the framework of independent management bodies, operating according to cutting-down-on-expenses criteria.

The first enforcement of participations shall have to be carried out within one year after the coming into force of the present law.

The associative relations between the mainly State-controlled enterprises and the trade unions of the other entrepreneurs shall cease within one year of the entry into force of this law.

This provision does not concern the companies and bank concerns, indicated in Articles 5, 40, paragraph *(a)*, 41 of the royal law decree No. 375 of 12 March 1936, and subsequent amendments, in Article 1 of the legislative decree of the provisional Head of State of 23 August 1946, No. 370, and in Article 1 of Law No. 445 of 22 June 1950.

4. In order to co-ordinate the activity of the Ministry of State Economic Participation with the activity of the other Ministries concerned, as regards the determination of the general guidelines relative to the various sectors controlled by the Ministry, a standing Committee is set up; it is constituted — in addition to the Minister of State Economic Participation —, by the Ministers of the Budget, of the Treasury, of Industry and Commerce, of Labour and of Social Security. This Committee is charged with the yearly examination of the results achieved in the various sectors.

The Committee is chaired by the President of the Council or — upon his mandate — by the Minister of State Economic Participation. The other Ministers concerned may be invited to participate in its meetings.

5. The Minister of State Economic Participation is a member of the Interministerial Committee for Reconstruction, the Interministerial Committee of Credit, the Interministerial Committee of Prices and the Ministers' Committee for Southern Italy.

6. The Ministry of State Economic Participation is constituted by a general Inspectorate, a Service for administrative affairs and personnel and a Service for economic affairs.

The Inspectorate is presided over by an official who shall be appointed General Director by decree of the President of the Republic, upon a deliberation of the Council of Ministers. Each of the two Services is presided over by an official who shall be appointed General Inspector.

During the first implementation of this law, and for no longer than five years, the posts under the previous paragraph may be assigned also to persons who do not belong to the Ministry, to be appointed by decree of the Minister of State

Economic Participation, subject to a deliberation of the Council of Ministers. Such assignments may be revoked any time. The central Counting-House, which depends from the Ministry of the Treasury, is set up at the aforementioned Ministry.

7. The Government is charged — within 12 months from the entry into force of this law — to organize the Ministry and to create the posts for the strictly necessary permanent staff, in relation to the real needs of the services, for an amount of no more than 100 posts, as well as the regulations concerning the personnel, on the basis of the criterion of transferring staff belonging to other Ministries to the Ministry of State Economic Participation, and of publishing competitive examinations for any post of the career.

8. Until the posts for the permanent staff — under Article 7 — are created, the Ministry of State Economic Participation may employ — on the basis of a temporary posting — no more than 100 persons (permanent and temporary staff) of other Ministries, to be subdivided — according to the career and category — by virtue of a decree of the President of the Council, in agreement with the Minister of State Economic Participation and with the Minister of the Treasury.

Moreover, specific professional assignment may be conferred — on a temporary basis — upon technical experts who are not directly employed by the Ministry, with a pay to be established by a decree of the President of the Council of Ministers, in agreement with the Minister of State Economic Participation and the Minister of the Treasury.

9. As regards the expenses necessary to the functioning of the Ministry of State Economic Participation and to the fulfilment of its tasks in connection with the State-owned enterprises until the relative budget is approved, such expenses shall be covered by the allocations of the expenditure estimate of the Ministry of Finance, concerning the services transferred to the Ministry of State Economic Participation, supplemented with the amounts to be transferred from the other Ministries, for the respective services for which the Ministry is competent.

The new overheads shall be covered by withdrawing an amount — up to 25 million Lire — on the Chapter No. 627 of the budget of the Ministry of the Treasury for the fiscal year 1956-1957.

The Minister of the Treasury is authorized to implement the necessary budget amendments by virtue of his own decrees.

10. The last balance sheet and a plan for each of the autonomous administrative bodies provided for in the first paragraph of Article 3 are submitted to Parliament, enclosed with the budget estimate of the Ministry of State Economic Participation.

11. This law comes into force the day after its publication in the *Official Bulletin of the Republic of Italy*.