Final Submissions of the Government of the United States in the case concerning Elettronica Sicula S.p.A.

The United States requests that the objection of the Respondent be dismissed and submits to the Court that it is entitled to a declaration and judgment that:

(1) the Respondent violated the international legal obligations which it undertook by the Treaty of Friendship, Commerce and Navigation between the two countries, and the Supplement thereto, and in particular, violated Articles III, V, VII of the Treaty and Article I of the Supplement; and
(2) that, owing to these violations of the Treaty and Supplement, singly and in combination, the United States is entitled to reparation in an amount equal to the full amount of the damage suffered by Raytheon and Machlett as a consequence, including their losses on investment, guaranteed loans, and open accounts, the legal expenses incurred by Raytheon in connection with the bankruptcy, in defending against related litigation and in pursuing its claim, and interest on such amounts computed at the United States prime rate from the date of loss to the date of payment of the award, compounded on an annual basis; and
(3) that Italy accordingly should pay to the United States the amount of US$12,679,000 plus interest.

(Signed) Michael J. MATHESON.

84. THE REGISTRAR TO THE AGENT OF ITALY

27 February 1989.

I have the honour to transmit to Your Excellency herewith a copy of the final submissions of the United States of America in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, communicated to the Court today by the United States Agent pursuant to Article 60, paragraph 2, of the Rules of Court.

85. THE AGENT OF ITALY TO THE REGISTRAR

2 March 1989.

I have the honour to transmit to you the text of the written replies[1] of the Italian Government to the questions put by Members of the Chamber on 23 February 1989 in the case concerning *Elettronica Sicula S.p.A. (ELSI)*.

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[1] With two documents attached.

Questions by Judge Oda

A. Question to both Parties

> "Suppose that the decision of the Prefect of Palermo (which was actually given on 22 August 1969) had been given one year earlier, say in August 1968, could the trustee of ELSI, under Italian law, have withdrawn the previous petition to bankruptcy which had once been filed on 9 April 1968 and have proceeded to liquidate in spite of the judgment of bankruptcy by the Tribunal of Palermo, which was delivered on 7 May 1968?" [1]

The answer is no.

The reason for ELSI's bankruptcy was its insolvency and not the requisition order. As ELSI remained insolvent, the declaration of bankruptcy could not be revoked.

Bankruptcy may be revoked by the judge only if there has been a written opposition to the declaration of bankruptcy (Arts. 18 and 19 of the Bankruptcy Law). The grounds for an opposition are either the formal nullity of the declaration of bankruptcy; the lack of the prerequisites for a declaration of bankruptcy (i.e. that the bankrupt is not a businessman or a commercial company); or that the debtor is not in a state of insolvency.

In ELSI's case the declaration contained no formal error; it concerned a commercial company; and the insolvency was admitted by the debtor itself, which had requested its own bankruptcy. Therefore, the setting aside of the requisition order could in no way affect the declaration of bankruptcy and its legal effects.

B. Questions to Italy

> "1. Am I right in understanding that the order of requisition of 1 April 1968 did bar ELSI from closing the plant in the framework of a liquidation process, but did not, or could not, prevent its closure in the framework of the bankruptcy procedure?" [2]

On 31 March 1968 ELSI dismissed most of the workers, but did not yet "close" the plant entirely. The so-called "orderly liquidation" could have resulted in a complete closing of the plant within a short period.

The requisition order was to ensure that no such closure could take place while the requisition lasted.

Bankruptcy does not necessarily require the closure of a plant. The plant was not in fact "closed" during the bankruptcy proceedings either, although production was very limited.

> "2. What kind of management plan did the Sicilian regional government have for the six-month period after issuing the order of requisition on 1 April 1968? In fact the regional government continued to pay wages to some 800 employees until 15 October 1968, even after the judgment of bankruptcy was delivered on 7 May 1968. What could have been the intention of the Sicilian regional government in paying the wages after the procedure of bankruptcy had started in May 1968?" [3]

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[1] See p. 276, *supra*.
[2] *Ibid.*
[3] *Ibid.*

The Sicilian government, whose position is entirely separate from that of the Mayor of Palermo, had nothing to do with the requisition process.

The order of requisition by the Mayor of Palermo, acting as an official of the central Government, must be seen as an emergency measure, undertaken at the last minute, and triggered by the precipitous dismissal of 800 workers by ELSI.

The Mayor was counting on the back-up of the regional government to make emergency payments to the workers. Under Regional Law 13 May 1968, No. 12, ELSI's former employees were to be paid as from 1 March 1968; those who had not been dismissed by the end of March, as from 1 May 1968. Payment was characterized as "an extraordinary and temporary monthly allowance, equivalent to the wages in fact received until February 1968" ("indennità mensile straordinaria di attesa pari alla retribuzione mensile di fatto percepita fino al mese di febbraio 1968").

These payments were not undertaken lightly. Indeed, the regional government considered it to be appropriate and necessary for the purposes of public order to avoid the possibility of severe hardship to the workers and to limit social unrest in a year (1968) that was proving disastrous in Italy as in other European countries.

The region also wished to preserve the qualifications and abilities of the workforce that had been dismissed. (Regional Law 13 May 1968, No. 12, Document 37, attached to the Counter-Memorial[1]; Regional Law 6 August 1968, No. 23, Document 38, attached to the Counter-Memorial[1]; Regional Law 23 November 1968, No. 31, Document 39 attached to the Counter-Memorial[1]; Regional Law 7 June 1969, No. 16, Unnumbered Documents, II, p. 264[2].)

Questions by Judge Schwebel

A. Question to both Parties

> "Let us assume, *arguendo*, that it has not been proved that the requisition was the cause of the bankruptcy. Does it follow that ELSI and its stockholders sustained no damage by reason of the requisition?"[3]

The question of the damages caused by the requisition was examined by the Court of Palermo, the Court of Appeal of Palermo and was finally settled by the "Corte di Cassazione" which confirmed the appeal decision (see Annexes 79, 80 and 81 to the Memorial). It was held that no damage had been caused by the actions of the workers occupying the plant, by negligent custody or any other factors.

The only damage suffered was that arising from the unavailability of the plant, and this was quantified as an amount equivalent to the interest at a rate of 5 per cent per year of the value of the property.

B. Questions to Italy

> "1. Mr. Highet spoke this morning of, I believe it was, 7 billion lire in low-interest loans extended by Italian governmental authorities to ELSI. May I ask how much lower than commercial rates of interest were these low-interest loans, that is to say, what was their real value?"[4]

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[1] See **II**.
[2] Exhibit III-21A, **II**, p. 315.
[3] See p. 276, *supra*.
[4] *Ibid.*

With regard to the question of the value of the low-interest rates, the Report on the Financial Statements at 30 September 1967 for Raytheon-Elsi S.p.A. prepared by Coopers & Lybrand and filed with the Court on 17 February 1989 by the United States, shows on page 8 [1] that the interest rates on the loans by IRFIS and by the Banco di Sicilia were at 4 per cent, while a further loan by IRFIS and a loan by the Chase Manhattan Bank were at 5.5 per cent.

Meanwhile, the average annual commercial rates of interest on current accounts for the relevant period were as follows:

Year	Rate (%)
1956	10.00
1957	9.83
1958	9.66
1959	9.34
1960	9.02
1961	8.63
1962	8.37
1963	8.41
1964	8.94
1965	8.80
1966	8.36
1967	8.18

(*Source:* Document transmitted to us on request by the Banca d'Italia and attached hereto.)

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

With regard to the second question, the purposes of the requisition were as stated in relatively precise terms by the Mayor in the Order of Requisition. These included the purposes of "protect[ing] the general economic public interest (already seriously compromised)". This meant that he did not want the place of work of so many citizens to close. They also include the "protect[ion of the] . . . public order". This meant that he did not want strikes and riots.

These two purposes, stated in the seventh paragraph, must be read in the light of the immediately preceding four paragraphs of the Order of Requisition, which stated that:

> ". . . ELSI's actions, beside provoking the reaction of the workers and of the unions giving rise to strikes (both general and sectional) have caused a wide and general movement of solidarity of all public opinion which has strongly stigmatized the action taken considering that about 1,000 families are suddenly destituted".
>
> ". . . That ELSI is the second firm in order of importance in the District, and that because of the shutdown of the plant a serious damage will be caused to the District, which has been so severely tried by the earthquakes had during the month of January 1968".
>
> ". . . That the local press is taking a great interest in the situation and . . . is being very critical toward the authorities and is accusing them of indifference to this serious civic problem";

[1] P. 438, *supra.*
[2] See p. 276, *supra.*

and that

> ". . . the present situation is particularly touchy and unforeseeable disturbances of public order could take place".

When read in the context of these findings by the Mayor, and that have not been challenged by the United States, the motivation of the Mayor appears to be candidly expressed and straightforward in purpose.

Were those purposes achieved?

Yes, up to a point. There were no riots; no solidarity strikes; no destitution of at least 800 families; no serious additional damage caused to the District; and no "unforeseeable disturbances of public order" took place. In addition, the workforce was paid by the regional government through the end of the requisition period, and beyond (see reply to question from Judge Oda [1]).

However, the purpose of protecting "the general economic public interest" was not achieved, at least in its entirety, because, as the Prefect had pointed out, the measures adopted did not take account of the fact that the situation of the company was such "as not to permit the continuation of the activity".

> "3. The Respondent has pointed out that the Prefect's decision holding the Mayor's order of requisition to be 'destitute of any juridical cause which may justify it or make it enforceable' depended on his conclusion that the order did not, and could not, achieve the goal to which it was directed. However, the Prefect also held that the order was issued
>
> 'under the influence of the pressure created by, and of the remarks made by the local press; and therefore we have to hold that the Mayor, in order to get out of the above and show the intent of the Public Administration to intervene in one way or another, issued the order of requisition as a measure mainly directed to emphasize his intent to face the problem in any way'.
>
> This holding of the Prefect appears to mean that the Mayor issued the order not for defensible juridical reasons but as a way of showing the public that he was doing something, whether that something was lawful or sensible or not: he issued the order 'to show the intent of the Public Administration to intervene in one way or the other'; the order was issued as a measure 'mainly' directed to 'emphasize his intent' to face the problem 'in any way'. Now my question is this, is a measure taken by a public authority 'to intervene in one way or another' with a view not towards resolving a problem — and the Prefect held that the order could not resolve the problem — but in order to appease press and public criticism or win public favour 'in any way' an arbitrary measure?" [2]

We would, first, respectfully disagree with the question's characterization (in its sentence after the quoted material)

> ". . . that the Mayor issued the order not for defensible juridical reasons but as a way of showing the public that he was doing something, whether that something was lawful or sensible or not".

The question's characterization of what the Prefect said is incomplete.

What the Prefect said was that the Mayor issued the order *also* for the reason mentioned ("*also* under the influence of the pressure created by, and of the

[1] See p. 458, *supra*.
[2] See pp. 276-277, *supra*.

remarks made by the local press: and therefore we have to hold that the Mayor, *also* in order to get out of the above and show the intent of the Public Administration to intervene in one way or another, issued the order of requisition as a measure mainly directed to emphasize his intent to face the problem in any way"). The answer to the question must therefore take into account the full context of the Prefect's review.

The answer is, that if the measure was taken solely " 'to intervene in one way or another' . . . with a view not towards resolving a problem . . . but in order to appease press and public criticism or to win public favour 'in any way' an arbitrary measure", then it probably would have been an arbitrary measure.

But, if there were other substantial and sincere motivations behind the measure in addition to that of appeasing public opinion, i.e., "to protect general public interest . . . and public order" it would then by no means have been an arbitrary measure.

It should be added that it would not be right to disqualify as arbitrary any measure that seeks to appease press and public criticism or win public favour, since without doubt all measures taken by public authorities in a time of great stress and perceived gravity will be motivated at least in part to respond to public criticism or to win public favour, and presumably also to "appease" press criticisms of inactivity. This is a natural consequence of a free press and a democratically elected government.

> "4. In view of the fact that the Prefect found that the requisition by the Mayor of Palermo of ELSI's factory was 'destitute of any juridical cause which may justify it or make it enforceable', and undertaken in order to permit the Mayor to show 'the intent of the Public Administration to intervene in one way or another', can it be maintained that the requisition nevertheless was, in the words of Article III of the Treaty, 'in conformity with the applicable laws and regulations' of Italy? Can an action which is taken 'without juridical cause' in order 'to show the intent . . . to intervene in one way or another' be an action not merely under colour of the law but 'in conformity with the applicable laws and regulations'? If not, and if the position of the Respondent is that these holdings of the Prefect were in error, why was not an appeal taken from them? If no appeal was open or was taken, does not that establish that the requisition was not in conformity with the applicable laws and regulations of Italy?" [1]

This question must be broken down into four sub-questions, each of which is expressed in a sentence of the question.

(i) To the first sub-question (first sentence), we respectfully demur from the characterization of the requisition. As pointed out in our answer to the immediately preceding question 3 [2], there were a number of reasons stated for the requisition order. On the correct premise, then, that the requisition was undertaken for several reasons, and that the language quoted from the Prefect must be read in the context of the impossibility of achieving the requisition's purpose not being cognizable or known to the Mayor of Palermo at that time, the answer is that the requisition was "in conformity with the applicable laws and regulations" (and by implication also subject to any corrections or remedies provided by these laws and regulations).

The Prefect expressly stated as follows:

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[1] See p. 277, *supra*.
[2] See pp. 461-462, *supra*.

> "The lack of competence of the Mayor to issue autonomous orders of requisition, according to Article 7 of Law of 1865, assumed by the appellant, is also to be rejected, since the competence of the Mayor is almost unanimously admitted by doctrinal writers and Case Law" (Unnumbered Documents attached to the Counter-Memorial, Vol. II, p. 131 [1]).

Thus, the Mayor's order was taken to be "intra vires" since "the grounds of the grave public necessity and of the emergency and urgency which caused the issuance of the order may be held to be existing", although it was quashed on the basis of the Mayor being mistaken in his forecast of the results that could be achieved by the order.

(ii) As to the second sub-question in the second sentence, the description by the Prefect of the action as being "destitute of any juridical cause" is not an accurate translation and, moreover, must be read in context. In actual fact, the Prefect affirmed that:

A. the Mayor of Palermo had the competence to issue the requisition order,
B. "in theory . . . the grounds of the grave public necessity and of the emergency and urgency which caused the issuance of the order may be held to be existing", but
C. the goal to which the order was directed could not be achieved by it, this being "proved by the fact that the activity of the company was neither resumed, neither might it be resumed".

Thus the phrase "the order is destitute of any juridical cause which may justify it or make it enforceable" is an inaccurate and misleading interpretation of the Italian "manca, pertanto, nel provvedimento, genericamente, la causa giuridica che possa giustificarlo e renderlo operante". This phrase is more accurately translated by "the order, generically speaking, lacks the proper motivation that could justify it and make it effective" as is explained by the Court of Appeal (see Annex 81 to the Memorial).

Therefore, the Prefect's decision does not refer to the legal basis of the act, but rather to the appropriateness or the adequacy of the measure to achieve the purpose for which it was intended.

Thus, the Prefect was actually only stating that the Mayor, in the exercise of his powers, was mistaken in his forecast as to the effect of his order.

Therefore, when read in context, such a description does not result in a categorical or absolute description of the act as being (in the words of the second sub-question) "without juridical cause"; and the question is therefore not answerable in these terms.

(iii) To the third sub-question, the answer is that there was no procedure for appeal or judicial review available under Italian law. In actual fact, the Mayor of Palermo attempted to have the decision reviewed by the President of the Republic, but the application was held to be inadmissible for lack of standing (see Annexes 77 and 78 to the Memorial).

(iv) To the fourth sub-question in the fourth sentence, the reply is that even if there was no appeal available, or taken, and even if the requisition was rejected by the Prefect of Palermo, that does not mean that "the requisition was not in conformity with the applicable laws and regulations of Italy", for the following reasons.

The action of the Italian State subsequent to the requisition must be deemed to have included the Prefect's ruling as well as the award of compensation to

[1] See **II**, p. 310, and **I**, p. 362.

ELSI as the result of a claim by the Receiver in bankruptcy for the loss of facilities during the requisition.

It is the action of the Mayor of Palermo as so corrected or modified that constitutes State action measurable as action under the Treaty that is, or is not, "in conformity with the applicable laws and regulations of Italy".

If the language of the Treaty (and Supplement) were to be understood differently, it would be possible to imagine an endless series of Treaty violations that take effect, or "bite", before Italy (or the United States) has had the opportunity to remedy them. This analytic process could well be applied, for example, to action taken by the United States at a local level that had not been yet remedied at a higher level, such as an appeal for rectification or annulment through the federal or State court systems. The concept is analogous to the concept of the exhaustion of local remedies, in so far as both ideas presuppose that the host country should, if possible, be rendered the opportunity to rectify or correct what could otherwise, in isolation, have constituted a Treaty violation.

In actual fact the requisition was followed by: first, the appeal to the Prefect, and second, the claim brought before the Courts by the Receiver in bankruptcy. It is thus not possible to hold that the requisition alone "was not in conformity with the applicable laws and regulations of Italy".

Therefore, the quashing of the requisition by the Prefect must be considered as having ensured that the overall actions of Italian authorities conformed to what was required.

> "5. Italy has stated in its pleadings and oral argument that certain of ELSI's actions or inactions made its board of directors criminally liable. If this is so, why is it that no criminal actions were pursued against them?" [1]

The answer to this question requires us to set out the relevant provisions of law.

First, Article 217 of the Bankruptcy law states:

> "There is a sanction of between six months' and two years' imprisonment in the case of the declaration of bankruptcy of an entrepreneur who:
>
> . . .
>
> (4) has aggravated his own bankruptcy by abstaining from requesting the declaration of his bankruptcy or by some other gross negligence."

Second, Article 218 of the Bankruptcy law states:

> "Unless it constitutes an even more serious offence, the sanction of up to two years' imprisonment attaches to an entrepreneur carrying out a commercial activity who resorts or continues to resort to credit, concealing his own bankruptcy."

There is absolutely no doubt that this refers to offences which, where they exist, require the Receiver to take action and the Public Prosecutor, if he has knowledge of them, to take action ex officio. It must be borne however in mind that the Receiver in the ELSI case could not possibly have had at the time a *complete historical picture of the affair such as we now have.*

In addition, the office of the Public Prosecutor in Italy is an office completely independent from the government, central or regional, and from administrative power. He becomes aware of matters only when they are brought to his attention.

In ELSI's case it is therefore reasonable to assume that the Public Prosecutor

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[1] See p. 277, *supra.*

was never brought in either by the Receiver or the creditors, because of wholly incomplete knowledge.

> "6. Volume I of the Unnumbered Documents submitted by Italy with its Counter-Memorial reproduces a translation of the dismissal letter sent by ELSI to its employees. That letter states:
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> 'You will be paid an indemnity in substitution of notice equal to the amount of your remuneration for the period of the notice you are not given. Such period will be counted for the purpose of calculating your severance benefits, and, if such be the case, for the purpose of any other payments owing to you, all in accordance with the laws and agreements in force.'
>
> In view of the terms of this letter, is there ground for complaining of lack of notice?" [1]

Absolutely. This letter *violated* the relevant "applicable laws and regulations" in force. In fact, it was wholly inconsistent with the applicable collective agreement (Interorganizational Agreement of 5 May 1965 on Lay-Offs for Personnel Cutbacks, in Unnumbered Documents, Vol. I, pp. 354-362 [2]), pursuant to which advance notice of any collective dismissal was required to be given to the representatives of the unions concerned. This was in order to allow the unions to discuss with management the proposed actions before they are taken.

These defects of failure to give notice would exist even if there *were* funds available to make the substituted indemnity payments suggested by ELSI. But when one realizes that the company was in a state of capital deficit, and complete insolvency, the illusory offer to pay the workers does not in any way "remedy" these deficiencies.

> "7. The written supplement of the Respondent to the oral reply to my question of 21 February states that, 'The requisition kept the factory open'. Open to do what? Was work performed in the factory, by whom, and with what results, in the period in which the factory was requisitioned? In this regard, it may be recalled that the Prefect's decision of 20 November 1969 holds that it was 'the fact that the activity of the company' was not 'resumed', that the plant was 'not working' and that it was occupied by the dismissed employees." [3]

As mentioned in our reply to Judge Oda's first question to Italy [4], the requisition was designed to ensure that the factory remained open.

Although the maintenance of the factory in an open condition did not result in a return to full activity or production, the Mayor of Palermo made provision for the temporary management of the plant immediately after the requisition.

In fact, on 6 April 1968, the Mayor issued a special order entrusting the management of the plant to Mr. Aldo Profumo, the managing director of ELSI. After Mr. Profumo refused to accept this appointment and to carry out the tasks assigned to him in the interest of ELSI, on 16 April the Mayor appointed Mr. Silvio Laurin, the senior company director to replace him temporarily. Mr. Laurin accepted the appointment and the Mayor also appointed Mr. Armando Celone and Mr. Nicolo Maggio as his representatives to enforce his orders in the factory.

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[1] See p. 277, *supra*.
[2] II, pp. 284-288.
[3] See p. 277, *supra*.
[4] See p. 458, *supra*.

These measures permitted the continuation and completion of work-in-process in the months that followed. Among the activities carried out, particular reference may be made to the commitments relating to the Nato Hawk programme which were regularly fulfilled despite the requisition. As a matter of fact, as confirmed by a confidential letter of 9 May 1968 from the Mayor of Palermo to General Luigi Mancini, Director General of the Nato Hawk Management Office in Paris (a copy of which is attached hereto) all the personnel connected with the programme were brought back to work, the necessary materials provided and the production lines were kept going.

Questions asked by President Ruda

"I want to ask a question about Italian law in regard to a situation described in the Report of Coopers & Lybrand to Raytheon-ELSI, of 22 March 1968. In that Report, Coopers & Lybrand, who were Raytheon's own auditors, stated, of the position at 30 September 1967:

'10. The adjusted accumulated losses at 30 September 1967 exceeded the total of the paid up capital stock, capital reserve and Stockholders' subscription account by an amount of 881.3 million lire. Should this become "officially" the case (e.g., should the adjustments made in arriving at this total of accumulated losses be entered in the company's books of account), under Articles 2447 and 2448 of the Italian Civil Code the directors would be obliged to convene a stockholders' meeting forthwith to take measures either to cover the losses by providing new capital or to put the company into liquidation.'

1. My question is this: if it was decided not to provide new capital but to put the company into liquidation, would it be possible, in Italian law, to conduct the liquidation without becoming bankrupt in law; and, if so, under precisely what conditions could bankruptcy be thus avoided?" [1]

The answer is as follows.

According to the Coopers & Lybrand Report (p. 3 [2], third column), ELSI's losses had produced a deficit of 881.3 million lire (once the capital, reserves and the shareholders' payment into the capital account had been deleted). In such a situation it is not possible under Italian law to liquidate the company without filing for bankruptcy.

The Civil Code, which deals with the rules applicable to companies with share capital, imposes a minimum capital for these companies (formerly one million lire, presently two hundred million). As soon as the capital of a company has fallen below this minimum as a result of losses, its shareholders must either reconstitute the capital or must put the company into liquidation.

For the shareholders to be entitled to decide to liquidate, however, the company must still be solvent — i.e., not in a deficit situation.

When, however, in addition to the capital having fallen below the legal minimum, there is a stockholders' equity deficit (i.e., the losses are greater than the entire capital, etc.), the company is "insolvent" and, in terms of Article 5 of the Bankruptcy Law, *must* be declared bankrupt (as long as or unless shareholders do not decide to reconstitute the capital).

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[1] See p. 278, *supra*.
[2] P. 434, *supra*.

It should be noted, moreover, that the company may approach the judge and ask that, instead of being declared bankrupt, it be allowed to submit to the creditors a proposed settlement *(concordato preventivo)*. The proposal must:

(i) contain realistic assurances by the debtor that the preferred creditors will receive 100 per cent payment and that the unsecured creditors will receive at least 40 per cent of sums due within 6 months, or assurances of the payment of interest in the case of a delay; and
(ii) foresee the transfer of all the debtor's assets to the creditors (always assuming that the evaluation of these assets shows a possible return to the creditors, as indicated above: see Art. 160 of the Bankruptcy Law).

The Judge would then appoint a judicial commissioner (see Art. 163 of the Bankruptcy Law). The creditors are called to vote, reaching decisions by a majority representing at least ¾ of the credits (see Art. 177 of the Bankruptcy Law). If the judge holds the proposal to be inadmissible or if the required majority is not obtained (see Art. 179, Bankruptcy Law), the judge will declare the debtor's bankruptcy as his own initiative (see Art. 162 (2) of the Bankruptcy Law).

A request for a "*concordato preventivo*" (for the creditors' acceptance) could certainly have been presented by ELSI in April 1968, but only if the above prerequisites or conditions could have been satisfied. The conditions were not present, since: (i) the company's books were not in order; and (ii) ELSI's assets were not sufficient to satisfy its creditors to the extent indicated above.

> "2. For the purpose of determining whether the requirements of Italian law as to the impact of losses on the capital of the company were satisfied, was the management of ELSI entitled, as a matter of Italian law or of sound accounting practice, to base itself on the book values in the September 1967 balance sheet (first column) so long as the adjustments (second column) had not been made in the company's books, or it was obliged for that purpose either to make those adjustments forthwith in the company's books or to use the adjusted figures (third column) to determine the company's financial and legal position?" [1]

The answer to this question is as follows.

First, Article 2423 (2) of the Italian Civil Code states that

> "the balance sheet and the profit and loss account must demonstrate clearly and accurately ("con chiarezza e precisione") the company's position with regard to its assets and liabilities and the profits made or losses sustained".

The principle of the "truth" of the balance sheet is thus constantly acknowledged in Italian doctrine and jurisprudence. In the application of the legal principles of evaluation, the principle of "prudence" is likewise recognized in that evaluation. Both of these principles are considered to belong to public policy.

Considering these principles it is not even imaginable that a company would use book values in its accounts when these are in excess of the actual values. The fact that the company did not make the adjustments to its own books is not relevant. In actual fact the books of account can be "rectified" with successive carry-overs. The amendment to the books must be made as soon as possible, showing the lesser value decided on by the directors.

Furthermore, it must be noted that the adjustments accepted by ELSI's management were:

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[1] See p. 278, *supra*.

1,309 million lire for a reserve for inventories, instead of 407.8 million;
100 million in losses in subsidiary companies; and
1,653 million in losses in deferred costs.

This means that in the adjusted figures accepted by ELSI's management, a deficit of 881 million (after having lost and cancelled capital stock, reserves and stockholders' subscription accounts) was in fact recognized (see p. 3[1], third column, of the Coopers & Lybrand Report).

But the accountants' adjustments were even greater:

453.3 million in excess of net realizable value in inventories (point 4, page 2[2] of Coopers & Lybrand's Report).

463.6 million in relation to fixed assets (point 4, page 2[2] of said Report).

The above figures come to a grand total of 916.9 million lire in losses, according to the auditors' suggested adjustments (not accepted by the company).

Therefore, the company's deficit, according to the accountants, was not 881.3 million lire, but was 1,798.2 million lire (916.9 + 881.3).

Of course, the above-mentioned deficit of 1,798.2 million lire was ascertained by Coopers & Lybrand in relation to the year ended 30 September 1967. By March 1968, as we know, there had been 1,068.2 million lire in further losses to add to ELSI's economic and financial disaster.

BANCA D'ITALIA: INTEREST RATE ON CURRENT ACCOUNTS
(1956-1967)

[*See p. 460*, supra.]

LETTER DATED 9 MAY 1968 FROM THE MAYOR OF PALERMO TO GENERAL LUIGI MANCINI, DIRECTOR GENERAL OF THE NATO HAWK MANAGEMENT OFFICE

CONFIDENTIAL

Palermo, 9 May 1968.

Dear General Mancini,

I thank you for the kind welcome extended the afternoon of May 2 to my delegates Messers. A. Celone and N. Maggio accompanied by Mr. S. Rovelli.

I apologize once again for being unable to take part in the meeting on account of previous business engagements deriving from my office, which I could not

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[1] P. 434, *supra*.
[2] P. 433, *supra*.

postpone. In regard to the matters discussed with my delegates, I wish to confirm and stress the following points:

1. Seizure and operational plan

Raytheon-Elsi had announced their intention to suspend activity in the Palermo plant since the month of March 1968, alleging purported union and economic reasons. As to the latter in particular they lamented that their repeated requests for participation by Italian public agencies had been turned down. During the period of their announcement to close the Raytheon-Elsi plant, they proceeded with a plan of mass dismissal of skilled personnel, and at the end of March they sent out several hundreds of letters terminating employment contracts.

The implementation of these decisions by Raytheon-Elsi generated lively reactions on the part of labour. The unions promoted a general solidarity strike; the company employees held protest manifestations and, among other things, occupied the factory and called to the attention of both city and national public opinion the extremely grave problem created by all the implications deriving from a final termination of all electronic activity in the Palermo area.

In this connection it is worth emphasizing that the Raytheon-Elsi plant represents a concrete reality in the economic life of our province and of the entire Sicilian Region. This reality consists in equipment, facilities, highly skilled labour, a management staff, domestic and foreign commercial relationships, all witnessing a social and economic potential of substantial bearing and no doubt irreplaceable in the framework of economic planning in Sicily.

Under these circumstances, therefore, Raytheon-Elsi's decisions sounded more like an extreme effort to exert pressure on the central and regional government organs to get the partnership requested rather than like an absolute need arising from an irreversible corporate situation.

Actually, the threat of a plant shutdown as well as the mass dismissal of personnel with all the consequent immediate and future social problems, the dreaded danger of the destruction and dismemberment of a company with an economic value composed not solely of corporate investments but also of the skill and co-operation of the personnel and relating human element, all roused the concern of the central and regional government organs at every level. This concern is proved by the detailed and frequent articles appearing in the local and national press to inform public opinion of the efforts made to preserve, also through State intervention, an electronic industry in Sicily, and particularly in Palermo, an area naturally preferable to any other industrial area because of the presence on the spot of a complete plant and skilled engineering and labour forces.

No attempts were neglected to discuss and negotiate at all levels with the Raytheon-Elsi representatives. However, no profitable results were obtained because of a rigid attitude assumed by these representatives, an attitude difficult to explain other than in the light of preconceived clearly speculative intentions. For these reasons it was necessary for the administrative authority to step in, in order to keep the situation from deteriorating in many ways, such as:

(a) a dismantlement of a productive activity highly affecting the economy of the city and the Region;

(b) a continuation of labour strikes likely to jeopardize also other productive sectors in the long run;

(c) a worsening of the state of tension of the company personnel, which was already perturbing public order and increasingly worrying the authorities because of surely foreseeable consequential actions in the immediate future.

The seizure order made necessary by the facts expounded above aimed and aims at safeguarding the economic interests of the public and the welfare of the Palermo labour community, without attempting in any way to prejudice Raytheon-Elsi. The purpose of the seizure is not to freeze an operation, but to use and preserve the work force and production facilities.

Therefore, an operational plant composed of different phases has been drawn up. After completion of the first phase consisting in the taking of an inventory and in the maintenance of equipment not operating for two months, a gradual resumption of activity is commencing both in the framework of existing contracts, provided they refer to economic and industrial operations, and in the framework of new relationships with domestic and foreign customers. The above activity is meant to represent a continuity of the company's economic operation and will subsequently be carried on by the company to be formed with the participation of IRI and ESPI under the auspices of the Sicilian Government. As a matter of fact, there are definite indications that foreign groups, with which negotiations are well under way, will very likely participate in this new company.

The solution already proposed to the Nato Hawk Management Office verbally, and now being submitted formally in writing, falls within the framework of the above report, which embodies the reasons that make the seizure legitimate and expound the goals that the seizure plans to achieve.

The contractual commitments already existing shall remain and be met by the seizure administration, which is perfectly in a position to do so as may be confirmed by the Military Agencies of the Ministry of Defence in charge of security and manufacturing. There seems to be a possibility, however, that Raytheon-Elsi may disregard the legal implications of the state of seizure and take actions to cancel the contracts and eventually to have them transferred to other foreign establishments of Raytheon Company or of third parties. Even assuming the feasibility of such an action (among other things it would conflict with the very interests of the company which, therefore, should be happy with the continuance of an industrial manufacturing activity) the contracts under reference or at least those that have not yet been completed, would have to be replaced by the Bureau with new contracts with different parties. Now, since most of the work under these contracts is performed, as known, with equipment belonging to the Nato Hawk organization, it would be uneconomical to dismantle this equipment and transfer it elsewhere. Also, it would take substantial time to train new personnel and start a new product line. The Hawk Department of the Palermo plant, on the other hand, has already acquired the highest degree of specialization in this field.

For these practical reasons it is deemed that the Palermo plant should be preferred, and the existing contracts should be transferred to the government seizing authority, which would also assume all relating responsibilities, since the said contracts *involve an industrial activity*, and the purpose of the seizure is the preservation of such activity.

2. Contracts in course

The enclosed chart (encl. 1) [1] summarizes the status of the contracts in existence. For each contract a delivery schedule for the near future is indicated. I wish to confirm that the production lines affecting the Hawk program have already resumed their activity, and that the delivery commitments indicated in the chart are based on this fact.

[1] Not reproduced.

3. Equipment, materials and personnel

With regard to the perplexities raised by you in the course of the meeting, I wish to point out the following:

(a) All the personnel connected with the program (executives, engineers, technicians, skilled workers) have returned to work and agreed to operate under the new administration. I am enclosing (encl. 2)[1] a notarized statement indicating the work force presently at the disposal of the seizing authority.

(b) The procurement of material needed to carry out the work planned does not present, for the time being, any difficulty as a result of the change in administration. All the materials required for the normal production cycle are in the company stores. Should any shortages occur in the future, no particular procurement problems are envisaged since the necessary materials are freely available on the market.

(c) All the material and equipment property of the O.P.L.O.H. as well as the classified documentation are in perfect order and condition under the surveillance of both the S.G.S. and the company security service, which have never ceased to operate.

I hope I have given you, dear General Mancini, all the necessary information to dispel your uneasiness concerning the continuity in the work and supply of the materials required by your organization.

Looking forward to hearing from you at your earliest convenience concerning the procedures to be followed to formalize the new relationships, I thank you for your kind attention and assistance.

(Signed) BEVILACQUA.

86. THE AGENT OF ITALY TO THE REGISTRAR

13 March 1989.

Pursuant to the invitation of the President of the Chamber of the International Court of Justice in the ELSI case, addressed to the Parties at the public sitting of 2 March last[2], I have the honour to transmit hereafter the comments of the Italian Government to the replies[3] given, on 27 February, by the American Government to the questions put by the Judges.

Our comments are as follows:

> "The answers given by the Applicant to questions from the Bench merely contain a statement of the Applicant's case as developed in the second round of pleadings. These answers, as well as the pleadings, present a series of assertions which either distort facts or are unsupported by evidence.
>
> As the essential aspects of the Applicant's case were considered by the Respondent in its rebuttal, a detailed consideration of each answer does not appear to be necessary at this stage of the proceedings.
>
> However, the Respondent would like to point out in particular two inaccuracies in the Applicant's replies.

* * * *

[1] Not provided.
[2] See pp. 371 and 383, *supra*.
[3] See pp. 449-456, *supra*.