I. In its response to the question from Judge Schwebel, the Applicant states that

'with the requisition in place, there was no opportunity to show the plant to prospective buyers after 1 April and no ability to negotiate any deals for the immediate disposition of the plant and assets'.

As exemplified by much of the material contained in the letter from the Mayor of Palermo to General Mancini of 9 May 1968 that was filed with the Court by Respondent in response to a question from Judge Schwebel, it was obviously quite possible for Raytheon to have explored various alternatives with him and there is no evidence to the contrary.

The requisition was issued to avoid the closure of the plant. The plant was kept open, operations were maintained to a certain extent and the premises could have been viewed by anyone showing an interest in doing so.

Moreover, it must be remembered that the Mayor had originally appointed ELSI's own director, Mr. Profumo, as manager of the requisitioned plant (Annex 34 to the Counter-Memorial).

* * * *

II. In its responses to questions from President Ruda, Applicant states that 'Raytheon and Machlett were committed to supplying necessary funds to accomplish the orderly liquidation', and that 'Raytheon would have increased its funding of the liquidation program to take care of any shortfall' in required severance pay.

Respondent's reply is once again that Applicant here appears itself to be stating a question of fact that is, unhappily, unsupported by any contemporaneous record or any document."

87. THE REGISTRAR TO THE AGENT OF ITALY

13 March 1989.

I have the honour to acknowledge receipt of Your Excellency's letter of 13 March 1989, setting out the comments of Italy on the replies given by the United States to questions put by Members of the Chamber during the oral proceedings in the case concerning *Elettronica Sicula S.p.A. (ELSI)*.

88. THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

13 March 1989.

During the last day of the oral proceedings[1] in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, the Court offered each party the opportunity to comment on the answers given by the other party to questions of the Judges during the final week. The United States does not agree with the conclusions of the Respondent in any of its answers, and accordingly submits the following comments. To

[1] See pp. 371 and 383, *supra*.

avoid repetition, these comments are limited to points not otherwise addressed in the oral or written pleadings, including our own answers to the same questions.

Questions from Judge Oda

A. For the reasons stated in our oral statements, the United States firmly disputes the Respondent's characterization of ELSI as insolvent at the time of the requisition order. (P. 306, *supra*.)

B.1. The Respondent's answer candidly admits that the ELSI plant was never re-opened following the requisition and that at best "production was very limited".

B.2. It is clear from the Respondent's answer that the Mayor, the regional government, and the national Government had no management plan for ELSI after the requisition. The United States disputes the Respondent's characterization of the requisition as an "emergency measure . . . triggered by the precipitous dismissal of 800 workers by ELSI". The dismissal of the workers was anything but precipitous. It followed a year-long effort by ELSI and its stockholders to persuade the Respondent to participate in and back ELSI on a commercial basis in order to continue ELSI as an employment base in the Mezzogiorno.

Questions from Judge Schwebel

A. The United States stands by its answer to the same question (pp. 454-455, *supra*). We strongly disagree, for the reasons stated in our written and oral pleadings, with the Respondent's assertions that the damage arising from its actions are limited to 5 per cent of the value of the property per year. See, e.g., pp. 115-121, *supra*.

B.1. The United States disputes the extent to which ELSI was the recipient of preferential low-interest loans. First, as the Respondent recognizes, Chase Manhattan Bank, a United States bank, extended a loan to ELSI at the rate of 5.5 per cent — the same rate as a loan by IRFIS and only slightly above loans from IRFIS and Banco di Sicilia. Second, the rates presented by the Respondent appear to be inappropriate for comparison purposes in view of the different factors affecting the determination of respective interest rates for long-term loans, as compared to interest on current accounts which are the highest rates imposed by banks on borrowers. The loans identified by the Respondent were long-term loans fully secured by ELSI's land and machinery, loans which typically carry lower interest rates than the commercial rates quoted by the Respondent. It is noteworthy that at the time these loans were issued ELSI's plant and machinery (characterized as virtually worthless by the Respondent) was found to be sufficiently valuable to secure the loans. Similarly, the proceeds realized by the sale of the land and buildings were sufficient to pay off these loans in full.

B.2-3. In determining the purposes of the requisition, the Respondent extracts two general clauses from the seventh paragraph of the Mayor's requisition order (I, Memorial, Annex 33) relating to the need to protect the "general economic public interest" and the "public order". This language obviously is simply a repetition of the requirements necessary to allow use of the Italian laws cited in paragraphs 8 and 9. In fact, the stated purposes of the requisition are quite clear from the preceding paragraphs. The Mayor essentially wanted to appease "a wide and general movement of solidarity of all public opinion", including press criticism and labor unrest, by avoiding a shut-down of the plant and further "unforeseeable" public disturbances.

Notwithstanding the Respondent's answer to the Court that these purposes were achieved, the Respondent's own administrative review of the requisition

shows that these purposes were not achieved. Certainly the purpose of avoiding a shut-down of the plant as of April 1968 was not achieved; the Prefect of Palermo concluded that "This is proved by the fact that the activity of the company was neither resumed, neither might it be resumed." (Memorial, Annex 76, I, p. 362.) Further, the Prefect found that labor unrest continued since "employees were staying [in the plant] to protest for the nonresumption of the activity and for dismissal of the whole personnel". (Memorial, Annex 76, I, p. 363.) As for the unforeseeable public disturbances, the Prefect found that "the events subsequent to the requisition have clearly demonstrated the inefficacy of the measure; this is proved by the fact that the parades and demonstrations of protest followed one another, creating also a situation of perturbation of the public order . . .". (Memorial, Annex 76, I, p. 363.) Further, the welfare of the ELSI workforce was not enhanced by the requisition. After the requisition, production was virtually non-existent and the workers remained unemployed. The sale of ELSI or its product lines as live businesses, by contrast, could have secured long-term employment for the workforce.

With regard to the desire to mitigate criticism by the public or local press, the Respondent apparently admits in its answer that if this were the sole reason for the requisition, then the requisition would be arbitrary. Yet in considering the pressure created by the local press, the Prefect ruled that the Mayor "issued the order of requisition as a measure mainly directed to emphasize his intent to face *the problem in some way*". (*Memorial, Annex 76, I, p. 363.*) *the United States* has shown that this motivation is arbitrary under the Treaty (Memorial, I, pp. 76-80). Further, unlawful government action undertaken without regard to individual rights mainly to mute public criticism (whether in the form of newspaper editorials or public demonstrations) is unjustifiable and arbitrary, and must be considered the antithesis and not the necessary consequence of a free society.

B.4. The Respondent states that the United States has provided an inaccurate and misleading translation of a significant phrase of the Prefect's ruling. The Respondent would translate "la causa giuridica" as "the proper motivation" rather than as "juridical cause". There can be no question that "la causa giuridica" translates as "juridical cause". Further, it is completely unacceptable for the Respondent to challenge at this late date the translation of a decision that was filed by the United States in its very first pleading. Not only did the Respondent never challenge this translation through two rounds of written pleadings, but the Respondent specifically discussed this phrase in English without an assertion that it was inaccurate. (Memorial, I, p. 88.) The Court should not accept the Respondent's sudden efforts at the close of these proceedings to cast aspersions on the translations provided by the United States (p. 463, *supra*) when the Respondent was fully capable of challenging these documents throughout the lengthy course of the written and oral proceedings, but failed to do so.

Moreover, whether the accurate translation of this phrase or the inaccurate translation proposed by the Respondent is used, it is a complete distortion of the obvious ruling by the Prefect to state that the Prefect simply found that the Mayor was "mistaken in his forecast as to the effect of his order". The Prefect clearly found that *the order* was without proper basis because the stated purpose of continuing operation of the plant was completely inapposite to the Mayor's subsequent action.

Ironically the Respondent argues that the requisition by itself was "in conformity with the applicable laws and regulations" because the Respondent could subsequently appeal to the Prefect, who, of course, eventually found that the requisition was unlawful. This argument is spurious. The requisition violated

Italian law the day it occurred, whether or not the Prefect so recognized 16 months later. Therefore the requisition was not "in conformity with applicable laws and regulations" of Italy. No provision within Article III (2) states that Article III (2) is only violated once the conduct of the Contracting Party is passed upon by that Party's administrative and judicial organs. A violation of Article III (2) takes effect (or "bites") immediately, and the fact that local administrative and judicial organs subsequently determine that the conduct was wrongful confirms the existence of — not avoids — a Treaty violation.

B.5. The Respondent asserts that it is "reasonable to assume" the public prosecutor did not criminally prosecute ELSI's management because the prosecutor had "wholly incomplete knowledge". This assumption is both wrong and irrelevant to the basic dispute before the Court. By filing a petition in bankruptcy ELSI submitted its books and its activities to the scrutiny of the court. Moreover, an excerpt of the bankruptcy judgment must be sent by the court to the public prosecutor to enable the prosecutor to undertake a criminal action, if appropriate, under Articles 17 and 238 of the Bankruptcy Law. In addition, under Article 33 of the Bankruptcy Law, the curator is required to submit to the court a report covering the responsibility of the debtor in the bankruptcy under criminal laws. If the court had any doubt about possible breaches of criminal law by ELSI's directors, these would have been reflected in criminal charges. (Pp. 302-303, *supra.*)

B.6. The Respondent's statement that the dismissal letter sent to the workers violated applicable laws and regulations is wrong. First, any laws and regulations that relate to the "collective dismissal" to which the Respondent refers are not applicable to a company in liquidation. A company in liquidation issues "individual dismissals" under Italian law to all employees. ELSI gave the notice required by law when it sent out letters to all affected employees at the end of March.

The collective labor agreement to which the Respondent refers did not have the effect of law. See Decree No. 8 of the Italian Constitutional Court (8 February 1966) (ruling that a predecessor labor agreement did not have the force of law, i.e., was not *erga omnes*). In addition to its strict compliance with Italian law governing dismissal of employees, ELSI also fulfilled the intent of the collective agreement. In the year preceding the requisition, ELSI management met periodically with the unions to inform them as to ELSI's future. (See Affidavit of Rico Merluzzzo, **I**, Memorial, Annex 21, paras. 15-16.) Union management and the workforce were specifically aware that if the Respondent did not participate in and back ELSI that Raytheon and Machlett liquidate ELSI's assets and discharge its employees. Thus, the workforce had a full year's notice of the liquidation of ELSI's assets.

Raytheon and Machlett put off the orderly liquidation and dismissal of workers for as long as possible to give the Respondent every opportunity to avert the orderly liquidation. In the dismissal notice, the workers were promised sufficient severance pay equivalent to the amount they would have received had they received longer notice of their dismissals. As we have previously shown, these promises were not "illusory" and were backed by firm commitments from Raytheon. (P. 306, *supra.*) In any event, the question of notice of dismissal is irrelevant to the basic dispute before the Court.

B.7. Neither Raytheon nor Machlett was aware of any continuation of work in the ELSI plant following the requisition. The Prefect of Palermo found that the activity of the company was not resumed. (Memorial, Annex 76, **I**, at p. 362.) However, even assuming the Respondent is correct that "very limited" production continued on the Nato Hawk line, this cannot be equated with resumption of

full production in the plant, employment of the dismissed workers, or any continuation of work on the other lines. Thus, the requisition did not result in keeping the plant open as the Respondent had earlier suggested. Following the requisition, the plant and machinery fell into disuse and deteriorated rapidly in value.

However, the letter submitted by the Respondent to support its position is noteworthy on several points. First, it belies the Respondent's prior assertions that the plant was valueless:

> "[T]he 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 . . ." (P. 469, *supra*.)

> "[The] company [has] . . . an economic value composed not solely of corporate investments but also of the skill and co-operation of the personnel and relating human element . . ." *(Ibid.)*

The letter belies the Respondent's prior assertions about the undesirability of the plant's location in Sicily:

> ". . . 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" *(ibid.)*.

The letter belies the Respondent's prior assertions that no one would invest in or purchase ELSI:

> "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." (P. 468, *supra*.)

The letter underscores the substantial value of the Nato Hawk line:

> "The Hawk Department of the Palermo plant . . . has already acquired the highest degree of specialization in this field." *(Ibid.)*

Questions from President Ruda

1. The United States stands by its answer to the same question (p. 455, *supra*) and offers the following comments on the Respondent's answer.

The United States strongly disputes the Respondent's assertion that "the company's books were not in order". The books were maintained through 24 April 1968 when the records were turned over to the trustee in bankruptcy. The books were properly closed and complete management reports were prepared for the months of October, November, and December 1967. The management report for January 1968 had been prepared in draft form in March 1968, consistent with the normal pattern of closing the books 30 to 60 days after the end of each operating period.

The United States has demonstrated that ELSI had no obligation to file a petition in bankruptcy under articles 5 or 6 of the Bankruptcy Law (a point conceded by the Respondent, II, Rejoinder, Annex 32). Further, ELSI's capital never fell below the statutory minimum established by article 2447 of the Italian Civil Code. Finally, ELSI's management was at no point in the situation contemplated by article 217 of the bankruptcy law. See pages 65-71, *supra*.

By contrast, ELSI's shareholders did have an entitlement as a matter of Italian law to liquidate ELSI's assets and pay ELSI's creditors. Proceeds from the sale

of ELSI's assets would have been sufficient to pay all creditors in full. Even if ELSI's liabilities had at any point exceeded its assets (a point we do not concede), ELSI's shareholders were entitled to proceed with the orderly liquidation under one of several alternatives identified by Professor Bonelli. (The Court should be aware that the Respondent's description of the *concordato preventivo* available under Italian law is incorrect; page 467, line 7, *supra*, should read "or" not "and".)

2. The United States stands by its answer to the same question (p. 456, *supra*) and offers the following comments on the Respondent's answer.

The United States strongly disputes the Respondent's implications that ELSI's books were not kept in accordance with principles of "truth" and "prudence". ELSI's books were in strict adherence with both Italian and US accounting principles. Thus, it is wrong for the Respondent to refer to the Column 3 values as "actual" and to imply that the Column 1 values were not.

From the earliest days of its control of ELSI, Raytheon instructed Fidital, its Italian auditors, to prepare its audit reports reflecting three columns:

Per Italian Books *Adjustments* *American Accounting Basis*

"Per Italian Books" represented the balances in conformance with Italian accounting regulations; US accounting principles are not mandatory or necessarily even acceptable in Italy. "American Accounting Basis" reflected Raytheon's reporting practices to its shareholders in conformance with US accounting principles.

The major adjustment annually to the Italian books was the write-off of all deferred charges. The deferred charges had been consistently carried on the Italian books without challenge by the auditors or others for many years. The only reason these charges were written off was that American accounting standards require all research, development and improvement costs to be written off as incurred. Their write-off for American accounting standards in no way suggests that the charges themselves are somehow suspect or not in accord with the actual value of ELSI's assets.

In complying with Italian Bankruptcy Law, ELSI's management was entitled to rely on the Italian books kept in accordance with Italian accounting regulations.

As a separate matter, Mr. Timothy Lawrence of Coopers & Lybrand has presented his analysis of the value that ELSI's assets would have realized had the stockholders been permitted to proceed with the orderly liquidation: that is, ELSI's tangible and intangible assets were worth at least 17,132.7 million lire. (Pp. 122-129, *supra*.)

89. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

14 March 1989.

I have the honour to acknowledge receipt of your letter of 13 March 1989, setting out the comments of the United States on the written replies by Italy to questions put by Members of the Chamber during the oral proceedings in the case concerning *Elettronica Sicula S.p.A. (ELSI)*. I have the honour further to transmit to you herewith a copy of the comments of Italy on the written replies of the United States to such questions.