80. THE CO-AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

27 February 1989.

Pursuant to Article 56 of the Rules of the Court, the United States submits the attached document[1] so that it may be referred to by Mr. Lawrence this afternoon at the hearing in the case concerning *Elettronica Sicula S.p.A. (ELSI)*. The document is a set of 19 pages comprising a list of the accounts receivable from customers of ELSI at 22 April 1968. The English translation of the title appearing on the first page is: "List of Customers and their Respective Amounts Due as of 22 April 1968."

I certify that the attached constitutes a true copy of a document adduced in support of the contentions contained in the US pleadings.

Copies of this document have been provided to the Respondent.

81. THE CO-AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

27 February 1989

Enclosed are the written answers to the questions posed by the Court to the United States this morning and on 23 February in the case concerning *Elettronica Sicula S.p.A. (ELSI)*.

Enclosure: As stated.

Applicant's Answers to Questions of 27 February 1989

Question of Judge Schwebel[2]

In the process of the exhaustion of local remedies, did ELSI rely on the Treaty and Supplement at any point? If not, why not? And, in so far as this is within the knowledge of the Applicant, did the trustee in bankruptcy, in his legal actions, invoke the Treaty and Supplement? If, as far as can be ascertained, the Treaty and Supplement were not invoked before Italian jurisdictions, what follows, if anything?

Question of Judge Oda[3]

. . . I would like to add just a supplementary question to the United States for clarification. The question is whether the attorney of Raytheon-ELSI, before the District Court of Palermo in 1969, the Court of Appeals of Palermo in 1973, and

[1] Not reproduced.
[2] See p. 291, *supra*.
[3] See p. 312, *supra*.

the Supreme Court of Appeals in 1974, did not refer to the FCN Treaty deliberately in the belief that the FCN Treaty, as a non-self-executing treaty, should not have been mentioned or relied upon before the Italian domestic courts, or on the contrary, simply he was not aware that international law, or more particularly the FCN Treaty, might have been relevant.

Answer

Once declared bankrupt on 7 May 1968, ELSI was incapable of bringing *any* lawsuits in Italian courts. Consequently, when the Prefect ruled in 1969 that the requisition was unlawful, ELSI was incapable of suing the Respondent for compensation on the basis of the FCN Treaty or the Supplement.

The trustee in bankruptcy, however, acting on behalf of the then-bankrupt ELSI, was capable under Italian law of bringing a suit against the Respondent based on the injury caused to ELSI. Therefore, after the ruling by the Prefect in 1969, the trustee sued the Government of Italy for wrongful injury to ELSI (Annex 79) and pursued this suit through the judgments mentioned by Judge Oda in his question. In doing so, to the United States knowledge, the trustee did not invoke the Treaty or Supplement. The United States has no knowledge regarding why the trustee, an Italian national unconnected to ELSI or Raytheon in any way but for the appointment of the bankruptcy court, did not invoke the Treaty or Supplement in his lawsuit. The trustee's decision not to invoke the Treaty or Supplement, however, is consistent with the belief of the United States, based on advice from Italian legal experts, that Italian courts would not have enforced the Treaty provisions at issue in this case.

The fact that the trustee did not invoke the Treaty and Supplement is not otherwise relevant to the United States' position in this case on the issue of admissibility of the claim. The United States believes that the local remedies rule does not apply at all to the claims of the United States under the Treaty. Even if the rule does apply, however, the Treaty and Supplement would not create any additional protections under Italian law upon which the trustee could base a claim.

Further, even if the Treaty and Supplement did provide additional protections as a matter of Italian law, the outcome of the trustee's suit would have been exactly the same. The trustee raised the same substantive contentions with respect to the requisition and the bankruptcy, as form the basis of the claim before this Court. The Italian courts found that there was no causal connection between the requisition and the subsequent bankruptcy, that damages therefore could not be claimed with respect to the bankruptcy, and that even if damages could be claimed the value of ELSI's plant and equipment on 1 April 1968 could not be reliably established. Given these factual findings, additional legal arguments based on the Treaty and Supplement would not have changed the outcome of the suits brought by the trustee in Italian courts.

Question of Judge Schwebel[1]

Is it the contention of the United States that since ELSI actually operated at a profit — but for its obligations to pay loans to it — buyers could have been found for ELSI or for its product lines since they could have been purchased free of this debt burden, a burden to be lifted by settlement with the banks and by

[1] See p. 312, *supra*.

payment by ELSI's stockholders on those loans pending settlement — is that a correct formulation of what the United States is contending on this point?

Answer

It is our contention that buyers could have been found on the basis indicated. Under the orderly liquidation plan, ELSI's business would have been disposed of either as a single operation or as a series of product lines. A purchaser would have acquired only ELSI's assets, including its goodwill, leaving the liabilities behind. This would have greatly increased the attractiveness of the purchase from the point of view of the purchaser. The proceeds of the disposal would have been available to pay off the liabilities.

Question of Judge Schwebel[1]

I would like to ask you, as counsel, the following: it was stated that ELSI had in fact applied for Mezzogiorno benefits. Can the Applicant provide documentary support for this statement?

Answer

The fact of ELSI's claim, and resubmission of its claim, for reimbursement of 300 million lire under the Italian "Mezzogiorno Investment Plan" is referred to in to the affidavit of Joseph A. Scopelliti, Memorial, Annex 17, Exhibit A, p. 10[2].

Mr. Clare also attested to the efforts of ELSI's counsel, Mr. Bianchi, to secure the Mezzogiorno benefits to which ELSI was entitled (pp. 58-59, *supra*).

Raytheon and Machlett do not have possession of the administrative claim for Mezzogiorno benefits. The documentation of this claim was most likely with the other ELSI records that were seized by the Respondent when it requisitioned the plant.

Question of Judge Schwebel[3]

Could the Applicant tell the Court, or supply to the Court, figures on the total sales and profits of Raytheon and its subsidiaries worldwide for the years 1967 and 1968? And in that regard it would be helpful, if it is feasible, to indicate where among the electronic manufacturers of the world in those years Raytheon ranked.

Answer

According to information filed with the Securities and Exchange Commission by Raytheon in respect of the year ended 31 December 1968, the consolidated sales of Raytheon for the years 1967 and 1968 were $1,106,049,000 and $1,157,963,000 respectively. Net income was $28,602,000 and $29,569,000, respectively.

This information is found at Rejoinder, Annex 24[4], pp. 12 (1968) and 43 (1967).

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[1] See p. 299, *supra*.
[2] I, pp. 193-194.
[3] See p. 299, *supra*.
[4] Not reproduced.

In 1968 Raytheon would probably have been among the top ten US companies in the electronics sector, worldwide.

Question of Judge Ruda[1]

In the course of the pleading of the Italian delegation, they have maintained that Raytheon charged ELSI for the patents, licences, and technical assistance given; and they say that ELSI had to pay a lot of money to Raytheon for this assistance. In your statement, Ms Chandler, you said that Raytheon had decided, in the liquidation, to provide these licences, these patents, and this technical assistance to the new buyer of the whole business or the buyer of the product lines. My question is: was Raytheon going to charge the new buyers the same amount as they had previously charged ELSI?

Answer

Raytheon and Machlett had set relatively low technical assistance and royalty rates for ELSI in order to be helpful to ELSI. In the case of prospective buyers, Raytheon would have expected to negotiate a total package including royalties and technical assistance together with the base price on terms agreeable to both buyer and seller.

Question of Judge Ruda[2]

On 28 March dismissal letters were sent to some 800 workers, if I remember correctly. How much was the amount of money, in Italian lire, that ELSI would have had to pay, according to the labour law of Italy, for the dismissal of these workers?

Answer

The balance sheet at 31 March 1968 shows a reserve for severance pay of 584.9 million lire. We believe that this reserve was adequate to cover all of the workers. We believe that 510 million lire would have been adequate to cover the 800 workers who were dismissed.

If the 510 million lire, for any reason, proved inadequate to fully satisfy Italian labor law requirements, Raytheon would have increased its funding of the liquidation program to take care of any shortfall.

Question of Judge Jennings[3]

I have a simple question of fact — I am not sure whether it is addressed to Professor Bisconti or to the United States delegation, probably the United States delegation will decide how the question should be answered and when. It is simply this: did ELSI succeed in selling any of its assets in pursuance of the orderly liquidation before the requisition intervened in the process, or, indeed, did it manage to sell any of its assets after the requisition, and before the bankruptcy?

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[1] See p. 299, *supra*.
[2] *Ibid.*
[3] See p. 304, *supra*.

Answer

Except for sales of products to customers in the ordinary course of business, ELSI did not sell any of its assets in pursuance of orderly liquidation before the requisition intervened in the process, since the requisition occurred only three days after the vote of the ELSI's shareholders on 28 March 1968, to proceed with liquidation. ELSI did not sell any of its assets in Palermo after the requisition and before the bankruptcy, because under the requisition order the assets could not be transferred to a buyer, nor even be shown to prospective buyers.

Question of Judge Schwebel[1]

Did I understand Mr. Bisconti to say that ELSI's plan to pay off small creditors in full was lawful under Italian law, and that there was no merit to the contention that such payment would have been an unlawful preference?

Answer

Within the framework of an orderly liquidation, such payments, if made, would not have constituted a "preference". Technically, a "preference" is such only in a bankruptcy situation. The stockholders planned on an orderly liquidation of ELSI. One step in such plan would have been the payment of the small creditors. The stockholders met with the creditor banks on 1 April 1968 to seek their understanding on the manner and timing of the orderly liquidation, including the proposed payment to the small creditors. Without the banks' agreement on the plan of orderly liquidation, there would have been no payment to the small creditors.

Question of Judge Schwebel[2]

I understood Mr. Bisconti to maintain that the fact than an instalment on a bank loan was due in late April of some 800 million lire, I believe the figure was, did not of itself indicate that bankruptcy at that juncture was inevitable, because the stockholders of ELSI were prepared to meet such a loan if doing so was pursuant to the sale of assets which would have realized, by the proceeds of the sale, funds which presumably would have repaid the stockholders for advancing funds to meet the loan payment. Now I had earlier understood, from argument of the Applicant, that the stockholders had transferred a sum of money sufficient to pay small creditors. Had any steps been taken by the stockholders, which evidenced the further intention of the stockholders to act in the fashion I have just referred to with respect to the loan payment due in late April?

Answer

After Raytheon and Machlett voted to proceed with the orderly liquidation on 28 March 1968, Raytheon transferred 150 million lire to Citibank Milan to begin paying the small creditors. The Respondent requisitioned ELSI's plant and assets only three days later; and did not take any actions to repeal it, in spite of ELSI's protests, petitions, etc. At that point, Raytheon and Machlett did not advance any other funds to ELSI as they had otherwise planned to do.

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[1] See p. 304, *supra*.
[2] *Ibid.*

Applicant's Answers to Questions of 23 February 1989

Question from Judge Oda[1]

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?

Answer

Since it is ELSI that filed the petition in bankruptcy, it would have been for ELSI to withdraw the petition. By August of 1968 ELSI could not have been brought out of bankruptcy.

A lifting of the requisition order in August, however, would have allowed the trustee to pursue liquidation of ELSI's plant and assets beginning in August, rather than in October of 1968. The trustee would have been obligated to end the occupation of the plant by former ELSI workers and to take steps to preserve the condition of the plant and assets. The failure to overturn the requisition resulted in the inability of the trustee to sell off ELSI's plant and assets until it was clear that the requisition had ended, which thus delayed the first auction until January 1969.

Question from Judge Schwebel[2]

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?

Answer

Assuming, *arguendo*, that bankruptcy would have still occurred at a some point after the commencement of the orderly liquidation on 1 April 1968, Raytheon and Machlett would still have suffered substantial damage from the existence of the requisition. The orderly liquidation team planned to secure commitments to purchase ELSI's product lines within no more than two or three months. Thus, by the time bankruptcy hypothetically would have occurred anyway, Raytheon and Machlett probably would have sold off most, if not all, of ELSI's product lines.

Yet 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. Under this hypothetical scenario, compensation would have to be based on the extent to which Raytheon and Machlett would have been able to sell ELSI's assets in the time available to them before the bankruptcy occurred. In so far as Raytheon had made the commitment to advance all funds necessary to maintain ELSI's liquidity, this would have been a substantial amount of time and might have resulted in a recovery close to ELSI's book value.

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

Further, after the bankruptcy had in fact occurred, the existence of the requisition prevented the prompt disposition of ELSI's plant and assets through the bankruptcy proceedings. Only after the six-month requisition ended on 30 September 1968 could the bankruptcy court and the Trustee begin the process of disposing of ELSI's assets, so that the first auction was only held in January of 1969. Obviously the saleability of ELSI's plant and assets diminished significantly the longer they lay idle and the longer former ELSI employees were permitted to occupy the plant.

The Respondent took the opportunity during the requisition to announce in its Parliament that it intended to take over ELSI's plant through one of the IRI's subsidiaries (Annex 46). Shortly after the requisition period ended, the Respondent announced in November that IRI-STET would intervene and take over ELSI's plant, and the former ELSI employees were allowed to take down the sign over the plant's entrance that said "ELSI" and put up a new sign that said "STET". By December ELTEL had been formed to take over ELSI's plant and assets. Regardless of whether it was planned this way, the requisition provided the Respondent ample time to determine how it wished to proceed, with the ultimate result that it obtained ELSI in 1969 for far less than it was worth in mid-1968.

Question from President Ruda[1]

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; and, if so, under precisely what conditions could bankruptcy be avoided?

Answer

It would be possible to conduct an orderly liquidation under Italian law without going bankrupt even if it was decided not to provide new capital into the company. Raytheon and Machlett in fact had decided not to provide new capital for ELSI's operations, but were committed to providing sufficient funds necessary for ELSI to meet its obligations during the orderly liquidation. Even if Raytheon and Machlett had been unwilling to contribute any funds to ELSI, an orderly liquidation would still have been possible through settlements with creditors pursuant to procedures of Articles 160 *et seq.* of the Italian bankruptcy law.

Professor Bonelli discussed in detail (pp. 65-71, *supra*) why it would not have been necessary under Italian law to place ELSI in bankruptcy during the orderly liquidation process. Under Article 5 of the Italian Bankruptcy Law, a company is obligated to file for bankruptcy if it is in default of payments due or if there are other external acts which would demonstrate that the company is no longer in a position to satisfy its own obligations in a regular manner. Thus bankruptcy can be avoided if the company avoids default on payments due and otherwise is capable of satisfying its obligations in a regular manner.

At all times prior to the requisition ELSI paid its obligations as they became due. Raytheon and Machlett were committed to supplying necessary funds to accomplish the orderly liquidation without the necessity of placing ELSI in bankruptcy. Consequently ELSI would have remained capable of satisfying its obligations in a regular manner.

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

Question from Judge Ruda [1]

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 was it 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?

Answer

The book values that appear in the first column of page three [2] of the September 1967 balance sheet reflect the amounts appearing in the company's records prepared in accordance with Italian legal requirements. The values that appear in the third column of that balance sheet reflect adjusted values arrived at by using US accounting principles, as required by ELSI's US parent companies. There was no obligation under Italian law or accounting practice to make these adjustments in the company's statutory accounting records prepared in accordance with Italian legal requirements.

Whether the capital of an Italian company fell below the legal minimum provided by Articles 2447 and 2448 of the Italian Civil Code was a matter to be determined by reference to the statutory accounts of the company drawn up in accordance with Italian legal requirements.

82. THE REGISTRAR TO THE AGENT OF ITALY

27 February 1989

I have the honour to transmit to Your Excellency herewith the text of the written replies of the United States to questions put by Members of the Chamber in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, referred to by the United States Agent during the hearing this afternoon.

83. THE CO-AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

27 February 1989.

Pursuant to Article 60, paragraph 2, of the Rules of the Court, I have the honor to enclose a signed copy of the final submissions of the Government of the United States of America in the case concerning *Elettronica Sicula S.p.A. (ELSI)*.

Enclosure: As stated.

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