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

Judgment of 20 July 1989

In its judgment, the Chamber of the Court formed to deal with the case concerning Elettronica Sicula S.p.A. (ELSI) rejected an Italian objection to the admissibility of the Application and found that Italy had not committed any of the breaches, alleged by the United States, of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Rome on 2 February 1989 or the Agreement Supplementing that Treaty. It accordingly rejected the claim to reparation made by the United States.

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The Chamber was composed as follows: *President* Ruda; *Judges* Oda, Ago, Schwebel and Sir Robert Jennings.

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The complete text of the *operative* clause of the Judgment is as follows:

"THE CHAMBER,

"(1) Unanimously,

"*Rejects* the objection presented by the Italian Republic to the admissibility of the Application filed in this case by the United States of America on 6 February 1987;

"(2) By four votes to one,

"*Finds* that the Italian Republic has not committed any of the breaches, alleged in the said Application, of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Rome on 2 February 1948, or of the Agreement Supplementing that Treaty signed by the Parties at Washington on 26 September 1951.

"IN FAVOUR: *President* Ruda; *Judges* Oda, Ago and Sir Robert Jennings.

"AGAINST: *Judge* Schwebel.

"(3) By four votes to one,

"*Rejects*, accordingly, the claim for reparation made against the Republic of Italy by the United States of America.

"IN FAVOUR: *President* Ruda; *Judges* Oda, Ago and Sir Robert Jennings.

"AGAINST: *Judge* Schwebel."

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Judge Oda appended a separate opinion and Judge Schwebel a dissenting opinion to the Judgment.

In these opinions the Judges concerned stated and explained the positions they adopted in regard to certain points dealt with in the Judgment.

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Proceedings and Submissions of the Parties
(paras. 1–12)

The Chamber begins by recapitulating the various stages of the proceedings, recalling that the present case concerns a dispute in which the United States of America claims that Italy, by its actions with respect to an Italian company, *Elettronica Sicula S.p.A. (ELSI)*, which was wholly owned by two United States corporations, the Raytheon Company ("Raytheon") and the Machlett Laboratories Incorporated ("Machlett"), has violated certain provisions of the Treaty of Friendship, Commerce and Navigation between the two Parties, concluded in Rome on 2 February 1948 ("the FCN Treaty") and the Supplementary Agreement thereto concluded on 26 September 1951.

Origins and development of the dispute
(paras. 13–45)

In 1967, Raytheon held 99.16% of the shares in ELSI, the remaining 0.84% being held by Machlett, which was a wholly owned subsidiary of Raytheon. ELSI was established in Palermo, Sicily, where it had a plant for the production of electronic components; in 1967 it had a workforce of slightly under 900 employees. Its five major product lines were microwave tubes, cathode-ray tubes, semiconductor rectifiers, X-ray tubes and surge arresters.

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From 1964 to 1966 ELSI made an operating profit, but this was insufficient to offset its debt expense or accumulated losses. In February 1967, according to the United States, Raytheon began taking steps to endeavour to make ELSI self-sufficient.

At the same time numerous meetings were held between February 1967 and March 1968 with Italian officials and companies, the purpose of which was stated to be to find for ELSI an Italian partner with economic power and influence and to explore the possibilities of other governmental support.

When it became apparent that these discussions were unlikely to lead to a mutually satisfactory arrangement, Raytheon and Machlett, as shareholders in ELSI, began seriously to plan to close and liquidate ELSI to minimize their losses. An asset analysis was prepared by the Chief Financial Officer of Raytheon showing the expected position on 31 March 1968. This showed the book value of ELSI's assets as 18,640 million lire; as explained in his affidavit filed in these proceedings, it also showed "the minimum prospects of recovery of values which we could be sure of, in order to ensure an orderly liquidation process", and the total realizable value of the assets on this basis (the "quick-sale value") was calculated to be 10,838.8 million lire. The total debt of the company at 30 September 1967 was 13,123.9 million lire. The "orderly liquidation" contemplated was an operation for the sale of ELSI's business or its assets, en bloc or separately, and the discharge of its debts, fully or otherwise, out of the proceeds, the whole operation being under the control of ELSI's own management. It was contemplated that all creditors would be paid in full, or, if only the "quick-sale value" was realized, the unsecured major creditors would receive about 50 per cent of their claims, and that this would be acceptable as more favourable than what could be expected in a bankruptcy.

On 28 March 1968, it was decided that the Company cease operations. Meetings with Italian officials however continued, at which the Italian authority rigorously pressed ELSI not to close the plant and not to dismiss the workforce. On 29 March 1968 letters of dismissal were mailed to the employees of ELSI.

On 1 April 1968 the Mayor of Palermo issued an order, effective immediately, requisitioning ELSI's plant and related assets for a period of six months.

The Parties disagree over whether, immediately prior to the requisition order, there had been any occupation of ELSI's plant by the employees, but it is common ground that the plant was so occupied during the period immediately following the requisition.

On 19 April 1968 ELSI brought an administrative appeal against the requisition to the Prefect of Palermo.

A bankruptcy petition was filed by ELSI on 26 April 1968, referring to the requisition as the reason why the company had lost control of the plant and could not avail itself of an immediate source of liquid funds, and mentioning payments which had become due and could not be met. A decree of bankruptcy was issued by the *Tribunale di Palermo* on 16 May 1968.

The administrative appeal filed by ELSI against the requisition order was determined by the Prefect of Palermo by a decision given on 22 August 1969, by which he annulled the requisition order. The Parties are at issue on the question whether this period of time was or was not normal for an appeal of this character.

In the meantime, on 16 June 1970 the trustee in bankruptcy had brought proceedings in the Court of Palermo against the Minister of the Interior of Italy and the Mayor of Palermo for damages resulting from the requisition. The Court of Appeal of Palermo awarded damages for loss of use of the plant during the period of the requisition.

The bankruptcy proceedings closed in November 1985. Of the amount realized, no surplus remained for distribution to the shareholders, Raytheon and Machlett.

I. *Jurisdiction of the Court and Admissibility of the Application; Rule of Exhaustion of Local Remedies* (paras 48–63)

An objection to the admissibility of the present case was entered by Italy in its Counter-Memorial, on the ground of an alleged failure of the two United States corporations, Raytheon and Machlett, on whose behalf the United States claim is brought, to exhaust the local remedies available to them in Italy. The Parties agreed that this objection be heard and determined in the framework of the merits.

The United States questioned whether the rule of the exhaustion of local remedies could apply at all, as Article XXVI (the jurisdictional clause) of the FCN Treaty is categorical in its terms, and unqualified by any reference to the local remedies rule. It also argued that in so far as its claim is for a declaratory judgment of a direct injury to the United States by infringement of its rights under the FCN Treaty, independent of the dispute over the alleged violation in respect of Raytheon and Machlett, the local remedies rule is inapplicable. The Chamber rejects these arguments. The United States also observed that at no time until the filing of the Respondent's Counter-Memorial in the present proceedings did Italy suggest that Raytheon and Machlett should sue in the Italian courts on the basis of the Treaty, and argued that this amounts to an estoppel. The Chamber however found that there are difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges.

On the question whether local remedies were, or were not, exhausted by Raytheon and Machlett, the Chamber notes that the damage claimed in this case to have been caused to Raytheon and Machlett is said to have resulted from the "losses incurred by ELSI's owners as a result of the involuntary change in the manner of disposing of ELSI's assets": and it is the requisition order that is said to have caused this change, and which is therefore at the core of the United States complaint. It was therefore right that local remedies be pursued by ELSI itself.

After examining the action taken by ELSI in its appeal against the requisition order and, later, by the trustee in bankruptcy, who claimed damages for the requisition, the Chamber considers that the municipal courts had been fully seized of the matter which is the substance of the Applicant's claim before the Chamber. Italy however contended that it was possible to cite the provision of the treaties themselves before the municipal courts, in conjunction with Article 2043 of the Italian Civil Code, which was never done.

After examining the jurisprudence cited by Italy, the Chamber concludes that it is impossible to deduce what the attitude of the Italian courts would have been if such a claim had been brought. Since it was for Italy to show the existence of a local remedy, and as Italy has not been able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of ELSI, and of ELSI's trustee in bankruptcy, ought to have pursued and exhausted, the Chamber rejects the objection of non-exhaustion of local remedies.

II. *Alleged Breaches of the Treaty of Friendship, Commerce and Navigation and its Supplementary Agreement*
(paras. 64–67)

Paragraph 1 of the United States Final Submissions claims 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 . . ."

The acts of the Respondent which are alleged to violate its treaty obligations were described by the Applicant's counsel in terms which it is convenient to cite here:

"First, the Respondent violated its legal obligations when it unlawfully requisitioned the ELSI plant on 1 April 1968 which denied the ELSI stockholders their direct right to liquidate the ELSI assets in an orderly fashion. Second, the Respondent violated its obligations when it allowed ELSI workers to occupy the plant. Third, the Respondent violated its obligations when it unreasonably delayed ruling on the lawfulness of the requisition for 16 months until immediately after the ELSI plant, equipment and work-in-process had all been acquired by ELTEL. Fourth and finally, the Respondent violated its obligations when it interfered with the ELSI bankruptcy proceedings, which allowed the Respondent to realize its previously expressed intention of acquiring ELSI for a price far less than its fair market value."

The most important of these acts of the Respondent which the Applicant claims to have been in violation of the FCN Treaty is the requisition of the ELSI plant by the Mayor of Palermo on 1 April 1968, which is claimed to have frustrated the plan for what the Applicant terms an "orderly liquidation" of the company. It is fair to describe the other impugned acts of the Respondent as ancillary to this core claim based on the requisition and its effects.

A. *Article III of FCN Treaty*
(paras. 68–101)

The allegation by the United States of a violation of Article III of the FCN Treaty by Italy relates to the first sentence of the second paragraph, which provides:

"The nationals, corporations and associations of either High Contracting Party shall be permitted, in conformity with the applicable laws and regulations within the territories of the other High Contracting Party, to organize, control and manage corporations and associations of such other High Contracting Party for engaging in commercial, manufacturing, processing, mining, educational, philanthropic, religious and scientific activities."

In terms of the present case, the effect of this sentence is that Raytheon and Machlett are to be permitted, in conformity with the applicable laws and regulations within the territory of Italy, to organize, control and manage ELSI. The claim of the United States focuses on the right to "control and manage". The Chamber considers whether there is a violation of this Article if, as the United States alleges, the requisition had the effect of depriving ELSI of both the right and practical possibility of selling off its plant and assets for satisfaction of its liabilities to its creditors and satisfaction of its shareholders.

A requisition of this kind must normally amount to a deprivation, at least in important part, of the right to control and manage. The reference in Article III to conformity with "the applicable laws and regulations" cannot mean that, if an act is in conformity with the municipal law and regulations (as, according to Italy, the requisition was), that would of itself exclude any possibility that it was an act in breach of the FCN Treaty. Compliance with municipal law and compliance with the provisions of a treaty are different questions.

The treaty right to be permitted to control and manage cannot be interpreted as a warranty that the normal exercise of control and management shall never be disturbed; every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like.

The requisition was found both by the Prefect and by the Court of Appeal of Palermo not to have been justified in the applicable local law; if therefore, as seems to be the case, it deprived Raytheon and Machlett of what were at the moment their most crucial rights to control and manage, it might appear prima facie a violation of Article III, paragraph 2.

According to the Respondent, however, Raytheon and Machlett were, because of ELSI's financial position, already naked of those very rights of control and management of which they claim to have been deprived. The Chamber has therefore to consider what effect, if any, the financial position of ELSI may have had in that respect, first as a practical matter, and then also as a question of Italian law.

The essence of the Applicant's claim has been throughout that Raytheon and Machlett, which controlled ELSI, were by the requisition deprived of the right, and of the practical possibility, of conducting an orderly liquidation of ELSI's assets, the plan for which liquidation was however very much bound up with the financial state of ELSI.

After noting that the orderly liquidation was an alternative to the aim of keeping the place going, and that it was hoped that the threat of closure might bring pressure to bear on the Italian authorities, and that the Italian authorities did not come to the rescue on acceptable terms, the Chamber observes that the crucial question is whether Raytheon, on the eve of the requisition, and after the closure of the plant and the dismissal, on 29 March 1968, of the majority of the employees, was in a position to carry out its orderly liquidation plan, even apart from its alleged frustration by the requisition.

The successful implementation of a plan of orderly liquidation would have depended upon a number of factors not under the control of ELSI's management. Evidence has been produced by the Applicant that Raytheon was prepared to supply cash flow and other assistance necessary to effect the orderly liquidation, and the Chamber sees no reason to question that Raytheon had entered or was ready to enter into such a commitment; but other factors give rise to some doubt.

After considering these other factors governing the matter—the preparedness of creditors to co-operate in an orderly liquidation, especially in case of inequality among them, the likelihood of the sale of the assets realizing enough to pay all creditors in full, the claims of the dismissed employees, the difficulty of obtaining the best price for assets sold with a minimum delay, in view of the trouble likely at the plant when the closure plans became known, and the attitude of the Sicilian administration—the Chamber concludes that all these factors point toward a conclusion that the feasibility at 31 March 1968 of a plan of orderly liquidation, an essential link in the chain of reasoning upon which the United States claim rests, has not been sufficiently established.

Finally there was, beside the practicalities, the position in Italian bankruptcy law. If ELSI was in a state of legal insol-

vency at 31 March 1968, and if, as contended by Italy, a state of insolvency entailed an obligation on the company to petition for its own bankruptcy, then the relevant rights of control and management would not have existed to be protected by the FCN Treaty. While not essential to the Chamber's conclusion stated above, an assessment of ELSI's solvency as a matter of Italian law is thus highly material.

After considering the decision of the Prefect and the judgments of the courts of Palermo, the Chamber observes that whether their findings are to be regarded as determinations as a matter of Italian law that ELSI was insolvent on 31 March 1968, or as findings that the financial position of ELSI on that date was so desperate that it was past saving, makes no difference; they reinforce the conclusion that the feasibility of an orderly liquidation is not sufficiently established.

If, therefore, the management of ELSI, at the material time, had no practical possibility of carrying out successfully a scheme of orderly liquidation under its own management, and may indeed already have forfeited any right to do so under Italian law, it cannot be said that it was the requisition that deprived it of this faculty of control and management. There were several causes acting together that led to the disaster to ELSI, of which the effects of the requisition might no doubt have been one. The possibility of orderly liquidation is purely a matter of speculation. The Chamber is therefore unable to see here anything which can be said to amount to a violation by Italy of Article III, paragraph 2, of the FCN Treaty.

B. *Article V, paragraphs 1 and 3, of FCN Treaty* (paras. 102–112)

The Applicant's claim under paragraphs 1 and 3 of Article V of the FCN Treaty is concerned with protection and security of nationals and their property.

Paragraph 1 of Article V provides for "the most constant protection and security" for nationals of each High Contracting Party, both "for their persons and property"; and also that, in relation to property, the term "nationals" shall be construed to "include corporations and associations"; and in defining the nature of the protection, the required standard is established by a reference to "the full protection and security required by international law". Paragraph 3 elaborates this notion of protection and security further, by requiring no less than the standard accorded to the nationals, corporations and associations of the other High Contracting Party; and no less than that accorded to the nationals, corporations and associations of any third country. There are, accordingly, three different standards of protection, all of which have to be satisfied.

A breach of these provisions is seen by the Applicant to have been committed when the Respondent "allowed ELSI workers to occupy the plant". While noting the contention of Italy that the relevant "property", the plant in Palermo, belonged not to Raytheon and Machlett but to the Italian company ELSI, the Chamber examines the matter on the basis of the United States argument that the "property" to be protected was ELSI itself.

The reference in Article V to the provision of "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. In any event, considering that it is not established that any deterioration in the plant and machinery was due to the presence of the workers, and that the authorities were able not merely to protect the plant but even in some measure to continue production, the protection provided by the authorities could not be regarded as falling below "the full protection and security required by international law"; or indeed as less than the national or third-State standards. The mere fact that the occupation was referred to by the Court of Appeal of Palermo as unlawful does not, in the Chamber's view, necessarily mean that the protection afforded fell short of the national standard to which the FCN Treaty refers. The essential question is whether the local law, either in its terms or in its application, has treated United States nationals less well than Italian nationals. This, in the opinion of the Chamber, has not been shown. The Chamber must, therefore, reject the charge of any violation of Article V, paragraphs 1 and 3.

The Applicant sees a further breach of Article V, paragraphs 1 and 3, of the FCN Treaty, in the time taken—16 months—before the Prefect ruled on ELSI's administrative appeal against the Mayor's requisition order. For the reasons already explained in connection with Article III, the Chamber rejects the contention that, had there been a speedy decision by the Prefect, the bankruptcy might have been avoided.

With regard to the alternative contention that Italy was obliged to protect ELSI from the deleterious effects of the requisition, *inter alia* by providing an adequate method of overturning it, the Chamber observes that under Article V the "full protection and security" must conform to the minimum international standard, supplemented by the criteria of national treatment and most-favoured-nation treatment. It must be doubted whether in all the circumstances, the delay in the Prefect's ruling can be regarded as falling below the minimum international standard. As regards the contention of failure to accord a national standard of protection, the Chamber, though not entirely convinced by the Respondent's contention that such a lengthy delay as in ELSI's case was quite usual, is nevertheless not satisfied that a "national standard" of more rapid determination of administrative appeals has been shown to have existed. It is therefore unable to see in this delay a violation of paragraphs 1 and 3 of Article V of the FCN Treaty.

C. *Article V, paragraph 2, of FCN Treaty* (paras 113–119)

The first sentence of Article V, paragraph 2, of the FCN Treaty provides as follows:

> "2. The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation."

The Chamber notes a difference in terminology between the two authentic texts (English and Italian); the word "taking" is wider and looser than "espropriazione".

In the contention of the United States, first, both the Respondent's act of requisitioning the ELSI plant and its subsequent acts in acquiring the plant, assets, and work-in-progress, singly and in combination, constitute takings of property without due process of law and just compensation. Secondly, the United States claims that, by interference with the bankruptcy proceedings, the Respondent proceeded through the ELTEL company to acquire the ELSI plant and assets for less than fair market value.

The Chamber observes that the charge based on the combination of the requisition and subsequent acts is really that the requisition was the beginning of a process that led to the acquisition of the bulk of the assets of ELSI for far less than market value. What is thus alleged by the Applicant, if not an overt expropriation, might be regarded as a disguised expro-

priation; because, at the end of the process, it is indeed title to property itself that is at stake. The United States had, however, during the oral proceedings, disavowed any allegation that the Italian authorities were parties to a conspiracy to bring about the change of ownership.

Assuming, though without deciding, that "espropriazione" might be wide enough to include a disguised expropriation, account has further to be taken of the Protocol appended to the FCN Treaty, extending Article V, paragraph 2, to "interests held directly or indirectly by nationals" of the Parties.

The Chamber finds that it is not possible in this connection to ignore ELSI's financial situation and the consequent decision to close the plant and put an end to the company's activities. It cannot regard any of the acts complained of which occurred subsequent to the bankruptcy as breaches of Article V, paragraph 2, in the absence of any evidence of collusion, which is now no longer even alleged. Even if it were possible to see the requisition as having been designed to bring about bankruptcy, as a step towards disguised expropriation, then, if ELSI was already under an obligation to file a petition of bankruptcy, or in such a financial state that such a petition could not be long delayed, the requisition was an act of supererogation. Furthermore this requisition, independently of the motives which allegedly inspired it, being by its terms for a limited period, and liable to be overturned by administrative appeal, could not, in the Chamber's view, amount to a "taking" contrary to Article V unless it constituted a significant deprivation of Raytheon and Machlett's interest in ELSI's plant; as might have been the case if, while ELSI remained solvent, the requisition had been extended and the hearing of the administrative appeal delayed. In fact the bankruptcy of ELSI transformed the situation less than a month after the requisition. The requisition could therefore only be regarded as significant for this purpose if it caused or triggered the bankruptcy. This is precisely the proposition which is irreconcilable with the findings of the municipal courts, and with the Chamber's conclusions above.

D. *Article I of Supplementary Agreement to FCN Treaty* (paras. 120–130)

Article I of the Supplementary Agreement to the FCN Treaty, which confers rights not qualified by national or most-favoured-nation standards, provides as follows:

> "The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: (*a*) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, (*b*) impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise. Each High Contracting Party undertakes not to discriminate against nationals, corporations and associations of the other High Contracting Party as to their obtaining under normal terms the capital, manufacturing processes, skills and technology which may be needed for economic development."

The answer to the Applicant's claim that the requisition was an arbitrary or discriminatory act which violated both the "(*a*)" and the "(*b*)" clauses of the Article is the absence of a sufficiently palpable connection between the effects of the requisition and the failure of ELSI to carry out its planned orderly liquidation. However, the Chamber considers that the effect of the word "particularly", introducing the clauses "(*a*)" and "(*b*)", suggests that the prohibition of arbitrary (and discriminatory) acts is not confined to those resulting in the situations described in "(*a*)" and "(*b*)", but is in effect a prohibition of such acts whether or not they produce such results. It is necessary, therefore, to examine whether the requisition was, or was not, an arbitrary or discriminatory act of itself.

The United States claims that there was "discrimination" in favour of IRI, an entity controlled by Italy; there is, however, no sufficient evidence before the Chamber to support the suggestion that there was a plan to favour IRI at the expense of ELSI, and the claim of "discriminatory measures" in the sense of the Supplementary Agreement must therefore be rejected.

In order to show that the requisition order was an "arbitrary" act in the sense of the Supplementary Agreement, the Applicant has relied (*inter alia*) upon the status of that order in Italian law. It contends that the requisition "was precisely the sort of arbitrary action which was prohibited" by Article I of the Supplementary Agreement, in that "Under both the Treaty and Italian law, the requisition was unreasonable and improperly motivated"; it was "found to be illegal under Italian domestic law for precisely this reason".

Though examining the decisions of the Prefect of Palermo and the Court of Appeal of Palermo, the Chamber observes that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law. By itself, and without more, unlawfulness cannot be said to amount to arbitrariness. The qualification given to an act by a municipal authority (e.g., as unjustified, or unreasonable or arbitrary) may be a valuable indication, but it does not follow that the act is necessarily to be classed as arbitrary in international law.

Neither the grounds given by the Prefect for annulling the requisition, nor the analysis by the Court of Appeal of Palermo of the Prefect's decision as a finding that the Mayor's requisition was an excess of power, with the result that the order was subject to a defect of lawfulness, signify, in the Chamber's view, necessarily and in itself any view by the Prefect, or by the Court of Appeal of Palermo, that the Mayor's act was unreasonable or arbitrary. Arbitrariness is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light. Independently of the findings of the Prefect or of the local courts, the Chamber considers that it cannot be said to have been unreasonable or merely capricious for the Mayor to seek to use his powers in an attempt to do something about the situation in Palermo at the moment of the requisition. The Mayor's order was consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and the local courts. These are not at all the marks of an "arbitrary" act. Accordingly, there was no violation of Article I of the Supplementary Agreement.

E. *Article VII of FCN Treaty* (paras 131–135)

Article VII of the FCN Treaty, in four paragraphs, is principally concerned with ensuring the right "to acquire, own and dispose of immovable property or interests therein [in the

Italian text, *"beni immobili o . . . altri diritti reali"*] within the territories of the other High Contracting Party".

The Chamber notes the controversy between the Parties turning on the difference in meaning between the English, "interests", and the Italian, *"diritti reali"*, and the problems arising out of the qualification, by the Treaty, of the group of rights conferred by this Article, laying down alternative standards, and subject to a proviso. The Chamber considers, however, that, for the application of this Article, there remains precisely the same difficulty as in trying to apply Article III, paragraph 2, of the FCN Treaty: what really deprived Raytheon and Machlett, as shareholders, of their right to dispose of ELSI's real property, was not the requisition but the precarious financial state of ELSI, ultimately leading inescapably to bankruptcy. In bankruptcy the right to dispose of the property of a corporation no longer belongs even to the company, but to the trustee acting for it; and the Chamber has already decided that ELSI was on a course to bankruptcy even before the requisition. The Chamber therefore does not find that Article VII of the FCN Treaty has been violated.

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Having found that the Respondent has not violated the FCN Treaty in the manner asserted by the Applicant, it follows that the Chamber rejects also the claim for reparation made in the Submissions of the Applicant.

SUMMARY OF OPINIONS APPENDED TO THE JUDGMENT OF THE COURT

Separate Opinion of Judge Oda

Judge Oda, in his separate opinion, agrees with the operative findings of the Judgment. He notes, however, that, in initiating the proceedings, the United States espoused the cause of its nationals (Raytheon and Machlett) as shareholders in an Italian company (ELSI), whereas, as the Court itself determined in the *Barcelona Traction* Judgment of 1970, the rights of shareholders as such lie beyond the reach of diplomatic protection under general international law.

In Judge Oda's view, the 1948 FCN Treaty was intended neither to alter the shareholders' status nor to augment the shareholders' rights in any way. The provisions in the FCN Treaty upon which the Applicant relied, and which are extensively addressed in the Judgment, were not intended to protect the rights of Raytheon and Machlett as shareholders of ELSI.

The 1948 FCN Treaty, like similar FCN treaties to which the United States is a party, enables one State party to espouse the cause of a company of the other State party in an action against the latter when the company in question is controlled by nationals of the party bringing the action. The United States could thus have brought an action for breach of certain provisions of the 1948 Treaty which entitled it to defend an Italian company (ELSI) in which its nationals (Raytheon and Machlett) possessed a controlling interest.

Yet the Applicant had not relied on those provisions, and the Chamber in its Judgment had made scarcely any reference to them. Even if the proceedings had been brought as an espousal of ELSI's cause, the Applicant, in Judge Oda's view, would still have had to prove a denial of justice. This it had failed to do.

Dissenting Opinion of Judge Schwebel

Judge Schwebel agreed with the Judgment in what he termed two paramount respects which have important implications for the vitality and growth of international law.

First, the Judgment applies a rule of reason in its interpretation of the reach of the requirement of the exhaustion of local remedies. It holds not that every possible local remedy must have been exhausted to satisfy the local remedies rule but that, where in substance local remedies have been exhausted, that suffices to meet the requirements of the rule even if it may be that a variation on the pursuit of local remedies was not played out. This holding thus confines certain prior constructions of the rule to a sensible limit.

Second, the Judgment largely construes the FCN Treaty in ways which sustain rather than constrain it as an instrument for the protection of the rights of nationals and corporations of the United States and Italy. The Chamber declined to accept a variety of arguments pressed upon it which, if accepted, would have deprived the Treaty of much of its value. In particular, the Chamber declined to hold that ELSI, an Italian corporation whose shares were owned by United States corporations, was outside the scope of protection afforded by the Treaty. The claims of the United States in the case were not sustained, but that was not because the Chamber found against the United States on the law of the Treaty; it found against the United States on the practical and legal significance to be attached to the facts of the case.

The Treaty and its Supplementary Agreement were to be interpreted as a unit, since the Agreement was specified to be "an integral part" of the Treaty. Because the United States and Italy advanced conflicting interpretations of the Treaty which demonstrated that certain of its provisions were ambiguous, this was a case in which recourse to the preparatory work and circumstances of the Treaty's conclusion were in order. It was the fact that Italy had requested negotiation of the Supplementary Agreement to meet the ascertained needs of U.S. investors for investment in Italy. Italian parliamentary proceedings in ratification of the Treaty and Supplement demonstrate that it was the intent of the Parties to give investors "guarantees against political risks" and "freedom to manage the companies" which investors established or procured in implementation of "the principles of equitable treatment" which are stated to be set forth in the Treaty. In the entire, detailed record of ratification, there is no trace of support for the interpretation that the manifold treaty rights granted investors were conditioned upon investment being made in a corporation of the investor's nationality.

The requisition deprived Raytheon of its Treaty right to control and manage and hence liquidate ELSI

The Chamber's cardinal conclusion in the case is that, because of the practicalities of ELSI's financial situation and the legalities of Italian bankruptcy practice, Raytheon was no longer able, as of the date of the requisition, to control and manage—and hence liquidate—ELSI and thus could not have been deprived by the requisition of its Treaty right to do so. In Judge Schwebel's view, that conclusion was incorrect for the following reasons.

First, ELSI had been advised in March 1968, on financial and legal grounds, that it was entitled to liquidate its assets, in a process to be managed by ELSI.

Second, as of the day of the requisition, no legal or practical steps had been taken in any quarter to place ELSI in, or force ELSI into, bankruptcy.

Third, in the weeks and days preceding, and following, the requisition, the most senior officials of Sicily and the Italian Government, while graphically informed of ELSI's precarious financial condition, pressed ELSI not to close the plant, not to dismiss the workforce, and most particularly not to go into bankruptcy, but rather to take measures in concert with the Italian public and private sectors to keep open or reopen the plant and carry out liquidation over a period of time. The Prime Minister of Italy and the President of Sicily and their associates presumably acted, and must be presumed to have acted, in accordance with the law of Italy. Thus whether in this case Italian or United States counsel are correct in their differing interpretations of Italian bankruptcy law, it is clear that the "living law" of Italy as of the time of the requisition was inconsistent with Italy's current plea and the Chamber's acceptance of it. Italy in 1989 should not be heard to maintain the opposite of what it maintained in 1968.

Fourth, the Chamber's cardinal conclusion is not fully consistent with the holding of the Court of Appeal of Palermo on which the Judgment relies. That Court concluded that ELSI's bankruptcy was caused not by the requisition but by its prior state of insolvency. But it neither concluded nor implied that such insolvency dissolved existing rights of management and control of ELSI. It rather awarded damages "derivable from the operational unavailability" of the plant as the result of what it found to be an "unlawful" requisition order. Thus the Court imported that ELSI continued as of the date of the requisition and thereafter to have possessory rights in ELSI even though it had been insolvent before that date.

Fifth, Italy's experts differed among themselves as to whether ELSI was insolvent as of the time of the requisition.

Sixth, and most important, the question of whether ELSI was insolvent as of 1 April 1968 essentially depended on the policy of Raytheon, whose resources were ample. The Chamber accepts that Raytheon had transferred fresh capital to pay small creditors; that Raytheon was ready to purchase ELSI's large accounts receivable at 100 per cent of value; and that Raytheon was prepared to advance sufficient cash-flow funds to enable ELSI to engage in an orderly liquidation. Why then does it accept the inconsistent conclusion that, as of the time of the requisition, ELSI was insolvent or, if not, was in any event fast slipping into bankruptcy? If the requisition had not intervened, and if ELSI's immediate cash-flow requirements had been met by Raytheon, thus buying time in order to sell assets, can it really be held that ELSI would have been forced into bankruptcy, at any rate *when* it was? Even if bankruptcy had eventually come, such a later date would have enabled Raytheon materially to reduce its losses relative to those which actually were incurred. Moreover, if the requisition had not intervened, it would have been in the interest of the Italian banks to have settled their claims against ELSI for 40 or 50 per cent of value.

An orderly liquidation, Judge Schwebel acknowledged, would have been beset by uncertainties, but they go not so much to ELSI's ability and entitlement to liquidate its assets as to the calculability of damages which may be found to flow from denial of that right.

The conclusion that by imposition of the requisition Italy violated a viable right of Raytheon to control and manage ELSI is the more compelling in the light of the meaning of the Treaty which the processes of its ratification elucidate. It was not consistent with investors' "unobstructed control" of companies they "procured", with the Treaty's "guaranty against political risks", and with the "principles of equitable treatment" which the Treaty was designed to ensure.

The requisition was an arbitrary measure which violated the Treaty

The Chamber's conclusion that the requisition of ELSI's plant and equipment was not an arbitrary measure in breach of the Treaty is based on three holdings, which Judge Schwebel saw as unfounded: first, that the Palermo Prefect and Court of Appeal did not find the requisition to be arbitrary; second, that in international law the requisition was neither unreasonable nor capricious; and third, that in any event the Italian processes of appeal and redress to which the requisition order was subject ultimately ensured that the order was not arbitrary.

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

The Prefect held that the Mayor, in issuing the requisition order, relied on provisions of law which, in conditions of grave public necessity and unforeseen urgency, entitle the Mayor to requisition private property; but in this case, the Prefect found, these conditions were present "from the purely theoretical standpoint", a finding which appears to mean that they were not actually present. The Prefect's decision indicates that in fact those conditions were not present since the Prefect's decision concludes that (*a*) the order of requisition could not restore ELSI's plant to operation or solve the company's problems; (*b*) the order in fact did not; (*c*) the plant remained closed and occupied by former employees and (*d*) public order was in any event disturbed by the plant's closure: in short, that the requisition order proved unjustified on all counts. The Prefect's holding that, since the requisition order was incapable of achieving its purported purposes, it lacked the juridical cause which might justify it, is not far from stating that the requisition was ill-motivated and hence unreasonable or even capricious.

Moreover, the Prefect held that the order by its terms showed that the Mayor issued the order to show his intent to intervene "in one way or another", as a step "aimed more than anything else at bringing out his intention to tackle the problem just the same". The Prefect there referred to the provision of the Mayor's order stating that "the local press is taking a great interest in the situation . . . being very critical toward the authorities and is accusing them of indifference to this serious civic problem . . .". The Court of Appeal of Palermo characterized that holding of the Prefect as "severe" and as "showing a typical case of excess of power" on the part of the Mayor—i.e., a classic arbitrary act. Moreover, the Court of Appeal taxed the Mayor with compounding the "unlawful" requisition by failing to pay the indemnity for requisition for which the order itself provided—a failure which is at odds with the due process which is antithetical to an arbitrary act.

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

What is unreasonable or capricious in international law, while having a sense in customary international law, has no invariable, plain meaning, but can be appreciated only in the particular context of the facts of a case. In this case, the order of requisition as motivated, issued and implemented was arbitrary since:

—the legal bases on which the Mayor's order relied were justified only in theory;

—the order was incapable of achieving, and did not achieve, its purported purposes;

—the order "also" was issued "mainly" to appease public criticism rather than on its merits, a "typical case of excess of power";

—the order violated its own terms by failing to pay an indemnity for the requisition;

—a paramount purpose of the requisition order was to prevent ELSI's liquidation and possible dispersal of its assets, a purpose pursued without regard to Treaty obligations of contrary tenor (despite Italy's contention that these obligations were binding internally).

(iii) *The process of appeal did not render the measure non-arbitrary*

Italy's objective processes of administrative and judicial review of the requisition order might be argued to have ensured, by their existence and application, that the requisition, even if initially arbitrary, ultimately was not, thus absolving Italy of any consummated breach of international responsibility.

However, as the Draft Articles on State Responsibility of the United Nations International Law Commission put it:

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

That fits this case, for Italy did not provide ELSI or its representative with "full and complete compensation" (as the ILC requires) for what otherwise was the arbitrary act of requisition. The requisition order was annulled by the Prefect, but 16 months after it was promulgated, by which time ELSI had suffered irreparable damage as a result of it. The Court of Palermo awarded minimal damages for the requisition, which, however, took no account of principal elements of ELSI's actual losses. It accordingly follows that ELSI was not placed in the position it would have been in had there been no requisition, or in an equivalent position. For that reason, Italian administrative and judicial processes, however estimable, did not absolve Italy of having committed an arbitrary act within the meaning of the Treaty.
