INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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

(UNITED STATES OF AMERICA *v.* ITALY)

VOLUME II

Counter-Memorial; Reply; Rejoinder

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

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

(ÉTATS-UNIS D'AMÉRIQUE *c.* ITALIE)

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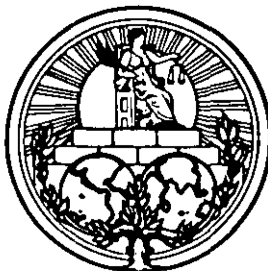

The case concerning *Elettronica Sicula S.p.A. (ELSI)*, entered on the Court's General List on 6 February 1987 under number 76, was the subject of a Judgment delivered on 20 July 1989 by the Chamber constituted by the Order made by the Court on 2 March 1987 (*Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15).

The pleadings and oral arguments in the case are being published in the following order:

Volume I. Application instituting proceedings; Memorial of the United States of America.
Volume II. Counter-Memorial of Italy; Reply of the United States of America; Rejoinder of Italy.
Volume III. Oral Arguments; Documents submitted to the Chamber after the closure of the written proceedings; Correspondence.

In internal references, bold Roman numerals are used to refer to Volumes of this edition; if they are immediately followed by a page reference, this relates to the new pagination of the Volume in question. On the other hand, the page numbers which are preceded or followed by a reference to one of the pleadings only or which appear between square brackets relate to the original pagination of the document in question, which, in general, is not reproduced in the present edition.

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L'affaire de l'*Elettronica Sicula S.p.A. (ELSI)*, inscrite au rôle général de la Cour sous le numéro 76 le 6 février 1987, a fait l'objet d'un arrêt rendu le 20 juillet 1989 par la Chambre constituée par ordonnance de la Cour du 2 mars 1987 (*Elettronica Sicula S.p.A. (ELSI), arrêt, C.I.J. Recueil 1989*, p. 15).

Les pièces de procédure écrite et les plaidoiries relatives à cette affaire sont publiées dans l'ordre suivant:

Volume I. Requête introductive d'instance; mémoire des Etats-Unis d'Amérique.
Volume II. Contre-mémoire de l'Italie; réplique des Etats-Unis d'Amérique; duplique de l'Italie.
Volume III. Procédure orale; documents présentés à la Chambre après la fin de la procédure écrite; correspondance.

S'agissant des renvois, les chiffres romains gras indiquent le volume de la présente édition; s'ils sont immédiatement suivis par une référence de page, cette référence renvoie à la nouvelle pagination du volume concerné. En revanche, les numéros de page qui ne sont précédés ou suivis que de la seule indication d'une pièce de procédure ou qui ont été mis entre crochets visent la pagination originale du document en question, qui, en principe, n'a pas été reproduit dans la présente édition.

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COUNTER-MEMORIAL OF ITALY

CONTRE-MÉMOIRE DE L'ITALIE

INTRODUCTION

In the present proceedings the Government of the United States has attempted to show that the Italian Government is responsible for a number of violations of international law, particularly of the provisions contained in the Treaty of Friendship, Commerce and Navigation between Italy and the United States of 2 February 1948 and the Agreement supplementing the Treaty of 26 September 1951. It is claimed that the alleged violations caused damage to two United States companies, the Raytheon Company and Machlett Laboratories Inc., on behalf of whom the Government of the United States has brought the present action.

In answer to the Memorial submitted by the Government of the United States on 15 May 1987, the Italian Government submits the present Counter-Memorial.

One of the purposes of this Counter-Memorial is to refute the reconstruction of the facts presented by the Government of the United States (Part I).

This part is followed by some considerations concerning the jurisdiction of the International Court of Justice (Part II) and the admissibility of the United States claims (Part III). In Part III the Italian Government lodges an objection on admissibility, which, in the defendant Government's view, should lead to the rejection of the claims.

However, the Italian Government, in order not to hinder the rapid administration of international justice, declares that it would favour the conclusion of an agreement between the parties, under Article 79, paragraph 8, of the Rules of Court, that the objection should be heard and determined within the framework of the merits.

Part IV of the Counter-Memorial deals with points of law relating to the substance of the allegations made by the Government of the United States. In practice, this consists of the interpretation of the above-mentioned 1948 Treaty and 1951 Supplementary Agreement and the problems related to their correct application.

Lastly, Part V of the present Counter-Memorial deals with issues that may be of interest only in the case of some of the claims made by the Government of the United States being upheld by the Court. This Part centres around the methods used to calculate the damage suffered and the evaluation of such damage.

In accordance with Article 49, paragraph 2, of the Rules of Court, the Counter-Memorial finally includes the submissions that the Italian Government respectfully present to the Court.

PART I

STATEMENT OF FACTS

1. Necessity to provide an objective account of the facts which are relevant to the case. — The statement of facts contained in the Memorial submitted by the Government of the United States shows a great many inaccuracies, gaps and tendentious interpretations. It is therefore necessary to run over all the relevant circumstances of the case in order to provide a more complete and above all more accurate account.

2. ELSI's problems from 1962 to 1967; the substantial financial aid given by Italian authorities. — From 1962, the year in which Raytheon became ELSI's controlling shareholder, ELSI proved to be a constant loss-maker, incapable of competing with other companies in the sector. As also the annexes to the claimant Government's Memorial show[1], ELSI's accumulated losses reached Lire 326,900,000 in 1962, Lire 1,228,600,000 in 1963, Lire 284,700,000 in 1964, Lire 361,000,000 in 1965, Lire 2,007,000,000 in 1966, and the record figure of Lire 2,681,300,000 in 1967.

Certainly, ELSI's difficulties were not due to the fact that it was a foreign-owned company[2]. ELSI's main competitors in Italy were in fact also non-Italian companies, namely, Philips, a Dutch company, Siemens, a German company, and Thomas Houston, a French company. The reason why ELSI continued to lose its market shares was due solely to the fact that the competitors managed to offer the same or even superior-quality products at considerably lower prices[3].

And that is not all. Unlike its non-Italian competitors, ELSI was always able to count on substantial financial aid from the Italian Government. Back in 1956, when Raytheon first became a shareholder in ELSI, it successfully requested the Sicilian Regional Government to take a 33.3 per cent stake in the company, and obtained a ten-year low-interest loan of Lire 700 million from the Regional Government through its financial company, IRFIS[4]. Between 1956 and 1966, ELSI was granted further low-interest loans totalling Lire 6,000 million, of which Lire 3,500 million were given in the last four years when the company was wholly controlled by Raytheon[5]. This does not take account of all the other grants of various kinds, such as the tax relief for the merger with the former group company, SELIT, in 1965[6]. This shows that the treatment meted out to ELSI by the Italian authorities was anything but discriminatory.

3. The basic reasons underlying the economic weakness of ELSI. — The truth is that ELSI had been a loss-maker from the very beginning. The bulk of its

[1] Cf. Memorial submitted by the United States of America (Case concerning Elettronica Sicula S.p.A. (ELSI)) (hereinafter referred to as "Memorial"), Ann. 13, Schedule B1.

[2] Contrary to what Raytheon managers claim, according to what is said in the Memorial, I, p. 48.

[3] For an explicit admission in this regard on the part of the ELSI management, see "Project for the Financing and Reorganization of the Company — 1967 Report prepared by Raytheon ELSI S.p.A." (hereinafter referred to as "1967 Report"), Memorial, Ann. 22, I, p. 204.

[4] See Letter-agreement of 21 October 1956: Memorial, Ann. 11.

[5] See for these figures "1967 Report", I, p. 220.

[6] See doc. No. 31, containing the minutes of the meeting of the ELSI Board of Directors, at which the merger decision was taken.

products were cathode tubes and semiconductors[1] and it is common knowledge that if products of this kind are to make a profit, they must be manufactured in the immediate vicinity of the raw materials suppliers (particularly the producers of glass tubes) and of the customers for the finished products (the radio and TV manufacturers). But ELSI had been set up at Palermo, far away from the large industrial settlements in the North of Italy, with the result that, only because of the extra cost of transportation, the prices of its products were at least 10 per cent higher than those of its competitors[2]. Moreover, some products were being manufactured using methods that were manifestly outdated. This is the case of the semiconductors, whose production line (which ELSI had purchased directly from Raytheon) was technologically obsolete already at the time it was installed[3]. Other products did not have reliable market outlets, or their market was dwindling to nothing. For example, sales of micro-wave tubes depended very largely on sporadic military orders. The cathode-ray tubes, which were solely for black-and-white television sets, were losing their prospective purchasers because in the mid-60s, Italy was about to introduce colour television[4].

All of this was taking place with manifestly disproportionate labour costs. In 1960, the company employed 530 people, rising to over 1,000 in 1967. Training costs were initially amply offset by the lower wages paid to workers in Sicily, but when wages in the area began to draw level with those of the rest of the country, the company's labour costs grew out of all proportion[5].

4. Raytheon's initial apathy towards ELSI; the high cost of its technical assistance. — There can be no doubt that many of ELSI's problems could have been avoided if Raytheon had shown greater concern about ELSI's fate. But it did not. The very decision of acquiring a participation in ELSI was taken on the spur of the moment, rather than as the result of a clearly thought-out plan[6], and even afterwards, as far as its investments in Italy were concerned, Raytheon continued to concentrate its attention on SELENIA. This company, which was controlled by Raytheon jointly with Finmeccanica-IRI and FIAT, manufactured sophisticated military equipment with satisfactory commercial results[7], while ELSI was ignored for many years.

The company continued to be managed by two Italian technicians — Carlo Calosi and Aldo Profumo, as President and Managing Director, respectively — who had already been employed by the former owners: this despite the fact that under their management the company had only recorded losses. Tom Philips, the President of Raytheon from 1964, was reported as having said on the subject of the managerial choices made by the two Italian executives: "[. . .] It seemed that more emphasis was being placed on the social, or rather the societal importance of operations in Sicily than on their need to return profits to their investors[8]". Calosi and Profumo were not, however, dismissed from their posts until 1967 when Raytheon's top management finally realized the desperate straits in which ELSI found itself. But it was too late by then, and all the former President of

[1] For the exact figures see the "1967 Report", I, pp. 212-213.

[2] See Memorial, Ann. 15, I, pp. 165-166; Otto J. Scott, *The Creative Ordeal. The Story of Raytheon*, New York, 1974, p. 364.

[3] See Affidavit of Ingegner Busacca (doc. No. 44).

[4] See in this connection the hardly reassuring analyses and predictions made by the ELSI management itself in the "1967 Report", I, pp. 205-206 and 214.

[5] See, in this connection, the "1967 Project", I, pp. 209-210.

[6] As Scott, *op. cit.*, pp. 246-247, shows, it was owing to ELSI's delay in paying the royalties due to Raytheon that the latter eventually accepted the proposal to convert its loans into shares of what at the time was only an insignificant Palermo-based company.

[7] For these data, see Scott, *op. cit.*, pp. 328-329 and 331-332.

[8] Scott, *op. cit.*, p. 346.

Raytheon, Charles Adams, could do was to let off steam with Calosi: "You have made a terrible mess of things[1]!"

In reality, the company was not only being run at a loss, but was managed on the verge of illegality. It was not without reason that the expert witness for the bankruptcy, Giuseppe Mercadante, said that ELSI's standard practice was to artificially increase the sales volume (probably with a view to showing the parent company in the United States positive results)[2]. The bankruptcy receiver, Mr. Siracusa, commenting on Giuseppe Mercadante's report, put the company's insolvency down to the cavalier way it had been managed and to the "poor organization and mistaken policies of the commercial department"[3].

Raytheon's apathy towards ELSI is demonstrated above all by its very low capital investment in the company. In the period 1962-1966, Raytheon's investments in equity in ELSI totalled a bare 3,600 million.

The inadequacy of these investments to meet the needs of the company is proved by the fact that in 1966, with a share capital of only Lire 4,000 million, ELSI had outstanding debts totalling Lire 15,910 million of which only Lire 4,230 million were guaranteed by Raytheon[4]. This excessive indebtedness naturally gave rise to huge interest charges: Lire 839 million in 1965, Lire 865 million in 1966 and Lire 960 million in 1967. Figures of this magnitude would have caused a crisis in any company, but in ELSI's case the debt burden was absolutely out of all proportion, considering that the company's sales during that same period never exceeded Lire 8,000 million, and that the item "operating profits/losses" (sales minus production costs, after deduction of interest charges) in the 1967 balance sheet showed a loss of Lire 1,721 million[5].

Moreover, while Raytheon left ELSI under-capitalized, it did not hesitate to charge very high rates for the technical assistance it supplied to its subsidiary, right to the very end. In the period 1965-1967, ELSI had to pay about 800 millions a year for "updating, preparation, studies and other work", and yet during the same period a further 650 million was paid for "group assistance royalties, and technical consultancies"[6].

In conclusion, there seems to be good reason for the highly critical judgment of the expert witness Mr. Mercadante on the subject of Raytheon's attitude to ELSI during all those years:

> "[. . .] There are grounds for believing that the parent company, which provided assistance to its subsidiary upon remuneration had ample time to realize that the subsidiary's indebtedness was swelling progressively and growing out of all proportion to the volume of production, and we are surprised that the parent company did not see it fit to bring the subsidiary within more realistic limits[7]."

5. The 1967 report and the search for an Italian partner. — At the beginning of 1967 ELSI's accrued losses had far exceeded one-third of the share capital, with the result that under Article 2446 of the Italian Civil Code ELSI had to reduce its equity from Lire 4,000 to 1,500 million. It was only at this point that Raytheon finally decided to act.

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[1] Scott, *op. cit.*, p. 365.
[2] See doc. No. 36, p. 212, *infra*.
[3] See doc. No. 40, p. 223, *infra*.
[4] "1967 Report", I, pp. 220-221, and *ibidem*, App. B2.
[5] Memorial, Ann. 13, Schedule B3.
[6] See doc. No. 36, pp. 214-215 and 209, *infra*.
[7] See *ibidem*, p. 216, *infra*.

A delegation, headed by the Raytheon President, Tom Philips, went to Palermo, and the first thing they did was to replace Carlo Calosi with John Clare as President of ELSI and to appoint Justin J. Guidi as the second managing director of ELSI, alongside Aldo Profumo.

At the request of the parent company, ELSI's new management prepared the "Project for the Financing and Reorganization of the Company — 1967 Report", in which they thoroughly analyzed the causes of the crisis and the possibilities of pulling out of it. The prospects that lay ahead were dramatic. The report made no bones about the fact that, if one had left the company to its own devices, its days were practically numbered: "Given the current product base, the current level of spending and the increasing adverse pressures mentioned above, heavy losses will continue and in all probability increase . . ." (I, p. 221); "the current product and people structure of Raytheon ELSI does not produce desirable results, and in fact continued operations on the current basis is quite unsound" (I, p. 222). The only chance of survival was indicated to be an intervention by Italian authorities to the effect that, *inter alia, (a)* ESPI (Ente Siciliano per la Produzione Industriale) would immediately invest in ELSI Lire 6,000 million as additional capitalization of the company; *(b)* the Central Government would guarantee that over the next four years ELSI would receive government procurement orders for not less than 5,000 million lire; *(c)* the personnel would be given retraining courses organized at the expense of the Sicilian Regional Government; *(d)* the Central Government would undertake to do what it could so that ELSI could obtain all the other financial facilities available under current legislation for the development of Southern Italy (I, pp. 222-223).

On being informed of the gravity of the situation, the Italian authorities immediately stated their readiness to examine the possibility of a solution acceptable to everyone in joint consultation with the ELSI management. In no way did they reject altogether the suggestion of public intervention on behalf of the ailing company. It was simply a question of defining the terms of intervention, since it was unthinkable that all of ELSI's demands might be accepted. The Sicilian Regional Government immediately pointed out that the financial contribution it was being asked to make exceeded its resources, and that at all events, it would acquire a direct stake in ELSI only if it was joined by another partner, possibly a company of the IRI group. Raytheon had itself already been in touch with some companies on its own account. But IRI's response was decidedly negative. IRI was studying the possibility of enhancing its own companies' presence in the electronics sector, and it was therefore not at all interested in helping ELSI which — at least according to the restructuring plans elaborated by the company's management — would have inevitably become their direct competitor (for further details, see *infra*, para. 18).

6. ELSI's financial difficulties and the labour disputes: 1967-1968. — Meanwhile, ELSI's difficulties went from bad to worse. The balance sheet of 30 September 1967 closed with a loss of Lire 2,681 million, with the result that less than one year after the last reduction, the company's share capital should have been reduced once again because of losses. The company directors, who, under Article 2446 of the Italian Civil Code, should have asked the shareholders already before the end of the fiscal year "to take the appropriate steps", did nothing of the sort even after that date: and yet the losses continued to increase also in the last quarter of 1967 and the first quarter of 1968. According to the estimates of Raytheon's expert accountant, on 31 March 1968 ELSI had accrued losses of Lire 3,750 million[1]. This being so, ELSI's management clearly failed to comply

[1] Memorial, Ann. 13, Schedule B1.

with its duties under Italian law to protect the company's creditors (not to mention its shareholders!) in the event of persistent losses totalling over one-third of the share capital[1].

ELSI's financial difficulties were compounded by serious labour disputes during that same period. Already in June 1967, because of the uncertain market prospects and the need to cut its exorbitant production costs, the company had announced the shedding of 300 jobs. Faced with the inevitable protests on the part of the trade unions and the threat of a solidarity strike by all the workforce which would have brought production to a complete halt, the Sicilian Regional Government immediately came to ELSI's rescue. An agreement was concluded under which the company agreed not to dismiss all the 300 employees, but merely to lay off temporarily 168 of them, and the Regional Government undertook to pay the wages of the laid-off workers until they were able to resume work[2]. For a few months, peace was restored in the factory, but at the beginning of 1968, when it became clear that not only would the company never be able to take back the laid-off workers, but also that its days were numbered, serious union unrest resumed. In January and February 1968, the days on which the whole workforce, or specific departments, were on strike were more numerous than those of normal activity. In early March, the company decided to dismiss the 168 laid-off workers.

The reaction of the workforce was immediate. On 4 March 1968 the company's workforce was called out on an indefinite strike, and a sit-in on the factory premises began[3].

To have an idea of the general situation at ELSI at that time, it should be borne in mind that even before the workers' sit-in, precisely on 2 March 1968, all that remained of the company's administration, including its accounting records, was transferred wholesale to a small regional office in Milan[4] and thereafter the Board no longer met at the Palermo headquarters, but began instead to meet in Rome. After January 1968 the accounts for the company's operations were no longer kept properly, and when Arthur Schene, the Vice-President of Raytheon's Board of Auditors was summoned urgently to Italy in early April to draw up the balance sheet for the liquidation of the company, he had to work on the basis of records that had been kept only up to 31 December 1967[5]. Only afterwards, in their petition for bankruptcy, did the directors try to explain this further example of malpractice which — incidentally — is a criminal offence under the Italian Bankruptcy Act[6]. The reasons advanced for having been prevented from keeping the accounts properly were — in order of appearance — the Christmas and the New Year's holidays, the earthquake that struck part of Sicily in January, and the strikes . . .[7].

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[1] For the full text of Art. 2446, Civil Code, see doc. No. 19.

[2] *The Claim of Raytheon Company and the Machlett Laboratories, Incorporated, against the Government of Italy in Connection with Raytheon-ELSI S.p.A.* (hereinafter referred to as "The Claim").

[3] See Memorial, Ann. 81, I, pp. 384-385 (containing the decision of the Court of Appeal of Palermo of 24 January 1974); see also "The Claim", p. 233, *infra* [p. 29], where reference is made to "complete strike . . . which was never settled"; a further explicit admission in this connection is made in the explicative report of ELSI Board of Directors, attached to the petition in bankruptcy, see doc. No. 32.

[4] See Memorial, Ann. 30, containing a statement to this effect by Domenico A. Nett, an ELSI Auditor.

[5] See Memorial, Ann. 13, I, p. 123.

[6] Compare Arts. 216-217 of the Italian Bankruptcy Act, the full text of which is contained in doc. No. 21.

[7] See Explanatory report on the petition in bankruptcy (doc. No. 32).

7. The decision to liquidate ELSI: the actual prospects of an "orderly liquidation". — On 16 March 1968 the Board of ELSI, "in view of the continuous deterioration of the company's financial situation" decided to put the company into liquidation. More specifically, "production was to be discontinued immediately, whereas commercial activities and employment contracts were to be terminated on 29 March 1968"[1].

According to the United States Government, this decision was taken by ELSI's two shareholders with the view of beginning an "orderly", or as it is elsewhere described, "voluntary" liquidation of the company, "in order to minimize their losses". The claimant Government also contends that only after the Mayor of Palermo had requisitioned the factory the company's financial conditions worsened to such a degree that bankruptcy became inevitable[2].

But this is far from the truth. ELSI's decision to halt production immediately and to stop any commercial activities within two weeks, was by no means a free choice: it was a matter of absolute necessity. On 7 March 1968 Raytheon formally notified ELSI that, even though it had noted that

> "[. . .] Raytheon-ELSI requires additional equity capital in order to continue its operations [. . .] Raytheon company cannot obligate itself further and must decline to subscribe to any further stock which might be issued by Raytheon-ELSI or to guarantee any additional loans which might be made by others to Raytheon-ELSI[3]".

ELSI was therefore certain that it could no longer count on Raytheon for even the slightest help. And since its coffers had dried up a long time earlier, the only way to meet its commitments shortly falling due for payment was to liquidate its assets.

After all, this had been bluntly anticipated by the President of ELSI, John D. Clare, at a meeting on 20 February 1968 with the President of the Sicilian Regional Government, Vincenzo Carollo. According to the full version of the minutes of that meeting, drafted by ELSI, and annexed as Exhibit II-15 to "The Claim",

> "[. . .] CFA [Charles F. Adams, *ed.*] stressed that ELSI cannot survive without immediate cash help, which Raytheon cannot provide. JDC [John D. Clare, *ed.*] drew a precise time chart showing *(a)* Feb. 23 — Board Meeting; *(b)* Feb. 26-29 — inevitable bank crisis; *(c)* March 8 — we run out of money and shut the plant".

Surprisingly, the text of the minutes that appears as Annex 15 to the Memorial, Exhibit B, has been altered, and the words quoted above have been replaced by the insignificant words: "Both CFA and JDC stressed again the urgency of the situation."

Moreover, the conclusive evidence that the liquidation of ELSI, which was decided by the Board on 16 March 1968, was anything but "orderly", is given by the company's balance sheet at that date. On 31 March 1968 the company had outstanding debts totalling Lire 16,292 million, of which Lire 4,855 million was owing to preferential creditors, and Lire 11,435 million to unsecured creditors[4]. To meet these debts, the company had assets whose book value was Lire

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[1] See Memorial, Ann. 31, **I**, p. 278.
[2] See Memorial, **I**, pp. 51 ff.
[3] See Charles F. Adam's letter to John D. Clare, attached as Exhibit III-13 to "The Claim", but omitted in the Annexes to the Memorial.
[4] Memorial, Ann. 13, Schedule F.

17,053 million, but whose quick-sale value had been calculated by ELSI's expert accountants as no more than Lire 10,838 million[1].

Even supposing, for the sake of argument, that everything had gone as planned by ELSI, namely, that the sale of the assets had made Lire 10,838 million[2], after deducting the amount needed to pay the preferential creditors, the remainder would only have been sufficient to pay 50 per cent of the unsecured creditors! But if this is so, it is patently evident that what is now presented as an orderly and voluntary liquidation, decided by the shareholders in order to avoid further losses, was in reality a desperate attempt on the part of an insolvent company to avoid bankruptcy by having its creditors accept an amicable settlement.

The ELSI management were perfectly well aware of the real meaning of the decision taken on 16 March 1968: "With the proceeds of the sale it was ELSI's intention to satisfy all the creditors in an amicable way[3]." Indeed, they also knew perfectly well that in order to succeed in their endeavour they had to obtain at least the tacit approval of all the creditors. If only one creditor had demanded to be paid immediately and in full, bankruptcy would have been unavoidable. This is why the liquidation plan provided for the full payment not only of the preferential creditors but also of the mass of small creditors: as it was stated, the danger was that "[. . .] a small irresponsible creditor would take precipitous action which would raise formidable obstacles in the way of orderly liquidation"[4].

Such a risk apparently represented a sort of nightmare for Raytheon: indeed, despite the fact that it had formally announced that it would never pay ELSI an extra lira, it immediately arranged to pay ELSI Lire 150 million to silence the more unruly among the small creditors[5].

But the large creditors, who were being asked to accept 50 per cent of the amount owed them, were six banks which had outstanding claims of about 9,000 million against ELSI, of which just over a half was guaranteed by Raytheon[6]. In the Memorial of the United States Government one reads that

> "Raytheon reasonably anticipated, however, that the bank creditors with large unsecured, unguaranteed loans would quickly settle their claims at no more than 50 per cent of this value as part of the orderly liquidation, as such a settlement would guarantee prompt and substantial payment, as compared with receiving little or nothing in bankruptcy[7]."

There is no telling whether ELSI's directors really were so sure that they would be able to reach an immediate agreement with the banks: the fact is, that on 1 April 1968, not knowing what the Mayor of Palermo was about to decree, the

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[1] Memorial, I, p. 108. For an indication of the criteria followed for the determination of the "quick-sale value", see Memorial, Ann. 17, I, pp. 184 ff., whereas for a comparison between the different items in the balance sheet and in their estimate quick-sale value, see *ibidem*, Exhibit A.

[2] The hypothesis that the "book value" of 17,053 million could be realized is not even worth being taken into consideration, although the United States Government is now claiming that it was the most likely one (Memorial, I, pp. 52 and 107). Not only at the time all ELSI (and Raytheon) plans and calculations were based on the "quick-sale value" (see, in this connection, Charles F. Adams' Affidavit, Memorial, Ann. 9, I, pp. 122-123; Arthur Schene's Affidavit, Ann. 13, I, p. 132, Joseph A. Scopelliti's Affidavit, Ann. 17, I, p. 186), but also in the Raytheon and Machlett claim of 1974 against the Italian Government this was the value which had been chosen for the computing of damages.

[3] See "The Claim", *infra*, p. 233 [p. 33].

[4] *Ibid.*

[5] See Memorial, Ann. 17, I, p. 186.

[6] For the exact figures, see Memorial, Ann. 13, Schedule E.

[7] See Memorial, I, p. 52.

parties held yet another meeting which came to nothing[1]. Yet the passage just quoted from the Memorial is mentioned not only because it alleges that an agreement between ELSI and the banks was a foregone conclusion, but also because it openly states that the banks had everything to gain by being content with 50 per cent of their loans because "such a settlement would guarantee prompt and substantial payment, as compared with receiving little or nothing in bankruptcy"! This statement clearly implies that from the very moment in which the "orderly" liquidation of ELSI had been decided, the only real prospect for the company was either bankruptcy or an "amicable settlement" with the creditors. And all the parties were perfectly well aware of this: ELSI, Raytheon and the banks!

8. *The requisition of ELSI's plant and equipment; its legal basis, nature, justification and effects.* — On 1 April 1968, the Mayor of Palermo ordered that the plant and equipment owned by ELSI be requisitioned for a period of six months[2]. This decision is the main point on which the charges made by the Government of the United States against the Italian authorities are hinged. It therefore appears necessary to clarify the nature, the content and the effects of the Mayor's decree.

We shall begin by pointing out that under Italian law the legal basis of the decree is Article 7 of Law No. 2248 of 20 March 1865, Annex E (the so-called administrative litigation law)[3]. The article in question states that

> "when because of grave public necessity, the administrative authorities must dispose of private property without delay . . . the administrative authorities will proceed by means of a decree indicating the reasons, without prejudice to the rights of the parties".

This means that the administrative authorities are empowered to "dispose of private property" and therefore also to take requisition measures, provided that this is justified by a state of "grave public necessity" and of urgency (there is the need to act "without delay"); however, the parties must be ultimately *compensated*.

If the private property concerned consists of immovable property and it has been requisitioned in accordance with the above-mentioned law, there can only be a *requisition in use*[4]. As a rule, the extension of the requisition measure will depend on the duration of the state of necessity: in any case, the decree itself must be accompanied by an indication of a time-limit (in the case in hand, this was six months) which may be further extended upon expiry. Within this time-limit, the authority can use the immovable property, but cannot acquire it or sell it to others. All this is implicit in the terms "without prejudice to the rights of the parties".

The difference between requisition in use and expropriation is clear: expropriation deprives the private individual of his right of ownership, which is transferred to the administrative authority expropriating the property. On the other hand, requisition in use deprives the owner only of the use of the property over a certain period of time. Under Italian law, expropriation is regulated by specific legislation, notably Law No. 2359 of 25 June 1865 (on compulsory expropriation in the public interest), and is also covered by a provision in the Constitution (Art. 42, paragraph 3, according to which "private property, in such cases as are provided

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[1] See "The Claim", *infra*, p. 233 [pp. 34-35].
[2] See Memorial, Ann. 33.
[3] See *ibid.*, Ann. 34.
[4] See Sandulli, *Manuale di diritto amministrativo*, 13th ed., Naples 1982, p. 789.

for by law and upon payment of compensation, may be expropriated for reasons of public interest"); requisition in use, on the other hand, is covered by the above-mentioned Article 7 of Law No. 2248 of 20 March 1865.

Three aspects of the content of the decree issued on 1 April 1968 by the Mayor of Palermo deserve special mention: the provisions explicitly referred to, the detailed reasons given and the measures actually taken. With regard to the first aspect, it is noteworthy that the decree referred not only to the above-mentioned Article 7 of Law No. 2248 of 20 March 1865, Annex E, but also to Article 69 of the regional legislation governing local authorities, namely, Legislative Decree No. 6 of 29 October 1955 of the President of the Sicilian Region[1]. Under the heading of "orders based on emergencies and urgency", the latter provision (para. 1) states that "the Mayor issues emergency and urgent orders in matters of civil works, local police and health for reasons of public health and safety". It thus underlines and defines the Mayor's powers also to take, *inter alia*, urgent measures in local police matters for reasons of public safety. The Mayor's authority to dispose of private property on this basis was considered to be "unchallengeable" *(indubitabile)* by the Prefect of Palermo when he was called upon to rule on the appeal taken by ELSI against the requisition decree we are examining[2]. The decree was justified on a number of circumstances: in the first place the decision by ELSI to shut down its plant and dismiss about one thousand employees, a decision that was followed by the strikes called by trade unions with the support of public opinion. Other relevant considerations were the damage to the local economy, the strong interest shown by the press and the danger of law and order being perturbed. All these circumstances led the Mayor to form the opinion that the conditions of grave public necessity and urgency specified in particular in Article 7 of Law No. 2248 of 20 March 1865 actually existed in the ELSI case.

As already seen, the decree issued by the Mayor of Palermo provided for the requisition, for the duration of six months and "except as may be necessary to extend such period, and without prejudice for the rights of the parties concerned and of third parties", of the plant and equipment owned by ELSI. The same decree acknowledged the right of the company to be paid compensation for the requisition, although the assessment of such compensation was deferred to a subsequent order.

The requisition decree did not deal with the measures to be taken for the purpose of the temporary management of the plant; provision for this was made by the Mayor immediately afterwards by means of separate orders. 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, also "for the purpose of avoiding damage to the equipment and machinery due to the cessation of all activities including maintenance"[3]. 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 wrote to Mr. Silvio Laurin, the senior company director, to notify him that

> "[. . .] in view of the continuing absence of Ingegner Profumo, to whom the management of the requisitioned plant had been entrusted, I hereby appoint you to replace him temporarily in the same capacity with the same powers, functions and limitations. The choice of yourself is justified by the need [. . .]

[1] See Memorial, Ann. 35.
[2] See *ibid.*, Ann. 76.
[3] See doc. 34.

to ensure the co-ordination of management activities to safeguard the interests of government authorities and the rights of third parties[1]."

Mr. Laurin accepted the appointment. The Mayor also appointed Mr. Armando Celone and Mr. Nicolo Maggio as his representatives to enforce his orders in the factory[2].

9. Precedents concerning the requisition of plants ordered by other Italian local authorities (1950-1986). — An examination of Italian judicial decisions concerning the requisition of industrial plants during the years 1950-1986 indicates that the requisition of plants was not episodic in nature but was often used to protect existing jobs in plants facing the threat of closure. Under the circumstances, its purpose was that of preventing the financial difficulties of certain companies from having negative repercussions on workers' employment. Emblematic in this regard is the well-known "Marzotto affair", which arose out of the decree to requisition a plant of Marzotto S.p.A. of Valdagno issued by the Mayor of Pisa on 25 June 1968[3]. Another such case is that of a plant of S.p.A. Torrington, a company in liquidation which was requisitioned by the Mayor of Genoa in order to prevent it from being closed down and the employees from losing their jobs[4]. A third case is that of a plant belonging to the Italiana Zuccheri company, which was requisitioned for 90 days by the Mayor of Chieti on 16 July 1974 and handed over to the Abruzzo Development Agency, which was given the task of managing it so as to avoid the suspension of activity and thus to safeguard job stability[5].

Also worth mentioning are the cases of Soc. SITE, whose plant was requisitioned by order of the Mayor of Padua on 29 September 1974 just as it was about to be closed down[6] and Soc. Manifattura dell'Adda. The latter company's plant was requisitioned by the Mayor of Berbenno di Valtellina in order to ensure the continuity of its productive activity, which was considered to be essential for the economy of the area[7].

On other occasions requisition of a company plant has been ordered so as to ward off the negative repercussions on the economy and law and order caused by prolonged suspension of the company's productive activities. This is the case of Soc. Terites and Soc. San Marco, whose plants were requisitioned in order to safeguard the future activity of the plant in the interest of local employment and of law and order[8]. Then there is the case of the plant of Soc. SIDELM, requisitioned by the Mayor of Brindisi on 14 September 1974 for reasons of law and order and to ensure the continuity of productive activity in a plant considered essential for the economy of the area and the public interest[9], and that of the Felice Fossati cotton mills, which was requisitioned by the Mayor of Sondrio on 2 February 1975 in order to ward off the threat to law and order due to the plant

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[1] See doc. 35.

[2] See doc. 33.

[3] See decision No. 3086 of the Court of Cassation of 23 October 1974 (doc. No. 23).

[4] See decision No. 72 of the Council of State, sec. IV, of 7 February 1978 (doc. No. 29).

[5] See decision No. 198 of the Abruzzo Tribunale Amministrativo Regionale of 30 December 1976 (doc. No. 24).

[6] See decision No. 208 of the Council of State, sec. IV, of 25 February 1975 (doc. No. 26).

[7] See decision No. 210 of the Lombardy Tribunale Amministrativo Regionale of 30 July 1975 (doc. No. 27).

[8] See respectively decisions by the Prefect of Milan of 12 November 1971, *Il Foro Italiano-Repertorio* (1972), *Requisizione*, No. 7, and by the Prefect of Cremona of 28 November 1975, *ibidem* (1976), *Requisizione*, No. 23.

[9] See decision No. 3 of the Puglia Tribunale Amministrativo Regionale of 28 January 1975 (doc. No. 25).

closing down[1]. The best-known case is still, however, that of Soc. Eridania, whose plant was requisitioned by the Mayor of Cremona in order to avoid damage to the economy of the area and the threat to law and order caused by the company's plans to close down the plant.

A similar decree was issued against Soc. Eridania Zuccherifici Nazionali shortly afterwards, on 5 December 1968, by the Mayor of Ferrara[2].

The above-mentioned cases show that the requisition of the ELSI plant was by no means an isolated event, let alone the result of persecution of a company controlled by United States shareholders. In fact, it is clear that the authority given to the Mayor by Article 7 of Law No. 2248 of 20 March 1865, Annex E, has very often been used in similar cases to that of ELSI.

10. Compensation for the damage caused by the requisition. — It has already been pointed out that the requisition decree of the Mayor of Palermo recognized the principle that ELSI was entitled to compensation. It is true that this recognition was not followed by any action by the Mayor to determine the amount of such compensation. However, it should be borne in mind that some days after the requisition (that is, on 19 April 1968) ELSI lodged an appeal with the Prefect of Palermo, claiming that the decree was illegitimate[3]. After the favourable decision of the Prefect on 29 December 1969, the bankruptcy receiver sued the Ministry of the Interior before the Tribunal of Palermo on 29 December 1969, claiming damages for the requisition[4]. This claim was rejected by a decision of 2 February 1973[5], but this decision was reversed by the Court of Appeal of Palermo on 23 November 1973[6]. The latter decision was upheld by the Court of Cassation on 26 April 1976[7].

Thus, the receiver in the ELSI bankruptcy succeeded in obtaining compensation for the damage caused by the requisition. The damages actually awarded amounted to 5 per cent of the value of the requisitioned property, as assessed by the bankruptcy evaluator (exactly, Lire 114,014,711). Clearly, the claim for damages was based on the premise that the measure was illegitimate, while compensation in the strict sense only applies to the case of a legitimate requisition decree. The Court of Appeal of Palermo, in the above-mentioned decision of 23 November 1973, correctly pointed out that

> "in application of principles of law that have never been questioned, any impediment to the enjoyment of private property is by itself an economic sacrifice and as such gives entitlement to the payment of adequate compensation, when carried out legitimately (e.g., occupation, requisition, etc.) and to the payment of damages when it is illegitimate".

11. Requisition and occupation of ELSI's plant. The impact of requisition on the prospect of an "orderly liquidation". Requisition and bankruptcy petition. — Let us now consider three points in which the version of the facts given by the claimant Government is based on a complete misrepresentation. These points are the problem of the relationship in time between the requisition of ELSI's plant

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[1] See decision No. 21 of Council of State, sec. IV, of 18 January 1977 (doc. No. 28).

[2] On these cases, see respectively decisions by the Prefect of Cremona on 8 December 1968, *Foro Italiano-Repertorio* (1969), *Requisizione*, No. 7, and by the Prefect of Ferrara, quoted in decision No. 405 of Consiglio di Stato, sec. IV, of 8 April 1975, 99 *Il Foro Italiano* (1976) III-14.

[3] See Memorial, Ann. 36.

[4] See *ibid.*, Ann. 79.

[5] See *ibid.*, Ann. 80.

[6] See *ibid.*, Ann. 81.

[7] See *ibid.*, Ann. 82.

and its occupation by ELSI's employees, the question of the effects that the requisition had on the prospect of an orderly liquidation of the company and the issue of whether the requisition actually caused the bankruptcy.

With regard to the first point, it must be recalled that the plant had been occupied by the employees since early March 1968, and not only after the requisition[1]. The claimant Government's allegation that the Italian authorities behaved in such a way as, if not actually to encourage the occupation, at least to make it possible and subsequently to tolerate it[2], is far from being true.

The only action which one way or another succeeded in calming down the ELSI employees, who were exasperated by the company's decision to cease all activity and dismiss all its workforce, was the requisition decreed by the Mayor. Rightly or wrongly the employees saw this as an effective way of safeguarding their position. This is why, after the requisition, the occupation quickly took on a purely symbolic character with all the workers now feeling directly responsible for everything that happened inside the factory. It is a fact that — as expressly stated also in the above-mentioned decision by the Tribunal of Palermo on 2 February 1973 — the occupation not only caused no ascertained damage to the equipment and material located in the factory but did not even prevent the regular performance of the winding-up operations.

With regard to the company's "orderly" liquidation plan and the effects of the requisition on it, it must be pointed out from the outset that ELSI was already insolvent when the requisition decree was issued. The company, whose assets in the estimation of its own management had a quick-sale value of no more than Lire 10,500 million, had accumulated more than Lire 16,000 million in debts. After its two shareholders refused to contribute further capital, the company was forced to liquidate part of its assets to meet its commitments when they fell due. As both Raytheon and Machlett were to state in their 1974 claim against the Italian Government:

> "At the end of the month of March 1968, the situation relating to ELSI was as follows: (. . .) ELSI had run out of money and had no prospect of receiving funds except from the sale of assets (. . .) Substantial payments were due from ELSI, *the maturities of which had not been extended*[3]."

The "orderly" liquidation decided by the Board of Directors on 16 March 1968 was therefore only a bluff. An "orderly" and voluntary liquidation presupposes that the company has sufficient assets to fully satisfy its creditors[4].

In the case of ELSI it was common knowledge from the outset that in the best possible case the unsecured creditors would receive only 50 per cent satisfaction: had one of them refused the settlement and requested full payment, bankruptcy would have inevitably ensued. Under these circumstances, the ELSI management was under an obligation, also according to criminal law, either to file for bankruptcy or to formally propose an amicable settlement to all the creditors.

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[1] See *supra*, para. 6. The claimant Government's contention that "the occupation began only after the Mayor — an Italian government official — had assumed custody of the plant" (Memorial, I, p. 101) contradicts evidence.

[2] See Memorial, I, pp. 100 ff.

[3] "The Claim", *infra*, p. 233 [pp. 35-36].

[4] See Arts. 6 and 160 of the Italian Bankruptcy Law (doc. No. 21) according to which it is primarily up to the insolvent enterprise itself to request the declaration of its bankruptcy or alternatively to propose an amicable settlement to the creditors. Accordingly, Art. 217, No. 4, of the same Law states that the debtor shall be sentenced from 6 months to 2 years of imprisonment if he has aggravated the economic situation by abstaining from petitioning for the declaration of bankruptcy or by other serious negligence.

The truth is that ELSI had actually been in a state of virtual liquidation already from the beginning of the year (and its plant had been occupied by the employees ever since early March). If it was not possible to sell on the open market all or part of its assets at the prices fixed in the company's "orderly" liquidation plan, the fault did not lie with the Mayor's requisition, which was issued only on 1 April 1968. The fact is that even before this event no one was willing to purchase at those prices the assets of a company which was clearly insolvent.

In any case, it must be ruled out that the bankruptcy was a consequence of the requisition, as is claimed by the Government of the United States[1]. In this connection, it may be sufficient to recall the statement of the Court of Appeal of Palermo in the above-mentioned decision of 23 November 1973:

> "The fact that the Company was insolvent during the time immediately prior to the Mayor's intervention — in connection with which we recall the many and noisy demonstrations which this gave rise to, as we are reminded by the Court — is sufficient to rule out any causal link between the subsequent requisitioning order and the Company's bankruptcy and that the Company's state of insolvency was decisive and sufficient cause for its failure (Art. 5, Bankruptcy Law)[2]."

12. The appeal against the requisition decree. — The requisition decree of 1 April 1968 was appealed against by ELSI to the Prefect of Palermo 18 days later (on 19 April 1968). A much shorter time was to pass between this appeal and the bankruptcy petition, filed with the Court of Palermo by the company on 25 April. Therefore, while the appeal against the decree was pending, the bankruptcy proceedings were opened. At the same time increasing efforts were made to find a definitive solution to the problems of the company. It can therefore be said that, from the month of April 1968 onwards, three parallel events were in progress: the appeal proceedings against the requisition decree, the bankruptcy of the company, and the rescue operation in which IRI became more and more involved. We shall describe each of these events, taking the interactions between them into account.

13. The decision taken by the Prefect of Palermo on the appeal. — The ELSI appeal to the Prefect of Palermo requested the setting aside of the requisition decree. It was claimed on the one hand that the laws on which the requisition was based (Art. 7 of Law No. 2248 of 20 March 1865, Ann. E; Art. 69 of the Legislative Decree No. 6 of the President of the Sicilian Region of 29 October 1955) had been violated and, on the other, that the Mayor had misused his powers. It should be noted that the Prefect's decision of 22 August 1969 rejected the arguments concerning the first issue and thus ruled that the above-mentioned laws had been correctly applied. In particular, the Prefect pointed out that

> "it is undisputed, in case law and legal doctrine, that the Public Administration is empowered by the above-mentioned Article 7 to dispose of the private property whenever the necessity exists to face a situation of actual and imminent danger for a public interest (public health, public order, etc. . . .) and therefore the grounds of an urgent emergency are given".

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[1] See Memorial, I, pp. 83-84.

[2] Memorial, Ann. 81, I, p. 382. Art. 5 of the above-mentioned Bankruptcy Law states:

> "Any entrepreneur in a state of insolvency shall be declared bankrupt. The state of insolvency is revealed by cases of default or by other external facts which indicate that the debtor is no longer able to meet his obligations regularly."

However, the Prefect ruled that the decree appealed against was nevertheless illegitimate since, in his view, "the purpose the goal to which the requisition was directed could not be actually achieved by the order"; in other words, the Mayor had not taken account of the fact that the company could not continue its activity unless there were interventions capable of solving its financial and industrial problems. This was the only reason why the Prefect upheld the appeal and set the requisition decree aside.

14. The delay of the Prefect's decision. — One of the charges made by the Government of the United States against the Prefect's decision is that it was delayed. It was in fact delivered 16 months after the appeal taken by *ELSI*. The claimant Government contends that this delay was quite unusual for normal Italian practice and that at the time the requisition was declared illegitimate, it had already irremediably produced its effects[1].

With regard to Italian practice the Government of the United States relies on an affidavit by the legal counsel of Raytheon[2], to the effect that the average time taken by Prefects to decide upon appeals against requisition orders issued by Mayors is about one month. The Chief of Staff of the Italian Ministry of the Interior has instead declared that the average time is about one year[3].

Quite apart from this, three significant circumstances must be pointed out. In the first place, it must be recalled that, in accordance with Article 5, paragraph 5, of the Consolidated Law No. 383 of 3 March 1934 (Municipal and Provincial Law),

> "[a]fter 120 days from the date of the filing of the appeal without the authority with which the appeal has been filed having ruled on the said appeal, the appellant may request the authority, after notifying it by means of a petition, that the appeal be ruled upon[4]."

In the case in hand a request was made to the Prefect only on 9 July 1969 and the appeal was decided upon about a month and a half later. In the second place it should be pointed out that the requisition had already ceased to have any effect on 30 September 1968, that is, at the date of expiry of its normal term of six months. By this date the effects of the requisition and those of the bankruptcy, declared on 16 May 1969, had already long overlapped as far as the availability of the plant and its equipment were concerned. Therefore even if the Prefect had decided on the appeal against the requisition within a month, ELSI would not have anyway been able to make free use of the requisitioned property. Furthermore, if the requisition was to be regarded as the cause of the bankruptcy, as the claimant Government contends, the relevant delay in the Prefect's decision did not go beyond the seven days elapsing between the presentation of the appeal to the Prefect (18 April) and the date when the bankruptcy petition was filed (25 April). In fact, from the point of view of the availability of the plant it would have obviously been of no use to succeed in an appeal to the Prefect after the bankruptcy petition had been filed.

Lastly, it must be emphasized that the Prefect's decision had the only effect that it was actually capable of producing, that is, it created the preliminary conditions needed for the receiver in the bankruptcy proceedings to take action against the Ministry of the Interior before the Tribunal of Palermo for the purpose of claiming damages for unlawful requisition. This claim was brought

[1] See Memorial, I, p. 99.
[2] See *ibid.*, p. 64.
[3] See doc. 30.
[4] See doc. 20.

four months later, on 29 December 1969, and, as has already been mentioned, was successful[1].

15. The episodes characterizing the bankruptcy proceedings: 1968-1969. — Let us now examine the episodes characterizing the bankruptcy proceedings, which opened, as we have seen, with the decision of the Tribunal of Palermo of 16 May 1968 upholding the petition filed by ELSI on 25 April.

By way of introduction, it is to be recalled that, under Italian law, the judicial authorities concerned with bankruptcy proceedings (i.e., the bankruptcy court and the delegated judge) have the statutory aim of ensuring the best possible satisfaction of the interests of all the creditors through the liquidation of the bankrupt's assets. For his part, the receiver, in his capacity of public official, acts as a close collaborator of the delegated judge.

The Government of the United States casts some doubts about the objectivity of the authorities dealing with the ELSI bankruptcy. It further contends that the Italian Government "discouraged private bidders, boycotted the auctions itself, and worked out special arrangements for a piecemeal take-over directly with the bankruptcy authorities"[2].

In actual fact, three of the auctions called by the delegated judge (held on 18 January 1969, 22 March 1969 and 3 May 1969, respectively) were unattended and only at the fourth auction (held on 12 July 1969) did ELTEL, a new company of the IRI-STET group, make a bid, which was accepted in the absence of any other bidders. This in no way implies that irregularities were committed by the Italian authorities. Any bidders interested were invited to participate as is shown by the fact that extensive publicity was given to individual sales announcements published also in the foreign press (see the advertisements in *Corriere della Sera*, *Sole-24 Ore*, *Il Globo*, *Financial Times*, *The New York Times*, *Frankfurter Allgemeine Zeitung*, *Le Monde*, *Le Soir*, *De Telegraaf*, *The Nihoneiza Shimbun*)[3].

At the beginning of April 1969, that is between the second and the third auction, the delegated judge of the bankruptcy court, at the request of the receiver and with the support of the majority of members of the creditors' committee, authorized the lease of the ELSI plant to ELTEL for a period of 18 months. Raytheon contended that the lease represented a prejudice to the creditors because it made in fact impossible a sale to third parties other than ELTEL of the plant or of individual separate lines[4]. However, the Tribunal of Palermo, in rejecting this contention, did not fail to point out that the lease was actually advantageous for the creditors since, far from making the sale of the plant impossible, it actually made the sale easier, in that ELTEL was under obligation to maintain the plant in perfect efficiency and to carry out all the repairs and replacements due to normal wear and tear[5]. No appeal against this decision of the Tribunal of Palermo was taken by Raytheon.

16. The sale of the supplies and of the ELSI plant. — On 5 May 1969 the bankruptcy judge authorized the sale to ELTEL of the material existing on the production lines at the price of Lire 105 million. The Government of the United States now describes this operation as a sell-out, by arguing that the price paid by ELTEL amounted to barely 48 per cent of the inventory value of the material in question[6]. However, it fails to consider that while judicial valuator Mr. Di Benedetto had indeed assigned an inventory value of Lire 217 million to the

[1] See Memorial, Anns. 79-82.
[2] See Memorial, **I**, p. 85.
[3] See "The Claim", Exhibit III-19, no longer attached to the Memorial.
[4] See Memorial, Ann. 62.
[5] See *ibid.*, Ann. 64, **I**, p. 342.
[6] See *ibid.*, **I**, pp. 61-62 and 87.

material in question, ELSI itself had previously valued it at only Lire 193 million[1]. Furthermore, it must not be overlooked that the receiver himself, in his request *for sale authorization, pointed out* that the material was more than one year old and therefore hard to market, and that its removal from the production line would further reduce its value[2]. Lastly, if the operation was truly so suspect, why did Raytheon merely express its reservations at the meeting of the creditors' committee and not appeal to the court against the authorization given by the delegated judge?

On 12 July 1969 the fourth auction for the sale of the ELSI plant was held. The plant and equipment were put up for sale at the starting price of Lire 3,200 million, and the supplies, excluding raw materials and finished products, together with the semi-finished products for semiconductor production, at the starting price of Lire 800 million.

The only bidder at the auction was ELTEL, to whom the whole lot was adjudicated for a total price of Lire 4,006 million. According to the claimant Government this was a ridiculously low price that ELTEL allegedly managed to impose by virtue of the fact that it was already in renting of the plant. Allegedly, the Italian Government thus achieved its aim of having IRI purchase the ELSI assets "without paying a freely market-determined price"[3]. In this connection, it is necessary to clarify a gross misunderstanding. At the stage that matters had reached (as this was the fourth auction after the first three had been unattended) it was out of the question that the sale of the plant could take place according to a "freely market-determined price": the question is therefore not to see whether ELTEL had purchased "at less than fair market price" or at a "reduced price"[4] but only whether the price paid could be considered reasonable in the circumstances.

17. The value of the property in question and the price paid by ELTEL. — The first thing to establish is the value of the property in question according to the various previous estimates. The claimant Government refers to an alleged "book value" of Lire 12,000 million[5] although this is a totally unreliable figure. This value is based on the last balance sheet drawn up by ELSI more than one year earlier (31 March 1968) and without the support of regular accounting. Furthermore, it refers, in addition to the plant and equipment, to all the supplies existing at the time, while the supplies acquired by ELTEL at the auction were very limited, as many articles had been previously sold by the receiver and also the remainder was exclusive of all raw materials and finished products, as well as semi-finished products for semiconductors. Only two estimates can be taken into consideration with reference to the value of the assets in question: the quick-sale value, worked out by the *ELSI management itself before deciding to wind* up the company and the judicial evaluation carried out by Ingegner Puglisi on 12 October 1968[6].

If we take either of these two estimates as a reference, the value of the assets actually purchased by ELTEL basically corresponds to the price adjudicated at the auction.

All that remains to be done at this point is to examine the prices set in the various individual auctions and to see how the final figures were arrived at. The starting price set for the first auction was Lire 4,650 million (for plant and

[1] See "The Claim", *infra*, p. 233 [p. 57].
[2] See Memorial, Ann. 69.
[3] Memorial, I, p. 63.
[4] Memorial, I, respectively pp. 85 and 87.
[5] *Ibid.*, p. 97.
[6] See "The Claim", Exhibit II-41, no longer attached to the Memorial.

equipment alone). For the second auction the starting price was fixed at Lire 6,223 million (Lire 4,000 million for the plant and Lire 2,223 million for the supplies). A few days earlier, ELTEL had sent the bankruptcy judge a documented valuation made by the Siemens technical office, giving the current value of the ELSI plant and equipment as not exceeding Lire 2,770 million[1]. The judge maintained the previously fixed price and the auction was unattended. The starting price for the third auction was fixed at Lire 5,000 million (Lire 3,200 million for the plant and Lire 1,800 for the supplies). ELTEL made it known that it was willing to pay the requested price for the plant, but that in no case was it willing to bid for the supplies, which it considered quite useless[2]. The delegated judge nevertheless remained firm in his decision to auction off plant and supplies. The third auction was also unattended. ELTEL relented and, on 27 May 1969, informed the delegated judge that it would be prepared to purchase the entire lot at a price of Lire 4,000 million[3]. After requesting and obtaining the approval of the receiver and the creditors (among the latter, only the Raytheon representative expressed strong reservations), the delegated judge set the starting price for the fourth auction at Lire 4,000 million (Lire 3,200 for the plant and Lire 800 for the supplies). It should be noted that this price only apparently coincided with that offered by ELTEL, as the latter referred to all the supplies contained in the stores, while the lot auctioned by the judge excluded all the raw materials and finished products, as well as semi-finished products for semiconductors. Nevertheless Raytheon appealed to the Court against the delegated judge's order, but its appeal was rejected by the Court on 20 June 1969[4].

In view of the above considerations it can be concluded that the price paid by ELTEL at the bankruptcy auction was perfectly reasonable. In this context, it may be recalled that, in the 1974 Claim put forward against the Italian Government by the applicant Government on behalf of Raytheon and Machlett, it was contended that the price paid by ELTEL was only 300, or at most 500, million Lire less than the estimated realization value of the property in question[5]. This is an understandable difference considering that ELTEL was purchasing at a fourth bankruptcy auction, after three auctions had been unattended!

18. The role played by IRI from 1967 to March 1968. — It may be useful to add some explanations concerning the role played on several occasions by IRI in the attempt to rescue ELSI.

A fact of considerable interest for a correct understanding of the matter is that IRI (Istituto per la Ricostruzione Industriale) is a public enterprise which has numerous interests in private companies. By law it must act in accordance with the principle of profitability (see Art. 3 of Law No. 1589 of 22 December 1956) and enjoys full managerial freedom. Naturally, its legal personality is distinct from that of the State. Only in exceptional circumstances, when it is a matter of protecting general interests such as the safeguarding of employment, can the Government give IRI some directives (e.g., the purchase of unprofitable companies). However, even in such cases the decisions made by IRI are attributable to IRI itself and not to the State.

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[1] See Considerations by SIT-Siemens of 5 March 1969, contained in "The Claim", Exhibit III-32, omitted in the annexes to the Memorial.

[2] See the petition of 16 April 1969 annexed to "The Claim", Exhibit III-33, omitted in the annexes to the Memorial.

[3] See Memorial, Ann. 70.

[4] See the copy of the claim and the decree annexed to "The Claim" as Exhibit 38, but later omitted.

[5] "The Claim", *infra*, p. 233 [p. 66].

In the case in hand, the suggestion that IRI should intervene was first made by Raytheon. It should be recalled in this connection that, because of the serious crisis affecting its Palermo subsidiary, as early as Spring 1967 Raytheon had requested that IRI should purchase an interest in ELSI and thus help to improve its situation. The request was rejected for a very simple reason. According to the reorganization plan drawn up at that time by the new ELSI management, the company was to expand mainly in the telecommunications sector, that is, in a sector in which several companies belonging to the IRI group were already operating. ELSI would therefore have become a direct competitor[1]. IRI's response in early 1968 was to take a firm stance:

> "IRI and Finmeccanica point out that in this new ELSI report there seems to be little justification for modifying the opinion on the ELSI situation which they expressed at the previous meeting with Raytheon. The financial support to be provided by the proposed new capital of 6 billion lire is not in itself sufficient to improve significantly the basic operating position of the company, which remains in an extremely serious condition notwithstanding the praiseworthy efforts made by Raytheon to achieve a sound basis of operations [. . .] IRI and Finmeccanica point out that within the IRI Group there were no concrete possibilities of ensuring a direct market outlet for Raytheon-ELSI's production. The only exceptions to this statement concern areas of marginal interest, or areas in which other IRI companies, which already have substantial problems of their own to be solved, are currently operating [. . .][2]."

It is true that IRI did not exclude the possibility of a reappraisal some time in the future.

> "However, IRI desires to point out that, even though — with great regret — it cannot accept Raytheon's request at this time, it remains possible that a later request by Raytheon might receive more favorable consideration [. . .][3]."

Nevertheless, this was said out of pure courtesy, and is explained by the excellent relations till then prevailing between IRI and Raytheon.

At the time the Italian Government refrained from putting pressure on IRI to obtain its involvement. The situation changed considerably after ELSI's decision to cease its activity and to liquidate its assets. ELSI's desperate financial straits clearly indicated that only a large-scale intervention could avoid collapse with the consequent loss of more than one thousand jobs. Since the Sicilian Region had immediately stated the condition that any financial aid on its part would be dependent on IRI participation in the rescue operation, the Central Government now made it clear that it would do everything to convince IRI to accept.

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[1] See "1967 Report", which expressely states, at I, p. 215:

> "The third possible group, which would certainly represent the major build up of new products, could come from government-owned agencies in Italy [. . .]. As an example, a large part of the communications equipment for the Italian PTT and the Concessionary Companies is manufactured by IRI Companies [. . .]. There is certainly every reason why future telephone switching equipment and other communications for use in Sicily and Southern Italy could and should be made in Sicily in Raytheon-ELSI."

[2] See Memorial, Ann. 15, Exhibit C, containing the summary of the talks held at IRI on 4 January 1968, between IRI Management, the Chairman of Finmeccanica and Mr. John D. Clare.

[3] *Ibidem*.

It should be noted, however, that if the Italian Government had really intended to have IRI buy up the ELSI factory cheaply, the easist way to do so would have been to reject Raytheon's desperate requests for funds and to let ELSI's financial conditions deteriorate until bankruptcy became inevitable. And if, as was actually to happen, the shareholders of the company refused to come to terms with reality, bankruptcy could easily have been requested by one of the creditor banks.

Instead, the behaviour of the Italian Government was quite the opposite: it immediately declared its availability to come to ELSI's help and even when the ELSI shareholders tried to force its hand, ignoring the company's longstanding insolvency, and pretending to carry out an orderly liquidation, it continued to seek a solution which would be acceptable for all concerned. This would indeed have been a peculiar attitude to adopt for someone pursuing the diabolical aim of trying to take property for the benefit of IRI! Nor could it be claimed that the first step in this direction was the order to requisition the factory, which was alleged to have caused ELSI's bankruptcy and all the ensuing events. The first reason for this is, as already said, that it was not the requisition order which caused ELSI to go bankrupt as the company was already insolvent. In the second place the requisition was evidently a simple emergency measure, taken mainly for the purpose of avoiding any possible disorders due to the dismissal of ELSI employees decided by the company management on the previous day. Moreover, the fact that all parties concerned considered it to be little more than a temporary nuisance is shown by the fact that negotiations for the public rescue of ELSI continued without slackening even afterwards and that ELSI itself allowed 19 days to go by before lodging an appeal against the Mayor's decree.

The truth is that the impossibility of reaching an agreement concerning the timing and procedure of IRI action in favour of ELSI, which was then recommended by all concerned, was not the fault of the Italian authorities but of Raytheon. Raytheon was perfectly aware that the Italian authorities would never accept that ELSI's activities ceased overnight, leaving more than one thousand employees jobless. Taking advantage of this fact, Raytheon continued to act as though the ELSI crisis was none of its business and as though it was the concern of the Italian authorities to provide for the company and its creditors.

19. The Italian authorities' proposal for a settlement in March and April 1968. — At the end of March 1968, that is, after ELSI's decision to cease its activity and to proceed to an "orderly" liquidation, but before the requisition decree, the Italian authorities asked Raytheon to reopen the factory and not to send the dismissal letters as announced. In return the Government would pay the wages and shoulder most of the operating losses, until such time as a public company could open negotiations with ELSI for the purchase or lease of its assets. Raytheon refused[1].

The same proposal was renewed to the company one month later, but Raytheon again refused. This time, however, its acceptance would have entailed the immediate revocation of the requisition order, which the Mayor of Palermo had in the meantime issued, as well as the pledge of the Italian authorities that, once productive activity would have been resumed, by means of a special management company to be set up together with the Sicilian Region and IRI, "everybody, including the Region and IRI, shall be ready to help Raytheon and in the meantime to liquidate ELSI through a useful sale in the shortest possible time"[2]. In an attempt to justify the undue intransigence of Raytheon, the applicant Government now claims that, by means of this proposal, "[a]fter having requisi-

[1] See Memorial, Ann. 15, Exhibit G, **I**, p. 181.
[2] See *ibid.*, Ann. 38, **I**, p. 298; see also Memorial, Ann. 37.

tioned ELSI's plant and other tangible assets, Italian authorities pressured Raytheon to reopen ELSI at Raytheon's own expense"[1]. In actual fact, the establishment of the new operating company would have required not the paying-up of any new capital, but merely Raytheon's willingness to cover 40 per cent of the probable operating losses, while the remaining 60 per cent would be covered by the Region and IRI.

However, the crucial point was a different one: Raytheon, although it had made out that it intended to proceed with the "orderly" liquidation of ELSI, knew very well that only an agreement with the banks would allow it to avoid having to honour the guarantees extended to ELSI. And since, up to that time, the banks had shown little inclination to come to terms with Raytheon, it may be concluded that the latter had every interest in allowing the situation to worsen in the hope that, faced with the prospect of losing everything, the banks would soften their attitude. These appear to be the real reasons why Raytheon refused the proposals made by the Italian Government. The fact that, six days later, ELSI filed for bankruptcy with the Tribunal of Palermo, also appeared as an attempt to force the hand of the banks, which had previously seemed reluctant to accept a negotiated solution. Nevertheless the Italian authorities continued their efforts to find a satisfactory solution for all concerned.

During the same period, the President of the Sicilian Region, Mr. Vincenzo Carollo, again according to the Government of the United States[2], threatened the Raytheon management because of their refusal to reopen the plant. In fact, in the attempt to save jobs, President Carollo merely made a few reasonable predictions and several personal remarks. So when he stated that

> "[n]obody in Italy shall purchase, that is, IRI shall not purchase neither for a low nor for a high price, the Region shall not purchase, private enterprises shall not purchase [. . .] the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favor any sale while the plant is closed,"

he announced perhaps somewhat undiplomatically something that was really quite obvious: namely, that the Italian administrative authorities would not view with favour liquidation plans such as those envisaged by ELSI, as they were incompatible with any realistic reorganization plan. But also the further "threat" that

> "[t]he banks which have outstanding credits for approximately 16 billion lire, cannot and will not accept any settlement even at the cost of dragging the Company into litigation on an international level [. . .] It is obvious that every attempt will be made (even at the cost of long litigation) to obtain from Raytheon what is owed by ELSI [. . .]"

is not at all strange. In fact, it is only to be expected that the banks would attempt to recover their loans to ELSI also from Raytheon seeing that the latter held 99 per cent of the equity. All the banks actually claimed payment of the ELSI debts from Raytheon, but those claims were rejected by the Italian courts[3]. This despite

[1] See Memorial, Ann. 47.

[2] Cf. Memorial, I, pp. 55-56.

[3] See, in particular, Court of Cassation, decision No. 5143 of 7 October 1982 (final judgment against the Cassa Centrale di Risparmio Vittorio Emanuele); Court of Cassation, decision No. 6712 of 9 December 1982 (final judgment against the Banca Commerciale Italiana); Court of Cassation, decision No. 2879 of 9 May 1985 (final judgment against the Credito Italiano). The texts of the three decisions are attached as documents Nos. 41-43 to the present Counter-Memorial.

the existence of a number of authoritative doctrine and decisions which claim that the principle embodied in Article 2362 of the Civil Code, according to which a sole shareholder is liable for the company's debts in the case of insolvency[1], equally applies whenever an insignificant number of shares is being held by figureheads or controlled companies[2]. Then there is the final remark by President Carollo that "[i]n the event that the plant shall be kept closed [. . .] the requisition shall be maintained at least until the courts will have resolved the case. Months shall go by [. . .]". Despite the efforts by the United States Government[3] to show that this was a threat to maintain the requisition for an indefinite period, it was actually a prediction of what could have happened, but in fact did not occur as the effects of the requisition decree expired after six months.

20. The attitude of the Italian authorities in the following months. — On 25 July 1968 the Minister for Industry and Trade announced in Parliament that two measures had been adopted in favour of ELSI. The first, of a temporary nature, consisted in the pledge by the Sicilian Region to continue to pay the employees' wages for two months after the company would have resumed activity; a total of Lire 700 million was appropriated for this purpose[4] The second consisted of the establishment of a management company by the Region and other public agencies which would allow productive activities to be resumed until such time as the financial problems of ELSI could be finally resolved, if possible through settlement out of court[5].

The true objective of the Italian authorities thus remained negotiated settlement. For this purpose contact was resumed with Raytheon and, after a number of meetings held during the Summer, it seemed that an agreement was just round the corner: an IRI Group company would purchase the plant as it was, without the supplies (i.e., only the fixed assets) for the price of Lire 4,000 million. These funds, plus the revenue from the sale of the remaining company assets, would be used to pay the costs of bankruptcy and the secured creditors in full, as well as 40 per cent or even 50 per cent of the claims of the unsecured creditors, while Raytheon would not have to honour the guarantees extended to ELSI. However, on 14 October, after an eventful meeting held in Rome at the Ministry of the Budget and Planning, the parties separated without reaching an agreement.

The United States Government now claims, on the basis of evidence given by Raytheon's counsel[6], that the Italian Government was entirely responsible for the breakdown in negotiations since, for unspecified "political reasons", it "had decided to allow IRI to take over ELSI's assets without a creditor settlement". This is completely untrue. The negotiation of the above-mentioned agreement came to grief not because of the Italian Government (which had no cause to do so) but because of the creditor banks, for a very simple reason: the banks, who might have been willing to accept 50 or even 40 per cent and to free Raytheon from its guarantee obligations, realized that the ELSI assets were not enough to pay such a percentage. The assurances to the contrary given by the Raytheon management[7] did nothing to change this. In fact, the Raytheon estimates were based on the quick-sale value of the ELSI assets according to the valuation made by the company management itself six months earlier. Already dubious at the

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[1] Doc. No. 18.

[2] See, among others, Bigiavi, *L'imprenditore occulto*, Padua, 1964, pp. 185 et seq.; Ascarelli, *Foro Italiano* (1950), I, 1114; Ferri, *Le Società*, Turin, 1985, pp. 390 et seq.

[3] See Memorial, I, p. 56.

[4] See docs. Nos. 37-39.

[5] See Memorial, Ann. 46.

[6] See *ibid.*, Ann. 29, I, p. 246.

[7] See *ibid.*, I, p. 58.

time they were made, these estimates were even less reliable six months later, in full bankruptcy proceedings.

On 13 November 1968 the Italian Government issued a special press communiqué that

> "[w]hile the STET Group remains committed to build a new plant in Palermo for the production of telecommunication products, the IRI-STET Group, urged by the Government, after the examination of alternative solutions which proved unfeasible, stated its willingness to intervene in the take-over of the [ELSI] plant in the organization of new lines of production [1]".

The United States Government contends that the Italian Government thus interfered unduly in the ongoing bankruptcy proceedings; by publicly announcing its intention to take over the ELSI assets at all costs, it was allegedly discouraging other possible bidders from competing at the later auctions [2].

However this allegation is totally unfounded. The announcement in question was made when it was clear that there was no other way out and for the sole purpose of reassuring public opinion in Palermo, which was understandably exasperated after months of vainly waiting for a possible solution to the dramatic ELSI crisis. A perusal of the announcement reveals that IRI was actually only following a definite Government directive and that the Government itself was perfectly aware that the acquisition of the plant was a very poor bargain. This is the only possible explanation for the initial assurance that the purchase of ELSI's plant would in no way have jeopardized the implementation of the original STET project to build a new plant, also in Palermo, and for the final mention of the commitment to start up new production lines in ELSI's plant. There was therefore no danger of discouraging other possible buyers from bidding for the factory. After all, six months after ELSI had filed for bankruptcy (and eight months after the announcement that it was being wound up) only two enterprises — General Instrument and Compagnie Sans File — had come forward and both were interested solely in leasing the plant once it had been purchased by others. Therefore, the announcement of 13 November 1968 merely gave those concerned the certainty that the solution to the crisis was close at hand. In fact, the above-mentioned four auctions for the sale of the ELSI factory were held by the receiver the following year (18 January, 22 March, 3 May, 12 July 1969) and led to the final purchase of the plant by ELTEL.

[1] See Memorial, Ann. 47.
[2] See *ibid.*, Ann. 29, Exhibit 4A.

PART II

THE JURISDICTION OF THE COURT

In view of Article XXVI of the 1948 Treaty of Friendship, Commerce and Navigation (the "Treaty") between Italy and the United States, the Italian Government fully recognizes the Court's jurisdiction over the dispute in so far as it relates to the interpretation and application of the 1948 Treaty and the 1951 Supplementary Agreement.

The Italian Government respectfully calls the Court's attention to the fact that, under Article XXVI of the Treaty, jurisdiction only exists with regard to "any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy". The provision appears to require, as a condition for submitting a dispute unilaterally to the Court, that the basic contentions concerning the interpretation or the application of the Treaty should have first been put forward in diplomatic negotiations. A dispute between the Parties with regard to the principal legal issues[1] could not otherwise be held to exist.

In the "Memorandum of Law in Support of the Claim of Raytheon Company and the Machlett Laboratories, Incorporated, Against the Government of Italy in Connection with Raytheon-ELSI S.p.A."[2] submitted by the claimant Government, the "Summary of Legal Arguments" (pp. 276-277, *infra*) referred to Articles V, paragraph 2, VI and VII, of the Treaty, Article I and/or paragraph 2 of the Protocol and Articles I and V of the Supplementary Agreement. In the conclusions to its Memorial, the claimant Government no longer alleges violations of Article VI of the Treaty, Article I and/or paragraph 2 of the Protocol and Article V of the Supplementary Agreement; on the other hand, violations of Articles III, paragraph 2, and V, paragraphs 1 and 3, of the Treaty are also maintained. The latter provisions had only been referred to during the course of the argument in the earlier "Memorandum".

This lack of consistency on the part of the Government of the United States with regard to the treaty provisions which have allegedly been infringed hardly corroborates the claimant Government's contentions based on these provisions. In respect of the Court's jurisdiction, the Italian Government could request the Court to declare that the conditions set forth in Article XXVI of the Treaty have not been fulfilled, at least with reference to part of the claim. However, in the interests of a complete settlement of the present dispute, the defendant Government refrains from putting forward any such request.

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[1] *Right of Passage* case, *ICJ Reports 1957*, p. 149.

[2] Unnumbered document.

PART III

THE ADMISSIBILITY OF THE CLAIM

The Italian Government respectfully submits that the United States Government's claim is inadmissible in view of the fact that local remedies were not exhausted by the two United States corporations on behalf of which the claim is put forward.

In the well-known *Ambatielos* case, which concerned a claim made by the Greek Government against the United Kingdom Government on the basis of the bilateral Treaty of Commerce and Navigation of 1886, the United Kingdom Government invoked the local remedies rule and the Commission of Arbitration said:

> "The rule thus invoked by the United Kingdom Government is well established in international law. Nor is its existence contested by the Greek Government. It means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals[1]."

The local remedies rule was authoritatively defined by the Court in the *Interhandel* case in the following terms:

> "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system[2]."

Italy was therefore entitled to have an opportunity to redress the alleged violations of the 1948 Treaty and the 1951 Supplementary Agreement within the framework of the Italian domestic system.

In applying the local remedies rule, it is necessary to assume that the contentions with regard to law and to fact, which have been put forward by the applicant Government on the merits of the case, are correct. In the words of the arbitral award in the *Finnish Shipowners* case:

> "According to the principles approved by the Arbitrator every relevant contention, whether it is well founded or not, brought forward by the claimant Government in the international procedure, must under the local

[1] 12 *Reports of International Arbitral Awards*, pp. 118-119.
[2] *I.C.J. Reports 1959*, p. 27.

remedies rule have been investigated and adjudicated upon by the highest competent municipal court . . . The contentions to be taken into account must be considered well founded because otherwise the rule that where recourse is futile recourse is not required would lead to the consequence, pointed out by the British Government, that unmeritorious international claims would be taken out of the rule that municipal remedies must be exhausted. But, as previously said, every relevant contention brought forward by the claimant Government in the international procedure — whether erroneous or not — must, according to the opinion expressed by the Arbitrator, under the local remedies rule have been examined by the municipal courts, ere the respondent State is bound to enter into further international proceedings[1]."

The same approach was taken by the Commission of Arbitration in the *Ambatielos* case:

> "If the rule of exhaustion of local remedies is relied upon against the action of the claimant State, what is the test to be applied by an international tribunal for the purpose of determining the applicability of the rule? As the arbitrator ruled in the *Finnish Vessels* case of 9 May 1934, the only possible test is to assume the truth of the fact on which the claimant State bases its claim[2]."

The two United States corporations on behalf of which the claim is put forward never made use of any local remedy. The applicant Government contends that no suit for damages "could . . . have been brought under Italian law, on behalf of ELSI's shareholders, Raytheon and Machlett"[3]. However, the only support given to this assertion is a corresponding paragraph in an affidavit by Mr. Giuseppe Bisconti, Raytheon's Counsel ("Ann. 26, para. 28", to the Memorial).

In the present case no provision of the Treaty or the Supplementary Agreement was ever invoked before Italian courts. There is no doubt that the two US corporations could have done so. Enabling legislation had been enacted in Italy: Law No. 385 of 18 June 1949 (*Gazzetta Ufficiale*, No. 157 of 12 July 1949, supplement) and Law No. 910 of 1 August 1960 (*Gazzetta Ufficiale*, No. 213 of 1 September 1960), the latter with regard to the 1951 Supplementary Agreement Provisions of the Treaty had been regarded by the Italian Court of Cassation as self-executing and applied to the benefit of United States parties which invoked them. See, for instance, decision No. 2228 of 30 July 1960, *The Durst Manufactur-*

[1] *Reports of International Arbitral Awards*, pp. 1503-1504.

[2] 12 *Reports of International Arbitral Awards*, p. 119. In the *van Oosterwijck* case the European Court of Human Rights similarly held:

> "The only remedies which Article 26 of the Convention requires to be exercised are those that relate to the breaches alleged and at the same time are available and sufficient (see the Beweer judgment of 27 February 1980, *Series A, No. 35*, p. 16, § 29). In order to determine whether a remedy satisfies these various conditions and is on that account to be regarded as likely to provide redress for the complaints of the persons concerned, the Court does not have to assess whether the complaints are well-founded: it must assume this to be so, but on a strictly provisional basis and purely as a working hypothesis (see the arbitration award of 9 May 1934 in matter of the 'Finnish Ships', *United Nations Collection of Arbitration Awards*, Vol. III, pp. 1503-1504, also cited by the Commission in its decision of 17 January 1963 on the admissibility of application No. 1661/62, *X and Y* v. *Belgium*, *Yearbook of the Convention*, Vol. 6, p. 366)." *Publications of the European Court of Human Rights*, Series A, Vol. 40, pp. 13-14 (1981).

[3] Memorial, I, p. 65, n. 3.

ing Co. v. *Banca Commerciale Italiana*, with reference to Article V, paragraph 4, of the Treaty[1].

In the Italian Government's view, the fact that the two United States corporations never resorted to Italian courts, when they could have based a claim against the Italian State on the alleged facts and on the alleged infringements of the Treaty and the Supplementary Agreement, leads to the conclusion that the applicant Government's claim is inadmissible because local remedies were not exhausted.

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[1] 64 *Rivista di Diritto Internazionale* (1961), pp. 117-118 and 84 *Il Foro Italiano* (1961), I-304. A similar view appears to have been taken by United States courts. In *Spiess* v. *Itoh & Company* the US Court of Appeals for the Fifth Circuit held that "(t)he FCN treaties, including the Japanese Treaty, are self-executing treaties, that is they are binding domestic law of their own accord, without the need for implementing legislation". 643 *Federal Reporter*, 2d Series, pp. 353 ff., at p. 356 (1961).

PART IV

THE INTERPRETATION AND APPLICATION OF THE 1948 TREATY AND THE 1951 SUPPLEMENTARY AGREEMENT

1. The legal terms of the dispute: the claimant and the defendant Governments' positions. — The Government of the United States, at the beginning of its Memorial of 15 May 1987, asserts that the case

> "concerns the failure of the Government of Italy to afford to United States investors in Italy the protections and guarantees established by the 1948 Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic (the 'Treaty') and its 1951 Supplement[1]".

This claim is subsequently developed with reference, in particular, to Articles III, V and VII of the 1948 Treaty, and to Article I of the 1951 Supplementary Agreement. More precisely, the Government of the United States claims that

> "the requisition and subsequent conduct were both arbitrary and discriminatory, prevented Raytheon and Machlett from managing and controlling an Italian corporation whose shares they had lawfully acquired, and resulted in the impairment of their legally acquired rights and interests — in violation of Articles III and VII of the Treaty and Article I of the Supplement. In addition, the requisition constituted a taking of Raytheon's and Machlett's interests in property without due process and without adequate compensation, in violation of Article V of the Treaty. Italian authorities also failed to comply with the obligation under Article V to afford the protection and security, by the unwarranted delay in ruling on the challenge to the requisition order and by failing to afford protection to ELSI's plant and premises[2]."

On the contrary, the Italian Government considers the charges concerning the behaviour of the Italian authorities to be unfounded, because they are based not only on an inaccurate and biased reconstruction of the facts (as has been clarified in Part I), but also on an incorrect interpretation of international law. It will be shown how the provisions on which the United States Government's claim is based should be properly understood and applied to the case in question. Before doing so, however, a few considerations need to be made concerning the nature, content and general features of the two Treaties that the United States Government claims have been violated by Italy.

2. The rules on interpretation to be applied with reference to the 1948 and 1951 Treaties between the United States and Italy. — Although the 1969 Vienna Convention on the Law of Treaties does not apply to the interpretation of the Treaty and its Supplementary Agreement, the rules on interpretation included in the Convention are to be considered as corresponding to those applicable under general international law. As the Inter-American Court of Human Rights stated in its Advisory Opinion OC-3/83: ". . . the rules of interpretation set out in the Vienna Convention . . . may be deemed to state the relevant international law

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[1] Memorial, I, p. 43.
[2] *Ibid.*, pp. 43-44.

principles applicable to this subject"[1]. Similarly, the Arbitration Tribunal in the dispute concerning the *Delimitation of the Maritime Boundary* between Guinea and Guinea-Bissau considered that Articles 31 and 32 of the Vienna Convention provided the "relevant rules of international law governing the interpretation" of an 1886 treaty. The Tribunal referred to the "Parties' agreement on this point" and to

> "the practice of international tribunals concerning the applicability of the provisions of the Convention on the Law of Treaties by virtue of an international custom recognized by States (see in particular the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, *I.C.J. Reports 1971*, p. 47, para. 94; *Fisheries Jurisdiction* case, *I.C.J. Reports 1973*, pp. 18 and 63, para. 36)[2]".

It should be noted that, in accordance with the general rules of interpretation set out in Article 31 of the above Convention "[a] treaty shall be interpreted in good faith, in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object* and *purpose*"[3]. This provision is expressed in such terms as to allow one to conclude that, out of the various possible methods of interpretation, priority is given to the *textual method.* This method has the advantage of being objective, precisely because it is based on the normal, ordinary meaning of the words. The Convention gives less weight to the intention of the parties as it appears from the preparatory works. The value of these works, according to Article 32 of the Convention, depends on the results of the objective method[4].

Further elements which can be drawn from the above-mentioned Article 31 include the requirement that each clause of a Treaty shall be interpreted in its context, taking into account the aims pursued by the parties through the treaty as a whole. Both of the above indications strongly emphasize the unitary character of each treaty. Therefore, it is necessary to rule out the possibility of artificially combining individual clauses which may suit the specific and occasional interest of one interpreter in a particular case. Likewise, one must also refrain from representing, as the "object and purpose" of the whole treaty, an aim which is partial with respect to the overall aim of a treaty, and which, moreover, is not explicitly stated, but is, at most, pursued only indirectly in the treaty (in the present case, the protection of investments).

3. The Treaty of Friendship, Commerce and Navigation of 2 February 1948; its impact on the problem of investments. — The Treaty of Friendship, Commerce and Navigation signed in Rome on 2 February 1948 between the United States of America and Italy belongs to a well-known category of bilateral agreements governing the treatment of aliens. Agreements of this kind aim essentially at regulating the status of nationals of each Party, as well as of legal entities and

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[1] Advisory Opinion OC-3/83 of 8 September 1983, *Annual Report of the Inter-American Court of Human Rights 1984*, pp. 28-29.

[2] See translation published in 25 *International Legal Materials*, pp. 271-272 (1986). The original French text refers to "La pratique des tribunaux internationaux quant a l'applicabilité de dispositions de la convention sur le droit des traités au titre d'une coutume internationale reconnue entre Etats (...)". See 68 *Rivista di Diritto Internazionale*, p. 609 (1985).

[3] Emphasis added.

[4] However, the Italian Government finds it useful to complete the set of preparatory works (docs. Nos. 3 to 17) concerning the parliamentary debates relating to the 1948 Treaty and the 1951 Supplementary Agreement — as the claimant Government exhibited only part of the relevant documentation — both for Italy and the United States.

companies which have the "nationality" of one of the Parties, by assigning to them a number of advantages and guarantees in the other Party's territory.

One of the main features of these agreements is their broad scope, which is due to the great variety of objectives pursued. The matters regulated include, in the first instance, a wide range of questions referring to the establishment, in the territory of either Party, of nationals and legal entities belonging to the other Party, for the purpose of carrying on not only commercial and industrial activities, but also professional, cultural, scientific, religious or philanthropic activities. It should also be noted that the benefits granted to individuals and legal entities are not restricted to the recognition of rights with economic implications; also personal rights and even certain civil rights and freedoms are covered.

Within the framework of these agreements, the provisions governing establishment are followed by those concerning international trade and related problems of a fiscal, customs, and currency nature; a further set of provisions refers to navigation[1].

The Treaty of 2 February 1948 between Italy and the United States corresponds to the above model and is extremely complex. It lies beyond our present scope to go into its content in detail. We shall merely point out in passing that it is over 20 pages long and comprises 27 articles, many of which contain several paragraphs. The object and purpose of such a Treaty (in the light of which it must be interpreted, in accordance with Art. 31, para. 1, of the Vienna Convention on the Law of Treaties cited above) are given an appropriate overall description in the Preamble:

> "strengthening the bonds of peace and the traditional ties of friendship between the two Countries and [. . .] promoting closer intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of their peoples".

In consideration of all this, one cannot agree with the Government of the United States when it claims that "the parties' fundamental intention" was "to provide a framework which would foster a favorable climate for investment"[2]. In our view, the aim of creating legal conditions suitable for investment was only one of the numerous aims pursued in the 1948 Treaty[3]. It is useful to insist on this point, in order to oppose from the outset the tendency emerging from the Memorial of the claimant Government, namely, to interpret all the provisions of the 1948 Treaty as being intended to protect the investors of each Party in the territory of the other Party. This tendency does not conform to an objective interpretation of the said provisions. Furthermore, it would also have the result of greatly accentuating the imbalance between the two Parties in view of the overwhelming predominance of United States investments in Italy over Italian investments in the United States.

In this connection it should be noted that numerous other Treaties of Friendship, Commerce and Navigation concluded between the Government of the United States and Western European countries after the Second World War contain an explicit reference to the fostering of investment as one of the aims

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[1] In general, Blumenwitz, "Treaties of Friendship, Commerce and Navigation", in *Encyclopaedia of Public International Law*, Inst. 7, 1984, pp. 484 ff.

[2] Memorial, I, p. 69.

[3] In this regard, Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present U.S. Practice", in *American Journal of Comparative Law*, 1956, p. 239, says that "the FNC Treaty is not a special-interest vehicle, but rather one into which investor requirements, with scarcely an express reference to investments, are fitted as integral parts for a larger regulation of private affairs in international relations".

pursued. This applies to the Treaties with Greece, of 3 August 1951, with Denmark, of 1 October 1951, with West Germany, of 29 October 1954, with the Netherlands, of 22 March 1956, with Belgium, of 21 February 1961, and with Luxembourg, of 23 February 1962. The expression most frequently used refers to the possible contribution to the development of closer economic and cultural relations "by arrangements . . . promoting mutually advantageous commercial *intercourse and investments*". It is noteworthy that wording of this kind was not included in the Preamble to the Treaty signed by the United States and Italy on 2 February 1948.

Our remarks concerning the object and purpose of the 1948 Treaty are indirectly confirmed by the subsequent signing of the Supplementary Agreement (Washington, 26 September 1951). As can be seen from its Preamble, this Agreement actually aims at "giving added encouragement to investments of the one country in useful undertakings in the other country"; the contribution it makes to this end consists in the "amplification of the principles of equitable treatment set forth in the Treaty of Friendship, Commerce and Navigation signed at Rome on 2 February 1948". Clearly, there would have been no need to negotiate and sign a supplementary agreement had the preceding fundamental Treaty given sufficient weight to the specific problems of investment.

4. Recent tendencies of the United States policy for the protection of foreign investments. — A significant development needs to be recalled here. In recent years, particularly since 1982, United States policy, which had previously tended to encourage the stipulation of further Treaties of Friendship, Commerce and Navigation (many of which were negotiated after the Second World War), underwent a change. Preference began to be given to a more limited, but more *effective*, instrument for regulating relations with countries with heavy United States investments, namely, bilateral Investment Treaties. This new type of agreement had already been tried out in the seventies with reference to relations between a number of European countries and several developing countries. The United States ultimately saw the merits of the new approach and followed it in the case of a number of countries (starting with Egypt and Panama). An attempt was made by the Investments Bureau of the State Department to draft a model investment treaty[1].

Two remarks need to be made in this connection. Firstly, the change in the United States' attitude and the reasons for such a change are indicative of the objective limitations of the suitability of Treaties of Friendship, Commerce and Navigation as a means for protecting investments. It has been rightly said that these Treaties were "intended to protect American citizens abroad, rather than private foreign investments"[2]. In our opinion, when doubts arise as to the scope of certain provisions contained in the 1948 Treaty between Italy and the United States, this factor should not be underrated. It should also be noted, again in connection with Treaties of Friendship, Commerce and Navigation, that "the attempt to address very complex issues in the context of a broad spectrum of relations detracted from the utility of the FCN (Treaties) as an investment protection device"[3].

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[1] Blumenwitz, *op. cit.*, p. 489, mentions a "declining relevance" of the Treaties of Friendship, Commerce and Navigation.

[2] Bergman, "Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty", *New York Journal of International Law and Politics*, 1982, p. 7.

[3] Bergman, *op. cit.*, *loc. cit.*

This accurate remark can hardly be reconciled with the attempt by the claimant Government to make out that Treaties of Friendship, Commerce and Navigation are basically the equivalent of investment treaties[1].

Secondly, the differences between the two types of agreement we are comparing must necessarily have repercussions on their interpretation. From the point of view of the Government of the United States, each of the provisions in the 1948 Treaty to which it refers is merely a part of a complex regulatory design aimed at protecting investments. This view must be challenged. The approach chosen by the claimant Government distorts the global nature of the Treaty.

5. The principles on which the 1948 Treaty is based. — One of the fundamental characteristics of the 1948 Treaty, which is rightly emphasized in its Preamble, is the fact that it is "based in general upon the principles of national and of most-favored-nation treatment in the unconditional form". Perusal of the individual provisions of the Treaty reveals that the two standards are both referred to in some articles (e.g., Art. I, paras. 2 and 3), while reference to only one standard is made in others (e.g., Art. IV, which merely provides for the most-favoured-nation treatment in the case of exploitation of mineral resources).

When the Treaty was signed, the liberal spirit with which the principle of national treatment had been adopted was hailed by a distinguished member of the United States administration. During the hearing of 30 April 1948 before a subcommittee of the Committee on Foreign Relations of the US Senate, Mr. Thomas Blaisdell, assistant to the Secretary of Commerce for International Trade, made the following declaration:

> "The Treaty represents acceptance by republican Italy of a number of democratic principles in trade and navigation. The national treatment accorded to corporations, for example, is the most liberal ever specified in any treaty entered into by the United States[2]."

Clearly, both the national treatment and the most-favoured-nation standards take on a concrete and precise meaning through the ascertainment respectively of the conditions applying to the citizens (and thus of the municipal legislation governing them) and of those applying to third countries and their citizens (under the agreements concluded with those countries) with regard to a given matter. Therefore both clauses have been called "relative"[3]. Everything depends on the point of view adopted in a single case, that of one or other of the contracting States, and on the type of treatment referred to. In this connection it should be noted that, when speaking of "treatment" one cannot take into account only the advantages that are implied; in all matters, the overall treatment of aliens is an inseparable whole made up of advantages and disadvantages. If one considers, in particular, the concept of "national treatment" on the basis of this standard, one cannot avoid recognizing that an alien possesses certain rights and related obligations which are commensurate with the rights and obligations pertaining to the local State's nationals in the matter in question. Although the most-favoured-nation treatment implies the more favourable treatment between those enjoyed and enjoyable by a third Country (or by one of its nationals), it is necessary to compare the several legal systems *in their entirety* even for the purpose of assessing the applicable treatment.

6. The formula "in conformity with the laws and regulations in force" in the 1948 Treaty. — Analysis of the 1948 Treaty also shows that, in regulating a given

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[1] Memorial, I, pp. 69-70, notes.
[2] See doc. 15.
[3] Bergman, *op. cit.*, p. 20.

matter, the principle of national treatment, or that of the most-favoured nation, is often accompanied by a specific provision according to which the enjoyment or the exercise of rights by citizens of each Party are ensured "in conformity with *the applicable laws and* regulations". When such a clause is included in the text of a provision granting national treatment, it reinforces the concept defined above according to which foreigners do enjoy rights but are also bound to respect the duties imposed on the citizens by the laws of the country. In other words, the respect of the set of *local laws and regulations is a limit that cannot be overstepped* by virtue of a condition granted to foreigners "protected" by a Treaty of Friendship, Commerce and Navigation.

This appears quite reasonable and corresponds to a situation in which the alien benefiting from national treatment finds himself quite apart from the specification of conformity with the applicable laws and regulations. A foreigner cannot be considered to have a privileged position vis-à-vis a citizen of the local State when the national-treatment principle is applied. When the above-mentioned specification is contained in a provision which grants the most-favoured-nation treatment, the limitation set on the treatment of the foreigner consists in not granting him the favourable condition ensured to the citizens of a third country, should this *not be compatible with the municipal* legislation or regulations[1].

With regard to the principles laid down in the 1948 Treaty, it must be observed that the claimant Government makes occasional references to a notion of fair treatment, to which the status of an autonomous principle seems to be attributed. In fact, it is in the Preamble *to the 1951 Supplementary Agreement that* the "principles" (and not the principle) of "equitable treatment" stated in the 1948 Treaty are mentioned, and it is asserted that their amplification should contribute to encouraging investments further. But when Articles I to XIII of the 1948 Treaty, that is, the only clauses dealing with establishment and the only ones partially applicable also to questions of investments, are examined thoroughly, the only principles repeatedly used appear to be those of national treatment and of most-favoured-nation treatment. The fact is that *no fair-treatment principle is actually stated* in the 1948 Treaty.

This becomes all the more significant in view of the fact that an obligation to ensure "equitable treatment" (to the persons, property, enterprises and other interests of nationals and companies of the other Party) is laid down explicitly in the Treaties of Friendship, Commerce and Navigation entered into by the United States with Ireland, Denmark, Greece, Belgium and Luxembourg. Some other Treaties, particularly those concluded with Germany and the Netherlands, speak of *"fair and equitable treatment" to be accorded* by the Parties to the above-mentioned beneficiaries.

Therefore, the reference to the "principles of equitable treatment" contained in the Preamble to the 1951 Supplementary Agreement can only mean that the Parties thereto wished to express their intention to go beyond the two principles contained in the basic 1948 Treaty, the value and function of which have been

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[1] *According to an author quoted in the* US Government Memorial (I, p. 72, n. 1) whose opinion seems therefore to be shared by the claimant Government, the phrase "in conformity with applicable laws and regulations" as it occurs in this Treaty, is framed in such a manner as to imply that it does not constitute a reservation detracting from the Treaty right (Walker, "Provision on Companies in United States Commercial Treaties", in *American Journal of International Law*, 1956, p. 784, n. 53). The above-mentioned phrase is not altogether clear. In our opinion the question is not that of the detraction of something from a Treaty right. What happens is simply that the Treaty acknowledges some rights only to the extent to which they are in conformity with the laws and regulations of the local State.

expressed in the "equitable treatment" formula. In other words, the principles of national and of most-favoured-nation treatment are both considered to be "principles of equitable treatment". However, there is no separate fair treatment principle to which the other two are added. At most it may be claimed that Article I of the Supplementary Agreement implicitly grants equitable treatment to its beneficiaries in so far as it forbids subjecting the citizens and legal entities of either Party to arbitrary and discriminatory measures within the territory of the other Party.

7. The Status of corporations, in the same Treaty (Art. II, para. 2). — Another general problem solved by the 1948 Treaty, and the solution of which of course retains its validity in relation to the 1951 Supplementary Agreement, is that of the status of legal entities. It is a well-known fact that, in all treaties of friendship, commerce and navigation, the category of persons who are entitled to benefit from the protection provided by every treaty consists, in the first instance, of individuals who are nationals of either party to the agreement. These individuals are protected in so far as they are present or carry on activities within the territory of the Party other than the one of which they are citizens. A second category consists of legal entities; with regard to the latter each Treaty establishes the criteria according to which they are said to belong to one or other of the Parties to the agreement, and consequently recognizes the right of legal entities belonging to one State to enjoy the advantages granted under the Treaty within the territory of the other State.

Article II, paragraph 1, of the Treaty signed between Italy and the United States on 2 February 1948 gives a broad definition of the term "corporations and associations". In particular, it includes among the latter all "corporations, companies, partnerships and other associations, whether or not with limited liability and whether or not for pecuniary profit, which may have been or may hereafter be created under the applicable laws and regulations". Paragraph 2 goes on to lay down that

> "[c]orporations and associations created or organized under the applicable laws and regulations within the territories of either High Contracting Party shall be deemed to be corporations and associations of such High Contracting Party and shall have their juridical status recognized within the territories of the other High Contracting Party whether or not they have a permanent establishment, branch or agency therein".

In order to belong to either Party, according to Article II, paragraph 2, of the 1948 Treaty, what is therefore required is that the creation (or organization) of a legal entity takes place in accordance with the applicable legislation in the respective territories. The Treaty has adopted the criterion of nationality (if one intends to use this term) which is based on the place of origin of each legal entity.

There is no provision either in the Treaty or in its Supplementary Agreement to the effect that a High Contracting Party may claim that a corporation which was not "created or organized under the applicable laws and regulations" within its territory is nevertheless a company of the same Party. As was stated in the brief for the United States as *amicus curiae* in *Sumitomo* v. *Avigliano* with regard to the similar wording of the Treaty of Friendship and Commerce between the United States and Japan, the Treaty "provision makes clear that a company has the nationality of its place of incorporation"[1]. The brief ran as follows:

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[1] 21 *International Legal Materials*, p. 630 (1982).

"The simple place-of-incorporation standard in the FCN treaties was a deliberate departure from other tests of corporate nationality — including a control test of the sort adopted by the court of appeals — that were followed or suggested in other situations during the preceding several decades (Walker, *supra*, 50 *American Journal of International Law* at 381). Moreover, the intent of the Parties that a company's nationality would not be determined by the nationality of its owners is reinforced by other provisions of the treaty that distinguish between nationals and companies of a Party and enterprises owned or controlled by such nationals and companies[1]."

This argument was accepted by the Supreme Court of the United States, which applied it to the case in hand in the following terms:

"Sumitomo is 'constituted under the applicable laws and regulations' of New York; based on Article XXII, paragraph 3, *it is a company of the* United States, not a company of Japan. As a company of the United States operating in the United States, under the literal language of Article XXII, paragraph 3, of the treaty, Sumitomo cannot invoke the rights provided in *Article VIII, paragraph 1, which are available only to companies of* Japan operating in the United States and to companies of the United States operating in Japan[2]."

From the above-mentioned Article II, paragraph 2, in the case in hand it may be inferred that Raytheon and Machlett, which are companies of the United States, are beneficiaries of the protection afforded under the Treaty with regard to their activities in Italy (or, more in general, to the situations having arisen in Italy and which concern them directly), while ELSI, which without any doubt is a company *of Italy, is not included among the beneficiaries of protection* under the Treaty with regard to its activities in Italy, or in situations relating to them which have occurred in Italy (e.g., the requisition of its plant, the result of a decree which was addressed to ELSI).

8. *Provisions of the Treaty protecting activities and goods which formally belong to persons of the local State.* — As a general rule the Treaty and the Supplementary Agreement protect the physical persons and legal entities of one Contracting State solely as far as activities carried on and property *directly* held in the other Contracting State are concerned. However, there are a few provisions which, as well as according protection to such activities and property, also provide protection for certain property that, although formally belonging to a physical person or legal entity of the local State, are *substantially* activities and property belonging to persons of the other State. For example, Article V, paragraph 3, of the Treaty, after granting the nationals, corporations and associations of one Contracting party both national and the most-favoured-nation treatments within the territory of the other Contracting State for the purposes of the matters enumerated in paragraphs 1 and 2 of the same Article, makes the following further provision:

"Moreover, in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public

[1] *Ibidem*, at p. 634.

[2] 102 *Supreme Court Reporter* 2374 (1982); 21 *International Legal Materials*, p. 791 et seq., p. 794 (1982). Art. XXII, para. 3, of the Treaty between the United States and Japan, which corresponds to Art. II, para. 2, of the Treaty with Italy, reads as follows: "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof." Art. VIII, para. 1, confers rights on "nationals and companies of either party . . . within the territories of the other Party".

control, enterprises in which nationals, corporations and associations of either High Contracting Party have a substantial interest, shall be accorded, within the territories of the other High Contracting Party, treatment no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of such other High Contracting Party have a substantial interest, and no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of any third country have a substantial interest."

The structures of Article III, paragraph 1, second sentence, and Article III, paragraph 2, second sentence, are quite similar.

The existence of the above-mentioned provisions can be explained by recalling that there are frequent cases in present-day economic life of companies set up in one country and in accordance with its laws expanding their activities to other countries, different from that of their origin, by means of other companies controlled by them. The latter can be set up by the "parent" company, or companies may become "parent" companies by buying up the majority of the foreign company's shares (this occurred in the case of Raytheon and ELSI).

Legally, it must be observed that, in any case, the controlling and the controlled company remain two distinct entities, that is, two subjects which can, and in the present case actually do, have different nationalities.

The phenomenon described as the subordination of one company to another may lead to various consequences in treaties of friendship, commerce and navigation. Theoretically, the Contracting States could solve the question of the nationality of a controlled company by means of a clause in which the latter is deemed to belong to the national State of the controlling company (or "parent" company). However, this type of solution is not envisaged in the 1948 Treaty between Italy and the United States. It was decided instead to make the nationality depend on the State of origin and to include *ad hoc* provisions in order to give a certain limited importance to the fact of the control being exerted by a company belonging to the other contracting State. However, this has three consequences, about which there seems to be no doubt: *first*, the controlled company retains its nationality, in accordance with Article II, and this must be taken into account when applying all the provisions of the Treaty which do not have the special nature of the above-mentioned provisions contained in Articles III and V; *second*, the link between parent company and controlled company, which certainly exists at the level of economic interests, does not allow of any identification between the two when it comes to interpreting the Treaty; *third*, the above-mentioned provisions must be given a restrictive interpretation because any exceptional rule must be interpreted narrowly; it is therefore not possible to expect that the phenomenon of control by a foreign company over a national company has any impact beyond the situations provided for specifically in Articles III and V.

9. Alleged violations of Article V of the 1948 Treaty. — Let us examine the individual provisions of the 1948 Treaty and the 1951 Supplementary Agreement on which the United States has based its claim. It will be shown that, in the first place, Articles V and VII of the Treaty are almost entirely irrelevant to the case in hand, and, in the second place, Article III of the Treaty, and Article I of the Supplementary Agreement, when interpreted correctly, do not support the contentions of the claimant Government.

Article V concerns the "protection and security" of the persons and property belonging to nationals of each Contracting Party within the territory of the other Party. Paragraph 1 makes it clear that the term "nationals" is to be understood

as including corporations and associations in so far as the provision set out in the same paragraph is "applicable in relation to property". Paragraph 2, which *deals with a particular aspect of the protection and security of property,* lays down that

> "[t]he 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 same provisions give those receiving such compensation the right to withdraw it "without interference", with entitlement to foreign currency and with exemption from any tax for transfer or remittance. Lastly, paragraph 3 ensures that treatment no less favourable than national or most-favoured-nation treatment will be extended to enterprises in which nationals and corporations of each Contracting Party have a substantial interest whenever, within the territories of the other Contracting Party, the enterprise is transferred from private to public ownership or the enterprise is transferred to public control.

The Government of the United States contends that Article V, paragraph 2, was violated by the Italian Government when it requisitioned the ELSI plant. In its opinion, the "guarantee of compensation" is extended by the Protocol attached to the Treaty "to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party" ("in other words", it is claimed at **(I)**, p. 89, of the Memorial submitted by the Government of the United States, "the treaty unambiguously protects the investment interest of United States shareholders in Italian companies whose property is taken by the Italian Government"). Lastly, Article V, paragraph 1, is alleged to have been violated because the Italian Government supposedly did not protect the ELSI plant after the requisition; furthermore, paragraphs 1 and 3 of the same Article are deemed to have been violated at the same time owing to the delay with which the Prefect decided on the appeal against the requisition.

Let us begin from the last two points. The preliminary remark to be made on the claimant Government's contention is that the problem of the protection of the ELSI plant, as well as that of the delayed decision by the Prefect, do not directly concern the United States companies, which the Government of the United States seeks to protect. Article V, paragraphs 1 and 3, guarantees the protection and security of property belonging to United States companies in Italy, while the plant that according to the Government of the United States should have been protected under the Treaty belonged to the *Italian* company ELSI. Moreover, also, the Prefect's decision on the appeal against the requisition, together with the Mayor's decree were actually addressed to ELSI. The statement expressed on **(I)** page 89 of the Memorial submitted by the United States Government, according to which assets were "owned through ELSI" by Raytheon and Machlett is totally unacceptable[1].

In addition to this preliminary observation, a number of facts can also be challenged. In Part I of the present Counter-Memorial it was clarified that the occupation of the ELSI plant by the employees began before the requisition, and not after it, as the claimant Government would have it, and that the attitude of the workers *entailed no risk for the plant after the decree issued by the Mayor* of Palermo, especially as the Mayor had appointed two representatives to ensure that the orders issued with a view to the management of the factory were

[1] Memorial, I, p. 89.

respected. Adequate clarifications have been given with regard to the causes and effects of the delay with which the Prefect decided upon the appeal. In any case it must absolutely be ruled out that this delay has any connection with the alleged violation of paragraphs 1 and 3 of Article V.

10. . . . and of the Protocol annexed to the Treaty. — With regard to the alleged violation of Article V, paragraph 2, it must be pointed out that this provision accords, in the local State, protection against the taking of property and provides for compensation to be paid for property belonging to nationals, corporations or associations of the other Contracting Party. It is true that paragraph 1 of the Protocol specifies that this protection is afforded also to "interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party". However, this does not mean that the same protection is to be generally granted as for property belonging to nationals of the other Contracting Party also to property pertaining to a company which belongs, under the terms of the Treaty, to the local State and is controlled by a company belonging to the other State. Only exceptionally are some Treaty provisions intended to this effect (*supra*, para. 8) and a different language is used.

Furthermore, under paragraph 1 of the Protocol protection is accorded only to rights to property. While the Italian text refers only to "rights" *(diritti)* the term used in the English text is "interests". According to Article 33, paragraph 4, of the Vienna Convention on the Law of Treaties, the provisions drawn up in two equally authentic languages are to be interpreted in such a way as to reconcile the meaning of the two texts and therefore, in this case, in the more restrictive sense of the Italian text.

A further observation, which is decisive in itself, amounts to denying the applicability of both the Protocol and Article V, paragraph 2, in the present case, for the simple reason that no expropriation or "taking of property" occurred. A temporary requisition decree was issued with the effect of blocking the availability of the ELSI plant for six months and therefore of partially suspending the company's management functions, but only as far as that particular plant was concerned. On the other hand, the Commune of Palermo gained nothing at the company's expense. Thus, it must be ruled out completely that the requisition decreed by the Mayor of Palermo can be considered an expropriation measure. The Italian text expressly refers to expropriated property *(beni espropriati)*. In fact, Article V of the Treaty covers completely different situations from that which actually occurred[1].

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[1] In n. 3 at I, p. 90, the United States Government's Memorial quotes a number of awards delivered by the Iran-United States Claims Tribunal during the years 1981-1986 and tries to demonstrate that interference with an alien's property may amount to expropriation, even though the local State denies to have adopted such a measure, and notwithstanding the fact that the legal title to the property formally remains with the owner, the essential condition being that the foreign investor "has no reasonable prospect of regaining management and control". The application of this doctrine to our case depends on the assumption that "the Government of Italy physically seized ELSI's property with the object and effect of ending Raytheon and Machlett's management and control, in order to prevent them from conducting the planned liquidation". Furthermore, according to the alleged indications of "Italian officials" the requisition was going to be extended beyond its six-months term, while IRI was completing its arrangements for acquiring ELSI's assets: that is why Raytheon and Machlett had no reasonable prospect of ever recovering management and control of ELSI. Whatever the merits of the claimant Government's contentions in law, the assumption mentioned above is firmly denied by the Italian Government: ELSI's property was partially requisitioned for the reasons stated in Part I of this counter-memorial, with no intention of *ending Raytheon* and Machlett management and control. Their end was actually the result of the bankruptcy proceedings, opened at the request of the ELSI management.

11. Interpretation and application of Article VII of the Treaty. — We shall now examine the problems raised by the interpretation and application of Article VII of the 1948 Treaty. In paragraph 1, which seems to be the one to have mainly attracted the attention of the United States Government, this Article accords to the nationals, corporations and associations of each Contracting Party, the right to "acquire, own and dispose of" immovable property or interests therein within the territories of the other Contracting Party; for corporations of United States nationality the conditions are commensurate with the treatment accorded to Italian corporations in the United States state of origin, and in any case do not imply more extensive rights than those granted to legal persons in Italy. The fact that this provision includes a principle of the free availability of immovable property is interpreted by the Government of the United States in the sense that the Italian Government should have been under an obligation to respect the decisions of the ELSI management concerning *the voluntary liquidation of the* company and should not have requisitioned the ELSI plant, since the requisition allegedly prevented "the owners" from disposing of the plant; in any case, the requisition should have been followed by the payment of compensation.

Once again the first objection is that the plant belonged to ELSI, that is to an Italian company. The above-mentioned Article VII, applied to the situation to which the dispute relates, could only ensure the free availability to Raytheon and Machlett of the ELSI shares which belonged to them (an availability about which nobody has cast any doubts). Supposing the two United States companies were truly the owners of the plant requisitioned the decree of the Mayor of Palermo would not have had any effect since it was addressed to ELSI.

There are, moreover, other objections to be made. It is hard to see how the respect of a company's decision concerning its own liquidation can be confused with the only rights which unquestionably pertained to Raytheon and Machlett: their rights as shareholders of ELSI. It is hard to see how, in order to leave a company free to implement its own voluntary winding up, the Italian authorities should have refrained from requisitioning its plant: without doubt, such an argument would be inconceivable with reference to an Italian company, since a requisition decree referring to certain company property can legitimately be enforced even if the company is being wound up. In this connection it is worth pointing out that the above-mentioned Article VII, paragraph 1, explicitly excludes the possibility of United States companies having more extensive rights *than those accorded by the* Italian legislation to national companies in Italy. Lastly, it is worth repeating what has already been noted with regard to the requisition, that is, that it only temporarily blocked the availability of part of the ELSI property. Compensation was not *eventually paid simply* because it was replaced by the damages paid to the requisitioned party[1], as was explained in Part I.

12. Evaluation of the problems raised by Article III of the Treaty. — The provisions of the 1948 Treaty and the 1951 Supplementary Agreement on which the Government of the United States seems mainly to have based its case are Article III of the Treaty and Article I of the Supplementary Agreement. Attention will now be addressed to these provisions.

The content of Article III is rather complex. The first paragraph begins by guaranteeing that the nationals, corporations and associations of each Contracting State will have "rights and privileges with respect to the organization of and participation in corporations and associations" within the territory of the other Contracting State, in accordance with the applicable laws and regulations of the local State and benefiting from the most-favoured-nation treatment. In the

[1] In this explicit sense see Court of Appeal of Palermo, Memorial, Ann. 72.

case in point nobody has challenged the right of Raytheon and Machlett to have a right of participation in the Italian company ELSI. There is no disagreement on this between the Parties in the present proceedings. Article III, paragraph 1, then goes on to acknowledge that the corporations and associations of each Contracting Party in which nationals, corporations and associations of the other Party participate and which are controlled by the latter subjects, "shall be permitted to exercise the functions for which they are created or organized in conformity with the applicable laws and regulations", enjoying the most-favoured-nation treatment.

The claimant Government contends that the first sentence of paragraph 2 of Article III has been violated. This provision ensures the right of nationals, corporations and associations of each Contracting Party to "organize, control and manage" corporations and associations of the other Contracting Party" in conformity with the applicable laws and regulations" within the territories of the latter Party. According to the Government of the United States the provision summarized above gives the United States shareholders in a position to control an Italian company "a guarantee of non-interference with management and control"[1]. Furthermore, the Italian Government is accused of having exerted undue influence on the management through the requisition decree.

Both these contentions have to be challenged. In the first place, the requisition decree in no way affected control by the shareholders over the company. It merely concerned the management by the company of some property belonging to the said company. The right to control and manage certain "local" companies is not subject to unlimited guarantee, as the powers granted by law to the local authorities are thereby unaffected.

More exactly, with reference to the case in hand, it should be noted that there can be no violation of the Treaty in the case of a requisition decree based on a Law (Law No. 2248 of 20 March 1865, Ann. E, Art. 7, previously cited in Part I). This represents the logical consequence of the principle of "conformity with the applicable laws and regulations", which is explicitly asserted in Article III, paragraph 2. The possibility of requisitioning private property "because of grave public necessity" is, in fact, one of the cases provided for in Italian legislation concerning the unavailability of a plant for reasons of public interest. Moreover, it should not be overlooked that the Mayor's decree had the effect of determining only *temporary* unavailability of the ELSI plant.

Moreover, the fact that the requisition decree issued in the case in point was subsequently declared to be invalid does not transform it into a manifestation of undue interference by the Italian authorities. Until it expires or is overruled, a decree is to be considered legitimate and effective. In this connection, it should be recalled that the Prefect acknowledged it as a point of law that was

> "undisputed, in case law and legal doctrine, that the Public Administration is empowered under the above-mentioned Article 7 to dispose of the private property whenever necessity exists to face a situation of actual and imminent danger for the public interest (public health, public order, etc.) . . .".

The Prefect likewise acknowledged the Mayor's power to issue requisition decrees on his own initiative.

One point which deserves special attention is related to the nature of the consequences of the requisition decree. It in no way transferred the ownership of the ELSI plant to the Commune of Palermo. It only partially suspended the exercise of control and management by the company, with reference to the

[1] Memorial, I, p. 72.

requisitioned property alone. In fact, by 1 April 1968, the ELSI Board of Directors had already decided in complete freedom to cease production and to liquidate the assets. Furthermore, after the requisition, the Company was able to take an extremely important decision for its future, namely, to file for bankruptcy. Only after this decision and because of it, did the ELSI management definitely lose control and management of the company assets.

13. Article I of the 1951 Supplementary Agreement: was the requisition an "arbitrary" measure? — Let us now examine Article I of the 1951 Supplementary Agreement. It prohibits subjecting the nationals, corporations and associations of each Contracting Party, in the territories of the other Party, to "arbitrary or discriminatory measures" having, in particular, one of the following effects: "*(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 or interests in such enterprises or in the investments which they have made" in various forms, including in particular the contribution of funds through loans or shares.

In the present case, the Government of the United States claims that the requisition of the ELSI plant decreed by the Mayor of Palermo represented an arbitrary and discriminatory measure such as to prevent the United States companies Raytheon and Machlett from maintaining the effective control and management of ELSI. Inasmuch as it is responsible for the requisition decree, the Italian Government is thus alleged to have violated the above-mentioned Article I of the 1951 Agreement.

The first objection to be raised to this contention is related to our previous remarks concerning Article V, paragraph 2, of the 1948 Treaty. In the present connection, it must be said again that the requisition decree was addressed to the Italian company ELSI; the United States companies Raytheon and Machlett were not actually subject to any measures affecting their property. It is also worth repeating that the above-mentioned two United States companies, which were shareholders of ELSI, never actually lost control or management of the company: the company organs, through which this control and management were performed, were able to function freely also during the period of the requisition, as they were merely deprived (for six months) of the availability of the plant. One may refer in this context to the decision to file for bankruptcy, already mentioned above, which was taken after the requisition.

There is a second objection, which would still be valid even on the assumption that the decree of the Mayor of Palermo directly affected Raytheon and Machlett: the requisition of the ELSI plant cannot be defined either as an arbitrary measure or as a discriminatory measure.

In general, an "arbitrary" measure is defined as a measure which is completely lacking in justification, and which can be explained only as a tool used by the public authorities to damage and oppress a private citizen. In most Treaties of Friendship, Commerce and Navigation entered into by the United States after the Second World War, a prohibition similar to the one contained in the above-mentioned Article I of the 1951 Supplementary Agreement is placed on any "unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals and companies of the other Party in the enterprises which they have established"[1]. Each Party is therefore prohibited from taking

[1] See Art. V of the Treaty with Ireland (21 January 1950) and likewise Articles VIII of the Treaty with Greece (3 August 1951), V of the Treaty with the Federal Republic of Germany (29 October 1954), VII of the Treaty with the Netherlands (22 March 1956), IV of the Treaty with Belgium (21 February 1961), IV of the Treaty with Luxembourg (23 February 1962).

measures detrimental to the rights or interests of the citizens and companies of the other Party, whenever those measures can be defined as unreasonable; in other words, whenever no possibility exists of identifying an admissible reason on the basis of which public authorities have the power to limit those rights or interests.

Indeed, the way in which the Government of the United States represents the requisition decreed by the Mayor of Palermo against the ELSI company appears similar to an act corresponding to the model of arbitrary or unreasonable measures described above: suffice it to mention that, on (**I**) page 80 of the Memorial submitted by the United States Government, it is claimed, among other things, that the purpose of the requisition was "to prevent Raytheon and Machlett from protecting their investment". But a perusal of the requisition decree issued on 1 April 1968 reveals that it was based on two undeniable facts: ELSI, having decided to close down its plant and dismiss about 1,000 of its employees, had created a serious social and economic problem, and the reactions by the employees and the trade unions, with the backing of public opinion, were such as to create fears of "disturbances of public order". In the light of these facts — the exact analysis of which has been carried out in the preceding pages containing a correct reconstruction of events (Part I) — the Mayor of Palermo was of the opinion that the "features of serious public necessity and urgency" required by law in order to proceed with a requisition actually existed. His decree can therefore in no way be said to be arbitrary.

The Memorial bases its argument on the decision of the Prefect of Palermo to set aside the Mayor's decree and merely quotes a passage taken from that decision in which the requisition is held to be "destitute of any juridical cause which may justify it or make it enforceable"[1]. The Prefect in fact stated: "Therefore, the order is destitute of any juridical cause which may justify it and make it enforceable[2]." However, this passage is only the conclusion of an argument, as can be seen from the following words:

> "There is no doubt that the goal to which the requisition was directed could not be actually achieved by the order, even though — in theory — in the case in point, 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. This is proved by the fact that the activity of the company was neither resumed, neither might it be resumed."

In other words, the requisition decree was deemed illegitimate and set aside, certainly not because it was arbitrary — indeed, the Prefect acknowledged that, "in theory", the decree respected the conditions of necessity and urgency — but because the purpose of the resumption of activity by the company "could not be actually achieved" in this way. The Prefect's decision went on to criticize the Mayor for not having taken account of the fact that

> "the state of the company was such, for reasons of an economic and functional nature, as well as for market reasons, that its activity could be continued only after action by the management to solve the company's financial and industrial problems".

The decision to set aside the requisition decree therefore contained no statement that it was "arbitrary", as the claimant Government is attempting to make out in the present case. What was stated, essentially, is that the decree was not suitable

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[1] Memorial, **I**, p. 80

[2] See *ibid.*, Ann. 76, **I**, p. 362.

for achieving its purpose of getting the ELSI plant to function. Therefore the requisition decree was cancelled because the concrete goal the Mayor was trying to achieve was unattainable (and he had therefore wrongfully exercised his powers). Clearly such a situation has nothing to do with an alleged "arbitrary measure" under the above-mentioned Article I of the 1951 Supplementary Agreement.

14. Was it "discriminatory"? — It is now necessary to ascertain whether the requisition in question was a "discriminatory" measure according to the terms of the same Article. By adopting the thesis that the requisition decree was aimed at giving IRI the time to expropriate the property of ELSI, the Government of the United States contends that it was: the purpose is alleged to be discriminatory in so far as it aimed at favouring a public enterprise controlled by the Italian Government[1].

This thesis, however, is not only groundless, but is also the result of an obvious misinterpretation of the concept of the discriminatory measure set out in Article I of the 1951 Supplementary Agreement.

It is possible to speak of discrimination only when two comparable situations are treated in different ways to the detriment of the interests of one of the parties concerned. Within the framework of a Treaty of Friendship, Commerce and Navigation which is essentially based on the standard of national treatment, the situations to be compared for the purpose of ascertaining whether the principle of the equality of treatment has been respected or not, are those of a foreign investor and of the corresponding national investor. In the case in hand, it would therefore be necessary to prove that Raytheon and Machlett, assuming that the requisition decree was addressed to them, had been discriminated against with respect to possible Italian investors. In other words, that the requisition concerned them *as United States companies*, while the Italian investors, if any, would not have suffered any damage. This must be ruled out entirely: not even the Government of the United States has ever claimed that the requisition in question was decided out of bias against United States companies. In fact, during the same years, requisition was frequently used with regard to plants belonging to companies, the majority shareholders of which were Italians (Part I, para. 9).

Furthermore, the fact that IRI is considered by the Government of the United States to be the beneficiary of the requisition is quite irrelevant. The claimant Government has contended that the alleged favours extended to IRI by the Italian Government were one aspect of the unfavourable treatment meted out to United States investors. But what is the logic behind this assumption of discrimination against the Raytheon and Machlett companies? With respect to what other subject in a similar situation were the two United States companies discriminated against? It should not be overlooked that, according to the highly imaginative presentation of the facts made by the Government of the United States, IRI is equated to the Italian Government, which is accused of having "discriminated" against the two United States companies.

With reference to what actually happened we shall limit ourselves to repeating what has been said above, namely, that at the time of the requisition IRI had no intention of taking the place of Raytheon and Machlett in controlling ELSI, not only in view of this company's extremely poor technical and economic conditions, but also, and more simply, because, according to IRI's industrial policy, it was not considered advisable to intervene on a larger scale in the sector of ELSI's activities. Besides, the purposes of the decree of the Mayor of Palermo were those stated in the text of the requisition order and nothing else.

[1] Memorial, I, p. 80.

It remains to be seen whether the decisions related to the requisition of the ELSI plant resulted in damage to "other rights and interests" of Raytheon and Machlett or to investments made by them in the form of financial contributions, that is, loans or shares. In this connection it should be emphasized from the outset that, in order to speak of damage resulting from violation of Article I of the 1951 Supplementary Agreement, the basic assumption must always be that the requisition decree was arbitrary or discriminatory; and we consider we have already refuted such an assumption. We also wish to point out that the company subjected to the decree in question was an Italian and not a United States company; moreover, loans and shares were not directly affected. It is in any case important to recall that the interests of the Raytheon and Machlett companies, and the ultimate destiny of their investments, were jeopardized by events occurring prior to the requisition, for example, the proven incapacity of the ELSI management to make a profit, and its increasing insolvency, as well as by a subsequent fact, which was the consequence of the above-mentioned circumstances and in any case of the will of ELSI itself, namely, the declaration of bankruptcy. As has been amply illustrated in Part I, the requisition decree was in practice a parenthesis in the life of ELSI. The only damage caused by the decree was that of the temporary unavailability of a plant whose activities had already ceased without there being any intention of resuming them. Therefore the Italian Government completely rejects the accusation of having violated Article I of the 1951 Supplementary Agreement.

PART V

ISSUES RELATING TO THE CLAIM FOR REPARATION

1. *Subsidiary nature of the comments concerning the United States claim for reparation.* — In the preceding Parts of this Counter-Memorial the Italian Government has shown that the claim of the Government of the United States on behalf of Raytheon and Machlett is inadmissible and, on a subsidiary basis, that the alleged infringements of the Treaty and the Supplementary Agreement have not taken place. As the Government of the United States claims reparation on the basis of wrongful acts that have not occurred, it is not strictly necessary to deal in this Counter-Memorial with issues relating to reparation. However, on a further subsidiary basis, the Italian Government addresses some remarks on the claim for reparation in order to point out that even in this respect the claimant Government resorts to dubious contentions of law and to distortions of fact — all designed to maximize the amount of damages for which compensation is requested.

Given the entirely subsidiary character of the comments expressed in this Part, it seems appropriate to make only a few general remarks. However, the Italian Government expressly notes that the fact that some assertions by the claimant Government are not specifically contested by no means implies that the same assertions are recognized as accurate or supported by sufficient evidence. In fact, the claimant Government relies heavily on documents originating from ELSI or Raytheon or on affidavits of persons closely connected with Raytheon. The claim essentially rests on the book valuation of ELSI's assets, while no analysis is offered of experts' valuations which were given during the bankruptcy proceedings or of Raytheon's own pre-bankruptcy "quick-sale valuation"[1]. As was shown (see Part I, paras. 7 and 17), the book valuation in no way corresponded to the actual prospects of the sale of the assets.

Under the circumstances, the Italian Government notes that the claimant Government is far from having discharged its burden of proof also with regard to the alleged damages.

2. *Links between the alleged violations of the Treaty and the alleged damages.* — A claim for reparation may only be put forward for losses for which "in legal contemplation" the alleged acts were "the efficient and proximate cause and source from which they flowed"[2]. This characteristic of being the efficient and proximate cause must pertain to the alleged wrongful act or acts which is, or are, considered to have occurred. There must be a close connection between the infringement that has *ex hypothesi* occurred and the losses for which reparation is claimed[3].

In the claimant Government's Memorial the links existing between each alleged infringement of a Treaty provision and the alleged losses are not explored. For example, the applicant Government's contention that ELSI's bankruptcy was "the direct and foreseeable consequence of the requisition order"[4] is totally unacceptable. As was shown above (Part I, para. 11), bankruptcy was rather the

[1] Memorial, I, pp. 106 ff.
[2] Thus the *Administrative decision* No. II given by the United States-Germany Mixed Claims Commission, 7 *Reports of International Arbitral Awards*, p. 30.
[3] Strictly speaking, the loss suffered by nationals cannot be identified with the loss suffered by the State as a consequence of the infringement of an obligation under international law. See Ago, *Scritti sulla responsabilità internazionale degli Stati*, II, 2 (1986), p. 981.
[4] Memorial, I, p. 107.

consequence of ELSI's state of financial affairs and of Raytheon's declared unwillingness to make any further investments in its subsidiary. Nor could the delay in the Prefect's decision over the appeal be considered as a cause of the bankruptcy since ELSI's filing its application for bankruptcy came only seven days after the appeal (Part I, para. 14). Thus, even if the requisition decree and/or the delay in the decision over the appeal were taken to be infringements of Treaty provisions, no obligation to make good the alleged losses in the bankruptcy proceedings could be justified.

3. Considerations on the sums paid by Raytheon as a guarantor of ELSI's loans, or claimed by the United States in relation to Raytheon's credits towards ELSI. — The Government of the United States also seeks to recover sums that Raytheon had to pay in the bankruptcy proceedings because it had guaranteed some loans taken by ELSI. These guarantees were not an investment, but only a security covering 50 per cent of the loans which were given to ELSI by some Italian banks and which were otherwise unsecured. The banks lost 50 per cent of the money borrowed by ELSI. This money had contributed to ELSI's assets. By claiming the money which Raytheon later paid as guarantor for the other 50 per cent, the Government of the United States attempts to shift on to the Italian Government the loss of money which was borrowed and actually used by ELSI and never paid back to the lenders. It would be an extraordinary treaty provision indeed which would imply that the Italian Government should make good a financial loss of a United States company for money that had been freely used by that company's Italian subsidiary.

Substantial sums are claimed in relation to credits that Raytheon or other companies of the same group had towards ELSI. These sums do not necessarily correspond to investments. No claim had been made with regard to these credits in the bankruptcy proceedings[1]. Given the fact that all these credits exist towards companies all belonging to the same multinational group, their assessment would require particular care in evaluating the services actually rendered and the goods provided — both with regard to ELSI's need for these services and goods, and their prices in relation to fair-market prices.

4. The issue of the legal expenses incurred by Raytheon. — Legal expenses incurred by Raytheon can hardly find their "proximate cause" in the alleged infringement of a Treaty provision. "Legal and related expenses" incurred by Raytheon "in pursuing its claim against the Government of Italy for its actions against ELSI"[2] are at best part of the costs relating to the present proceedings. Most of the alleged legal expenses concerned lawsuits initiated by five Italian Banks — all independent entities, which are grossly misdescribed as "government banks acting pursuant to a government plan"[3] when they were only seeking to recover their financial losses over money borrowed by ELSI with a guarantee covering only 50 per cent of the sums[4]. These lawsuits are clearly unrelated to any alleged infringement of the Treaty. Even the claimant Government's contention that, had there been an "orderly" liquidation, the banks "would have

[1] Cf. Memorial, Ann. 26, I, p. 239.
[2] *Ibid.*, p. 109.
[3] *Ibid.*
[4] The banks invoked Article 2362 of the Italian Civil Code and contended that, since Raytheon was in substance the sole stockholder of ELSI, the corporate veil should be lifted against the United States company. The acquisition of a small part of shares by Machlett appears to have been a device for avoiding the application of the said provision against Raytheon. Italian courts accepted Raytheon's argument that Machlett was in fact a separate entity, although fully owned by Raytheon.

settled their debts *(sic)* with ELSI"[1] is sheer speculation. Moreover, costs were awarded to Raytheon by Italian courts in the same litigations[2]: the awards cover *normal legal expenses, including fees corresponding to lawyers' tariffs*; any further legal expense possibly incurred by Raytheon cannot be considered to be reasonable under the circumstances.

5. The claim relating to interest. — With regard to interest the Italian Government recalls that in the *Lighthouses* case the Arbitral Tribunal stated as follows:

> "[. . .] no strict rules of law of a general character exist which prescribe or forbid the award of interest. The Arbitral Tribunal cannot accept the views expressed thereon by the two Agents, with opposing results. Also in this respect the solution largely depends on the character of each particular case[3]".

No interest was awarded by the Court in the *Corfu Channel* case. The Government of the United Kingdom had not claimed interest but the Court did not refer to this circumstance and said: "The Court considers the true measure of compensation in the present case to be the replacement cost of the *Saumarez* at time of its loss[4]."

Among the circumstances to be considered in the present case is that the application to the Court could well have been made many years earlier. As the Government of the United States stated in its Memorandum of Law of 1974:

> "In none of the outstanding proceedings is it possible for Raytheon and Machlett to recover any compensation which resulted from the acts and omissions of the Government of Italy on which this claim is based[5]."

Thus, if one considers the claim to be admissible contrary to the contention of the Italian Government, the claim would have been equally admissible in 1974.

The applicant Government's claim for compound interest finds little support in practice. The following quotation from the arbitral award in the *British Property in the Spanish Zone of Morocco* case appears to be particularly relevant in this context:

> "With regard to the choice between simple interest and compound interest, the Arbitrator must first of all state that arbitral jurisprudence concerning compensation that a State should grant to another for damages suffered by nationals of the latter — although it is particularly rich — is unanimous, as far as the Arbitrator knows, in denying compound interest[6]."

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[1] Memorial, I, p. 109.

[2] Docs. Nos. 41-42.

[3] 12 *Reports of International Arbitral Awards*, p. 252. In the original French the text reads as follows:

> "... il n'existe de règles de droit rigides d'ordre général qui prescrivent ou interdisent l'allocation d'intérêts. Le Tribunal ne saurait admettre les thèses des deux agents qui s'y réfèrent, d'ailleurs en des sens opposés. Ici encore la solution dépend largement des caractéristiques de chaque cas particulier."

[4] *I.C.J. Reports 1949*, p. 249.

[5] "The Claim", p. 56.

[6] 2 *Reports of International Arbitral Awards*, p. 650. In the original French the text reads as follows:

> "En ce qui concerne le choix entre les intérêts simples et les intérêts composés, le rapporteur doit tout d'abord constater que la jurisprudence arbitrale en matière de compensation à accorder par un Etat à un autre pour dommages subis par les ressortissants de celui-ci sur le territoire de celui-là — jurisprudence pourtant particulièrement riche — est unanime, pour autant que le rapporteur le sache, pour écarter les intérêts composés."

SUBMISSIONS

The Italian Government makes the following submissions:

"May it please the Court,

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

If not, to adjudge and declare:

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

and accordingly, to dismiss the claim."

16 November 1987.

(Signed) Professor Luigi FERRARI BRAVO,
Agent of Italy.

DOCUMENTS ANNEXED TO THE COUNTER-MEMORIAL OF ITALY

Document 1

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND THE ITALIAN REPUBLIC, SIGNED AT ROME, 2 FEBRUARY 1948, ENTERED INTO FORCE, 26 JULY 1949, 79 *UNTS* 171

*[Italian text not reproduced; for the English text see **I**, pp. 9-31]*

Document 2

AGREEMENT SUPPLEMENTING THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION OF 2 FEBRUARY 1948, SIGNED AT WASHINGTON, 22 SEPTEMBER 1951, ENTERED INTO FORCE 2 MARCH 1961, 404 *UNTS* 326

*[Italian text not reproduced; for the English text see **I**, pp. 32-37]*

Document 3

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, DOCUMENTS — BILLS AND REPORTS, NO. 246, PAGES 1-6, SESSION OF 17 DECEMBER 1948

[Italian text not reproduced]

BILL submitted by the Minister of Foreign Affairs (Sforza), in agreement with the Minister of Justice (Grassi), with the Minister of the Interior (Scelba), with the Minister of the Treasury (Pella), with the Minister of Finance (Vanoni), with the Minister of Industry and Trade (Lombardo Ivan Matteo), with the Minister of Defence (Pacciardi), with the Minister of the Merchant Marine (Saragat), with the Minister of Foreign Trade (Merzagora), and with the Minister of Labour and Social Security (Fanfani).

RATIFICATION AND EXECUTION OF THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION, OF THE SIGNATURE PROTOCOL, OF THE SUPPLEMENTAL PROTOCOL AND OF THE EXCHANGE OF NOTES BETWEEN THE ITALIAN REPUBLIC AND THE UNITED STATES OF AMERICA, SIGNED IN ROME ON 2 FEBRUARY 1948.

Session of 17 December 1948

Honourable Deputies. On 2 February 1948 the Representatives of the Italian Republic and of the United States of America signed the Treaty of Friendship, Commerce and Navigation now submitted and proposed for your approval. It contains, in the first place, provisions on the right of settlement, followed by provisions on trade, navigation and transit, some general clauses, an additional protocol and a supplemental protocol. An exchange of Notes, providing for a supplemental cultural agreement, is attached to the Treaty.

The old Treaty of Commerce and Navigation, signed by Italy with the United States on 26 February 1871, has not been in force since 15 December 1937, following upon its termination one year before. This agreement replaces that Treaty, modelled on the old pattern of absolute free trade, and governs the broad category of Italo-American relations on the basis of modern criteria of a modern protectionism. Ambassador Dunn, upon signing the Treaty, pointed out that the new Treaty signed on 2 February 1948, was, also in its structure and form, a broader, more modern version of the old Treaty concluded 77 years ago.

This Treaty pursues essentially economic aims. It aims at strengthening trade relations with the United States of America, that are of the utmost importance to our country. The significance, well known to everybody, of our international economic relations, at a moment when the trend towards free trade re-emerges as the means destined to foster world economy and improve the standard of living in the various States, confers upon this Treaty a meaning which cannot be underestimated. In the framework of the progressive increase of commercial exchanges between our continent and North America, and in compliance with the resolutions contained in the ITO Charter, this Agreement is a precious contribution towards the regulation of our foreign trade.

The first part of the Treaty contains a number of provisions on the right of settlement (Arts. I-XIII). These provisions concern the treatment that each State

grants to the citizens of the other State, guaranteeing, as a general rule, full freedom in the exercise of private activities, and drawing inspiration, in any case, from the principle of reciprocity.

The Treaty provides for, in the first place, the exercise of commercial, industrial, financial, scientific activities, etc., on the part of citizens of each State living in the territory of the other contracting Party: the exercise of these activities is permitted, except for the legal profession. It is undeniable that this clause is very advantageous to a large number of our countrymen living in the United States of America, since there are many professionals among our emigrants, in addition to unskilled labourers.

This first article obeys a criterion that we hope will be followed in future settlement agreements with other countries as well, since the exercise of professions is generally treated only fragmentarily in specific agreements with various countries. The provision presents the merit of covering all liberal professions (except for the above-mentioned legal profession), thus avoiding on one side resorting to the slow mechanism of subsequent agreements concerning the exercise of professions taken separately, and eliminating the difficulties of interpretation stemming from partial provisions on the other.

The provision under letter *(b)* of the same article, paragraph 2 (concerning the acquisition, the construction and the renting of buildings for the various uses to which they are destined), and Article II, paragraph 3, granting to juridical persons and to the associations of each contracting Party in the territory of the other Party treatment equal to that of private citizens, are equally advantageous. Article VII, with regard to the right of settlement, is equally significant; it provides for real rights in movable and real property to which private citizens, juridical persons and the associations of each Contracting State in the territory of the other State are entitled.

As far as the articles on real estate are concerned, acquisition, possession, and the other real rights are subject to conditions aiming on the one hand at complying with the domestic legislation of each State and at enforcing an equal treatment on the other, which should under no circumstances be less favourable than the one granted to citizens of any third State. In the articles concerning movable property, the freest disposition of property is granted to American citizens in Italy and to Italian citizens in the United States, whereas express provision is made for succession (both in the case of *mortis causa* and *inter vivos*), and for the relative acquisition of movable property. Similar provisions refer to all the matters concerning acquisition, property, renting and possession of movable property, resulting in the establishment of conditions absolutely equal to the rights enjoyed by nationals in the same matters.

Article XI provides for the exercise of those freedoms which should be protected in a truly democratic State; freedom of conscience and religion, freedom of publication and information cannot but be granted to those foreign citizens who offer serious guarantees to exercise them appropriately, never infringing the limits of public order.

Provisions on social matters are also present; they are particularly useful to our countrymen living in the United States, given the considerable emigration from Italy to the United States and the need to guarantee favourable work conditions to our workers in the US. The second part of Article XII, in fact, deals with social insurance, extending to the citizens of each State living in the territory of the other country the benefits granted by laws and regulations establishing compulsory insurance systems in favour of nationals.

The rules governing our trade relations with the United States begin with Article XIV. Similarly to those rules contained in international agreements envis-

aging exchanges of defined consignments, these rules show a trend toward the relinquishing of the autarchic system, which had proved anti-economic and incapable of increasing the national income. Against a background characterized by the quota system and by restrictions to international free trade, which is what the world is suffering from right now, any attempt to create a trade flow and to overcome, in the conventional way, the obstacles to economic relations among the States is commendable and deserves our fervid approval.

Like the Treaty of 1871, this Treaty provides for mutual freedom of trade between the territories of the two contracting Parties. This clause, however, has a much greater value today, given the gradual worsening of the international trade outlook after the First World War. Obviously this freedom, envisaged by the Treaty, is by no means unconditional: paragraph 3 of Article XIV explicitly admits the eventuality that one of the two Parties, on the basis of its domestic administrative legislation, therefore exclusively unilaterally, has imposed or may impose in the future any restriction to the import, sale, distribution and use of foreign products, including those of the other Party. What the two contracting Parties basically commit themselves to, is the mutual enforcement of the most-favoured-nation clause: in the first place each of the two States will have to refrain from imposing prohibitions or restrictions on the importation and to the use of the products of the other State other than prohibitions or restrictions imposed on all third States; secondly, as regards customs duties, formalities, customs clearance fees, taxation, sale and use of products either imported or destined to be exported, each of the two States undertakes to grant to the products of the other State a no-less-favourable treatment than the one granted at present or which will be granted in the future to the same products of any third State, or destined to it.

The significance of these provisions is inbuilt in the advantages of the most-favoured-nation clause; the clause allows a levelling of duties and has a liberal nature; it is destined to make relations among States tranquil because it avoids differential treatments and the contrasts deriving therefrom; moreover, it guarantees to domestic producers, vis-à-vis those foreign producers with whom they are in competition, an absolute equality of treatment on foreign markets.

The boost the Treaty is bound to provide to our commercial flows from and towards the United States of America does not rule out the possibility — should the situation so require — of our Government taking restrictive measures in connection with international trade. The Treaty allows Italy — on the basis of reciprocity — to enjoy a favourable treatment vis-à-vis the United States, since our products destined to be exported to the United States are subject to the minimum duties provided for by the US customs legislation, whereas the products we import and upon which export duties have been levied, are subject to the most-favoured treatment.

In the old Treaty of 1871, many rules envisaged the state of war and governed trade relations between the two States, specifying the duties and obligations — in the case of war — of the neutral State and of the belligerent State; even the eventuality of war between the two Parties was envisaged, in spite of the explicit condemnation contained at the beginning of Article 21 ("if, due to an unforeseen misfortune, God forbid, the two Parties were to wage war on each other . . ."). The new Treaty does not mention war, either in the case of war between the two Parties, or in the case of the two Parties waging war on a common enemy, or — finally — in the case of only one of the two States being at war with a third State.

This remark stresses the nature of the Treaty, destined to be an instrument of international solidarity, aimed at governing peaceful relations between the two

Republics on a large part of current economic problems. To the provisions on essentially commercial activities, in fact, other dispositions must be added, concerning financial matters (Art. XVII), contracts (Art. XVIII, 2nd paragraph) and generally all those matters which have been judged by the two States to be of common interest.

The clauses on navigation and transit, contained in Articles XIX-XXII, present some new elements, as opposed to the old Treaty, which deserve special consideration.

It must be pointed out, in the first place, that there is no reference whatsoever to warships (Art. XIX, paragraph 2); two exceptions refer to the assessment of the ship's nationality on the basis of the flag the ship is flying, and the shelter in ports or in internal waters to be granted to all ships of the other State which are in danger, owing to bad weather or other serious causes (for instance, in the case of damage suffered by the ship). The Treaty of 1871 on the other hand, in most of the clauses on navigation, made no distinction between warships and merchant ships, therefore including the former as well in the broad-based regulation of relations between the two countries. Furthermore, many articles of the old Treaty made reference to maritime war, and listed the goods to be considered, in the case of war, to be subject to the restrictions of contraband of war.

The above-mentioned elements are not present in the new Treaty, where the regulation is confined to trade relations arising from navigation and transit.

Within these limits, full freedom of navigation is granted to the ships of both nations on the basis of absolute equality, thus ensuring full compliance with the principle, regarded as of the utmost importance in international law, whereby merchant ships of all countries are free — as a general rule — to enter the territorial waters of other States and to go with their loads to the sea ports of foreign States for their commercial exchanges.

Moreover, the Treaty provides for absolute equality of treatment between the two Parties; in fact, in the case of one of the two States deciding to impose limits on the maritime navigation of foreign States, the treatment granted by one Party to the ships of the other Party should not be less favourable than the one granted to its ships by the said other Party.

The content of paragraphs 2 and 3 of Article XX is even more liberal; they lay down that, as regards harbour-dues, duties levied upon goods and passengers and in other similar cases, the ships of the other State are entitled to receive a treatment equal to the one enjoyed by national ships.

The above-mentioned dispositions and a number of other provisions concerning navigation and transit are in full compliance with the legal status enjoyed by the Italian merchant marine vis-à-vis the other States with which maritime navigation has been regulated at international level. In particular, the above-mentioned rules must be seen in the framework of the complex matter dealt with, in 1921 and 1923 respectively, in Barcelona and Geneva by a number of States, including Italy, but not the United States of America. An important result of the Italo-American Treaty, as regards navigation and transit, is therefore the extension to the United States, to our country's benefit, of most of the provisions that had been agreed upon in Barcelona and Geneva in the above-mentioned multilateral agreements. Italian navigation will receive considerable advantages from this procedure, all the more important at a moment when our productive effort aims, among other things, at ship building, while the readjustment of our balance of payments sees in the increase in sea freights one of its most important factors.

Article XXIV marks the beginning of a list of general rules, concerning, among other things, the matters where Italy and the United States reserve to themselves a wide freedom of disposition, regardless of and without prejudice to the commit-

ments undertaken with the Treaty itself. Paragraph 1 of Article XXIV under letter *(f)* deserves special attention; it specifies the mutual position of the Parties vis-à-vis the commitments stemming from their being members of the International Monetary Fund. Thus the Treaty solves the possible cases of incompatibility among the clauses contained therein and those of the Washington Agreement of 1945 which set up, on a plurilateral basis and with the participation of Italy and the United States of America, the International Monetary Fund.

Paragraph 3 of Article XXIV lists the cases where the most-favoured-nation clause is not applied; in this list, basically, there is nothing new, since international practice is favourable to the imposition of most of the limitations set out in paragraph 3 of Article XXIV to the application of the most-favoured-nation clause. However, the specific remark contained in the Treaty aims at avoiding possible misunderstandings and conflicting interpretations of a rule of international law which is still purely consuetudinary.

Possible controversies on the application of the Treaty pertain, under Article XXVI, to the competence of the International Court of Justice, unless the Parties agree to settle them with other peaceful means. This is perfectly in compliance with what is set forth in the United Nations Charter, which refers to the International Court of Justice all the controversies of a judicial nature, namely, those where the claim of one Party and the resistance of the other are based on concrete elements represented by objective rules of international law.

In the last article, apart from the exchange of Ratifications to be carried out in Rome, the parties agree on the duration of the Treaty which is set as follows: ten years as of the date when the above-mentioned exchange of Instruments of Ratification will take place. However, a condition is added in paragraph 3 of the said article, concerning the expiration date as defined in the previous paragraph; the parties provide that, for the Treaty to be considered terminated at the end of the tenth year as of the date of its coming into force, one of the parties will have to express, one year before the expiration of the said one-year-period, its intention to this end, otherwise the Treaty will remain in force until one of the two States notifies its will to consider the Treaty terminated with one year's notice.

The content of the Protocol is explicitly considered as an integral part of the Treaty; it concerns some specifications the contracting Parties deemed useful to set forth, in connection with some provisions contained in the Treaty. Thus, paragraph 2 rules out, among the privileges granted to the citizens of one of the two Parties in the exercise of their commercial or industrial activities on the territory of the other Party, those privileges States grant to their public enterprises in the form of subsidies and aid for the supply of goods and services to the Government, and generally for public ends.

Paragraph 4 has a similar content; it provides for the exclusion from the free exercise of professions on the part of the citizens of both nations on the territory of the other State, professions whose members are appointed civil servants by virtue of law.

Paragraph 5 contains an obvious exception, concerning the safeguarding of the secrecy of military information in the field of freedom of publication and information.

On the whole, these rules emphasize the fact that, though granting to American citizens in Italy and to Italian citizens in the United States a broad-based freedom, the Treaty confirms the absolute respect of the sovereignty of each State, and guarantees the free exercise of the functions entrusted with the Governments, especially in those matters where the measures of State Authorities pertain to public security and domestic order.

The provisions of the Supplemental Protocol are an integral part of the Treaty as well. They are justified by the particular nature of the post-war economic situation, especially with regard to our Country. Therefore, if many rules in this Supplemental Protocol provide exceptions to the ones previously set forth, this is natural and admissible, even though it may appear to run counter to normal procedures in the field of treaties.

The reservations raised by the parties concern in the first place control on the commercial exchanges between the two parties, and precisely the adoption of import and export quotas; provision is made for four specific cases where it is possible to waive the rules contained in paragraphs 3 and 4 of Article XIV; in this case, each of the two States can impose on the goods directed to or coming from the other State stricter quantitative restrictions than those imposed on the same goods directed to or coming from third States; the assignment of the proportional quota, moreover, can be made independent, in the same cases, from the assessment of the volume of exchanges that have taken place in the previous period. These reservations allow Italy to avoid the damage deriving from scarce availability of foreign currency and its balance of payments deficit. On the whole, quotas are not an effective remedy to the trade balance deficit: the limits imposed on imports end up proportionally jeopardizing exports. But the quotas imposed on imports by the various countries can, in cases such as those provided for by paragraphs 1 and 2 of the Supplemental Protocol, be of help to the international balance, especially if they allow, as in the case of Italy, the use of non-convertible currencies that have been piling up in the meantime.

Further on, the Supplemental Protocol sets forth, in the field of expropriation of goods belonging to the citizens of the other State, the procedures that will be followed by Italy in the payment of compensation to American citizens, and fixes the exchange rate that will have to be applied.

The Treaty ends with this useful definition; an Exchange of Notes carried out between the Representatives of the Italian Republic and of the United States of America on cultural relations is attached to the Treaty itself. The two States undertake to promote closer relations in this field, through the interchange of professors, students and professional and academic personnel so as to facilitate and stimulate the mutual knowledge and study of institutions, literature, languages, etc. This aim is in compliance with the United Nations Charter, on the basis of which the Members envisage, among other things, through the Economic and Social Council and Unesco, of which Italy is a member too, the development of mutual cultural relations.

Honourable Deputies: The Treaty submitted to your approval is extremely useful to our Country. It is the best means for the safeguarding of the interests of our countrymen in the United States, and is at the same time an appropriate instrument for regulating our commercial and maritime relations with the United States.

The Treaty, guaranteeing absolute equality of mutual treatment to the two Parties, represents a further step towards the return to normalization in our international relations. For Italy to resume the place it is entitled to in the great community of States, it is necessary — on Italy's part — to comply with the principle of international solidarity, which is constituted above all by a close-meshed net of economic agreements.

This Treaty is an instrument of peace, like all previous trade Treaties concluded by Italy from 1945 onwards; it aims at abandoning the protectionist system while guaranteeing to our Country at the same time the safeguarding of its particular interests arising from our abnormal economic situation. By ratifying this Treaty,

Italy will prove once again its determination to recover from the collapse caused by the war and the peaceful intentions underlying its foreign policy.

BILL

Article 1

The President of the Republic and the Government are respectively authorized to ratify and to enforce the following Agreements signed in Rome, between the Italian Republic and the United States of America, on 2 February 1948:

(a) Treaty of friendship, commerce and navigation;
(b) Signature Protocol;
(c) Supplemental Protocol;
(d) Exchange of Notes.

Article 2

This law comes into force on the day of its publication in the *Official Gazette*.

Document 4

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, DOCUMENTS — BILLS AND REPORT, NO. 246-A, PAGES 1-9, SESSION OF 17 DECEMBER 1948

[Italian text not reproduced]

Report of the Committee for Trade Treaties and Customs Legislation on the Draft Bill presented by the Minister of Foreign Affairs (Sforza), in conjunction with the Minister of Justice (Grassi), the Minister of the Interior (Scelba), the Minister of the Treasury (Pella), the Minister of Finance (Vanoni), the Minister of Industry and Trade (Lombardo Ivan Matteo), the Minister of Defence (Pacciardi), the Minister of the Merchant Marine (Saragat), the Minister of Foreign Trade (Merzagora), and the Minister of Labour and Social Security (Fanfani).

Session of 17 December 1948

RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, TRADE AND NAVIGATION, OF THE PROTOCOL OF SIGNATURE, OF THE ADDITIONAL PROTOCOL AND OF THE EXCHANGE OF NOTES AGREED IN ROME, BETWEEN ITALY AND THE UNITED STATES OF AMERICA, ON 2 FEBRUARY 1948.

Presented to the Presidency on 2 March 1949.

REPORT OF THE MAJORITY

Honourable Colleagues. The new "Treaty of Friendship, Trade and Navigation" between Italy and the United States, which is submitted to you for approval, is of particular significance since it is the first wide-ranging and general treaty since the war to have been negotiated by us on a footing of absolute equality.

The new instrument is characterized by the broad scope and the modernity of its structure. It contains clauses referring to establishment (Arts. I-XIII), to trade (Arts. XIV-XVIII) and to navigation and transit (Arts. XIX-XXIII). The Treaty is completed by the customary general and final provisions (Arts. XXIV-XXVIII), a Protocol and an additional Protocol which form an integral part of the Treaty itself. Also annexed to the Treaty is an exchange of Notes referring to the opening of negotiations concerning the stipulation of cultural agreements. In fact, on 18 December 1948 there followed the signature in Rome of a special cultural agreement, while negotiations referring to a general cultural agreement are still in progress.

The importance of the new instrument and the advantage accruing from it to our country are due not only to the above-mentioned broad scope of the relations regulated in it but also and principally by the approach made to the establishment of such relations.

As stated in the Preamble, the Treaty is "generally and unconditionally based on the principles of national treatment and of that of the most-favoured nation".

The value of this approach is quite apparent, ensuring as it does the automatic and unconditional extension of all benefits granted or to be granted by the United States to any third country.

From this standpoint the various clauses of the Treaty should be examined to ascertain their scope fully and to make an adequate appreciation of their advantages.

However, before proceeding to analyse the individual provisions of the Treaty, some further general observations seem to be called for.

The new Treaty of Friendship, Trade and Navigation differs radically from the Italy-United States trade and navigation treaty of 26 February 1871. It was not possible to resurrect this old treaty, which in any case was reciprocally allowed to expire on 15 November 1937.

The instrument signed on the "twentieth day of February" of 1871 had aged irremediably and now reflected a situation of relations and exchanges which had since changed radically.

With regard to economic relations, the 1871 Treaty followed a distinctly free-trade approach, which made it virtually inapplicable when economic policy began gradually to shift towards protectionism and autarchy, nor was it compatible even with the new principles on which economic relations between States should be based. These new principles tend towards multilateral exchanges, although without excluding restrictive clauses intended, particularly during the early stages, to safeguard specific needs linked to special currency, production and labour conditions in the several countries.

Even the statutes of the international organizations created after the war to implement economic collaboration between nations, such as the International Monetary Fund and the International Trade Organization reflect the need for such flexibility as is required by environmental and market conditions.

As stated above, the rigid framework of the old treaty did not allow for this necessary flexibility, particularly as far as tariff policy was concerned.

The present situation, which is the outcome of the protectionist régime set up during the decade between 1929 and 1939, can only be changed gradually.

The forthcoming Annecy Conference should mark a further decisive step forward towards the reduction of customs tariffs. These results, which may legitimately be expected, together with those already obtained in the multilateral agreements, should encourage that additional expansion of international trade on which the chances of recovery of our economy depend.

This situation, which has slowly but surely been constructed since the Second World War, forms the background to the new Italy-United States Treaty. The Treaty is bound to become an important factor in the economic relations being organized on a multilateral basis.

The unconditional principle of most-favoured nation, on which the new Treaty has been seen to be based, represents the levelling and unifying mechanism by means of which the provisions of the bilateral treaties, already negotiated or to be negotiated, by being applied automatically to the contracting parties, allow the basis of agreement to be extended and a multilateral system to be gradually built up.

As pointed out above, the merit and distinguishing features of the new instrument are the broad scope and modernity of its structure compared with that of similar previous treaties.

This must also be interpreted as a reflection of the new conception underlying the Charter of the United Nations which is a marked improvement upon the Pact of the League of Nations in that it explicitly acknowledges the interdependence between the economic-social factor and the political factor, together with the decisive importance of the former vis-à-vis the latter (cf. Art. 55 of the UNO Statute).

These broader and topical conditions are addressed not only by the trade clauses of the Treaty but also by those referring to establishment. Also this section, as we shall see, is affected by new tendencies such as those referring to the guaranteeing of the fundamental freedoms. These principles, which are more and more firmly established in world consciousness and more and more precisely embodied in international statutes, form the basis of several provisions contained in the Italy-United States Treaty, for instance, those guaranteeing the freedom of worship, of information, etc. (cf. Art. XI).

* * *

However, the wide-ranging and modern character of the Treaty outlined so far must not be taken to mean that it can contain clauses which, by their nature, are extraneous to the matters dealt with in the Treaty itself, namely *establishment, trade* and *navigation*.

The Treaty does not contain political clauses. The title of "Treaty of Friendship, Trade and Navigation" corresponds to a traditional formula in long-standing use. It should also be noted that the Treaty is a *trade treaty* and not a trade agreement. In other words, it regulates the basic approach to be followed in the trade relations between the two countries, while the actual determination of the manner in which individual exchanges are to be carried out is left to specific *trade agreements*.

Therefore, although containing several general principles of fundamental importance, the Treaty does *not* directly regulate the problem of *customs tariffs*. This matter will be governed by specific technical agreements providing for the implementation of the fundamental principles embodied in the Italy-United States Treaty and the multilateral pacts. As pointed out above, favourable results concerning the solution of these problems are expected from the forthcoming Annecy Conference.

Lastly, it must be pointed out that the Treaty is a treaty of establishment, that is, it contains clauses regulating the treatment guaranteed to citizens of one State residing in the territory of the other. Naturally, these clauses are of particular importance for our emigration, that is, for our fellow citizens resident in the United States.

However, the Treaty is not an emigration treaty or agreement, that is, it does not contain provisions referring to emigration, as they would be out of place in a treaty of trade and navigation establishment such as the one signed on 2 February 1948. As is known, the problems related to emigration involve the examination and regulation of technical details which are normally embodied in special conventions between the States concerned.

The issue of a possible increase of our migratory flow towards the United States is therefore not mentioned in the Treaty provisions. This is a highly complex issue also because the immigration of foreigners is regulated by complex legislation in the United States *(immigration laws)* which regulates the migratory flow from other countries in the world by means of a quota system. The revision of the quota assigned to Italian emigration involves a revision of the entire system, so that the Italian aims can only be achieved through painstaking negotiation. This does not mean that the problem should not be raised as soon as possible and that the Government should not be urged to evaluate the importance of the matter and make every effort to find a solution. Partial solutions can in the meantime be found in occasional circumstances, such as the utilization of the quotas falling due during the wartime period, and it is no exaggeration to state

that our emigration needs today to receive greater understanding from American public opinion and from the United States government authorities.

Having thus described the characteristic approach followed in the new Treaty, and illustrated the principles on which it is based and the matters it deals with, the various provisions making up the text will now be outlined. The evaluation of their scope will certainly be more effective if the examination keeps to the framework of general considerations forming the introductory part.

The examination may be carried out by grouping the various clauses according to the topic referred to, namely:

(1) Establishment (Arts. I-XIII).
(2) Trade (Arts. XIV-XVIII).
(3) Navigation and transit (Arts. XIX-XXIII).
(4) General and final clauses (Arts. XXIV-XXVII), Protocols and exchange of notes.

I. Provisions regarding Establishment (Arts. I-XIII)

As a whole, these provisions do not differ appreciably from those normally contained in similar treaties. They are of special interest to Italian citizens residing in the United States in so far as they guarantee the latter will receive most-favoured treatment with regard to the free conduct of their work and their activities.

In this matter the Treaty is based on the principles of national treatment and on that of the most-favoured nation. In particular, specific acknowledgement is accorded to the free exercise of the professions (Art. I) and social insurance benefits have been extended to citizens of the other party to the treaty (Art. XII).

The free exercise of the profession has an exception in the legal field, in that the exercise of this profession in the United States is considered to be incompatible with being a foreigner. The substance of the relevant provisions contained in the Treaty consists in the acknowledgement of that the fact of being a foreigner does not in itself preclude anyone from exercising a given profession or activity.

It is a known fact that the regulation of the exercise of professions and other activities by foreigners comes within the purview of the legislation of the various states comprising the Union of North America. However, it is also a known fact that international treaties have, as it were, the force of federal law in US constitutional law: their provisions prevail over those of the legislation of the various states of the Union. The recognition obtained in favour of Italians resident in the United States is thus guaranteed also against any restrictive provisions contained in the laws of individual states. This concession stipulated in the Treaty is all the more significant in that the US federal authorities are usually loath to interfere in matters which are the responsibility of the individual states.

With regard to the extension of social security benefits to citizens of the other party to the contract, while it is true that in the internal legislation of the United States provision has already been made for this extension to the benefit of foreigners, the fact of including it in the Treaty implies that such concession, hitherto free and unsolicited and therefore revokable by the US Government, has now become an internationally contracted obligation.

As already mentioned, the Treaty does not contain any clauses referring to emigration. Therefore the right granted to citizens of one party to the treaty to enter, reside in and travel freely through the territory of the other is understood by the United States to be subject to the application of the immigration laws. At the request of Italy the new paragraph 4 was added to Article I in order to

guarantee the right of surveillance of foreigners resident on the territory of the State and the right to expel them for certain reasons. These are guarantees that no State would agree to forego for elementary reasons of security.

Also noteworthy are the provisions governing the activity of juridical persons who, in the present economic and commercial conditions, have much more extensive and important tasks than those of single individuals.

The specific examination of several of these clauses could lead to the erroneous interpretation that the treatment accorded to the juridical persons and associations of the other party are not perfectly reciprocal. In this connection it must be pointed out that the apparent lack of reciprocity is a necessary consequence of the federal nature of one of the two parties to the treaty, namely, the United States. A similar situation and solution is found in the establishing and consular Convention between Italy and Switzerland. It would in fact be inadmissible that in one state or in one canton of a Confederation a foreigner enjoyed more favourable treatment than that accorded to a citizen of another state or canton of the Confederation itself.

With reference to the protection of goods, the principle of expropriation with guaranteed payment of "fair compensation", normally embodied in treaties of establishment (cf. for example the Italo-Soviet Treaty of Trade and Navigation of 4 February 1924, Art. 6), has been developed to a considerable extent in the new Italy-United States Treaty. This was considered necessary also in view of other problems such as currency problems which arise out of the investment of capital abroad. The complex of provisions concerning these problems aims at ensuring and encouraging capital flow towards Italy. The advisability and importance of this clause is quite evident because of the peculiar economic and financial structure of our country, in which the accumulation of savings does not correspond to productive needs or to any programme of full employment. The influx of foreign capital represents an indispensable supplement for our country.

The provisions contained in Article XI are based on the principles of the fundamental freedoms of man. They are in full harmony with what is guaranteed by the new Constitution of the Italian Republic. With regard to the freedom of the press and of information, expressed in Article 21 of our Constitution, it should be borne in mind that paragraph 5 of the Protocol annexed to the Treaty makes express reservations for the needs of military secrets.

Also the provisions of Article XIII, intended to solve a number of problems related to the military service of citizens of one party to the treaty resident in the territory of the other party, reference can be found in preceding treaties (cf. for instance the Italy-Argentine Convention of 8 August 1938).

II. Trade Provisions (Arts. XIV-XVIII)

The clauses referring to trade are aimed at eliminating constraints and discriminatory measures. Following the criteria on which the Charter of the International Trade Organization was based they indicate a way, a direction, in that the economic and political circumstances do not allow abrupt changes in economic policy but call for gradual steps in order to shift from a state of bilateral agreements to one of multilateral exchanges.

Having asserted the principle of the most-favoured nation with regard to the application of customs duties and taxation, a commitment is made also to a non-discriminatory policy as regards quantitative restrictions. Nevertheless, the additional Protocol contains important exceptions which serve also to harmonize the obligations accepted under the Treaty with the provisions of the Agreement on

the International Monetary Fund. The exceptions take into special account the economic cycle characterizing the post-war period.

The clause dealing with trade concludes with paragraph 3 which deplores business methods in which competition is limited, access to markets restricted and monopolistic controls encouraged. Provision is therefore made for each party to the treaty to attend consultations at the other party's request should any such situation be complained of.

III. Provisions referring to Navigation and Transit (Arts. XIX-XXIII)

Also the content of these articles does not differ substantially from that of the corresponding provisions contained in similar treaties. Provision is made to treat the merchant vessels of the Other Party to the Treaty on a par with national vessels and to extend to them the most-favoured-nation treatment. For warships and fishing vessels the norms contained in the Treaty correspond both to internal Italian legislation (cf. for instance Art. 20 of the Italian law on neutrality, approved by Royal Decree No. 14-15 of 8 July 1938) and to the international conventions (see Arts. 12-13 of the Hague Convention referring to the rights and obligations of neutral Powers in the case of war at sea).

IV. General and Final Provisions, Protocols and Exchange of Notes

Article XXIV and the additional Protocol contain the exceptions to the applicability of the Treaty norms; the purpose of these exceptions is to reconcile the present needs of the Italian economy with the economic policy directives underlying the Treaty, again for the purpose of ensuring that the Agreement fosters the free development of the economy on an increasingly broad basis and with the graduality required by the peculiar situation having arisen after the war.

Annexed to the Treaty is an exchange of Notes referring to the opening of negotiations for the purpose of establishing cultural agreements between Italy and on 18 December 1948 a special cultural agreement was signed between Italy and the United States, and a general cultural agreement is currently being negotiated.

* * *

Honourable Colleagues. The new Italy-United States Treaty, which the majority of the Committee for trade and navigation treaties submits for your approval, is generally and unconditionally based, as is expressly stated in the introduction, on the principles of national treatment and of most-favoured-nation treatment. It represents an important result of the efforts made by Italy to regain its place in the international field and is to be appreciated also for its modern approach and the discernment of the technical rules contained in it.

The principles of equality and reciprocity on which the new Treaty is based will be of certain advantage to Italian interests. There is no doubt that the recognition of the equality and reciprocity of rights does not remove the inequalities of structure which exist between the several countries at the international level, just as the principle of juridical equality of individuals does not eliminate the natural differences of capacity and opportunity which exist between individuals and which laws can only correct and compensate for, but never eliminate completely.

International agreements must lay the foundations for a broader-based solidarity aimed at reducing the unremovable differences deriving from the complex of

geo-political conditions of the individual States forming the international community. This is the aim of the new Treaty, which basically sets out to be an instrument for the development of international relations to guarantee the prosperity and progress of peoples and to strengthen the peaceful relations between them.

Campilli, Rapporteur for the majority.

REPORT OF THE MINORITY

Honourable Colleagues. The considerations that have led the minority group of the Committee to table its own report substantiating the proposal to vote against the ratification of the present Treaty can be summed up in the following points:

Point I. Strictly speaking, the Treaty is not a treaty of trade and navigation. The Treaty is a separate entity, but at the same time takes for granted the preceding ERP agreements and its spirit foreshadows further developments involving not only economic and trade matters but also the future trends of our foreign policy. The economic conditions of Italy are such as to lead to a positive opinion being expressed on every trade treaty negotiated with any power whatsoever in the reciprocal interest of our country and of the other party to the treaty. Such treaties, based on reciprocal advantage and on the scrupulous respect for the economic and political independence of the parties thereto, are always to be preferred to diplomatic instruments that are ultimately restrictive of economic and political independence, as was the case of the ERP agreements. Unfortunately the present Treaty continues the policy begun with the ERP agreements. The report of the majority states that "the wide-ranging and modern character of the Treaty", "must not be taken to mean that it can contain clauses which, by their nature, are extraneous to the matters dealt with in the Treaty itself", namely *establishment, trade* and *navigation*: however, the report itself cannot but mention the interdependence which exists between the economic-social factor and the political factor as one of the characteristics of the Treaty.

Together with the bilateral agreements and the ERP agreements, also the present Treaty is an instrument which, by means of a number of articles (Arts. IV, VII, XI, XIII, XIV, etc.) approves the increasing economic and political penetration of Italy by US imperialism.

Point II. The Treaty is presented in such a way as to appear to be based on principles of absolute equality and reciprocity. In fact, such equality and reciprocity are false, not only because the great difference in economic power between the two Countries and the absence of guarantees and safeguards for the Italian economy objectively lead to a situation in which equality and reciprocity are purely formal, but because of a number of other considerations. For instance, when mention is made in Article IV of the right granted to citizens and juridical persons and associations of each of the parties to the treaty of carrying out research and exploiting the mineral resources of the other party, it is clear that this article is to the almost exclusive advantage of the United States, since no one would believe that Italy could reciprocally carry out research and exploit mineral resources in the United States of America. The same can be said for the exportation and movement of capital, which normally takes place in one direction, in favour of the United States of America. This is due in the first instance to the existence of an obvious actual inequality and because no defence of the Italian

economy is envisaged against certain particular forms of penetration of Italy by American capital which are not in the national interest. Here we are dealing with an objective inequality between the two economies and it cannot be reasonably claimed that this inequality in itself should be an obstacle to the trade relations between economically weaker nations and economically much stronger ones: all that it is intended to assert here is that, in such cases, a trade treaty safeguards the interests of the economically weaker country in so far as it contains a number of measures of protection and economic guarantees in favour of the weaker party, which system of protection and guarantees is not to be found in the present Treaty.

It is not therefore only to the aforegoing that we refer mainly when we state that the Treaty lacks the characteristics of equality and reciprocity; we refer to the fact that to a number of reciprocal concessions provided for in the Treaty itself actually exclusively favours the United States of America and cannot favour Italy, since they are obstructed by a number of United States laws which are not and cannot be modified by the Treaty itself. For example, Article I lays down that the citizens of each party to the treaty will be entitled to enter the territory of the other party and reside and travel freely in the said territory. But while the article in question is valid for United States citizens coming to Italy it cannot be valid for Italian citizens wishing to go to the United States, for whom the severe US immigration laws continue to exist. Furthermore, also for Italian citizens not migrating to the United States, and even for those merely requesting a transit visa, the relevant severe laws of the United States apply fully to Italian citizens who are denied visas for both immigration, temporary stay and transit without being required to fill out the extremely detailed forms which provide a hundred pretexts for refusing the visa and to fill out which we Italians are even obliged to undergo the humiliation (and we are the only country in the world to be subjected to this treatment by the United States of America) of declaring in writing whether we belong to the southern Italian *race* or to the northern Italian *race*. Article I of the Treaty of friendship, trade and navigation is thus doomed to remain inapplicable and it does not seem out of place here to point out that, despite the proclaimed right to enter, reside and travel freely in United States territory extended to all Italians, in the past few weeks even two colleagues, the Deputy Michele Sala and the Senator Mario Palermo were refused an entry visa on their service passports without further explanation. Equally specious and ineffective is paragraph 2 of Article I, which allegedly grants reciprocal rights to the citizens of the two countries, and therefore to Italian citizens in the United States, to freely carry on professional activities, except that of the legal profession. It has been asserted in the Foreign Affairs Commission that this involves the recognition of an Italian academic qualification for every professional activity other than that of the legal profession. But this is not true either. Also as far as the recognition of the academic qualification (and this observation is all the more true as far as the exercise of the profession is concerned) the laws of the United States are so designed as to render Article I of the Treaty ineffective. Suffice it to recall, for instance, that by means of an internationally inadmissible procedure the state of Connecticut recognizes as valid only three degrees, granted by the Universities of Naples, Rome and Bologna; the state of New Jersey recognizes as valid the academic qualifications awarded in Italy to American citizens and not those obtained by Italian citizens, etc. The report of the majority claims that "international Treaties have, *as it were*, the force of federal law under the US constitution: their provisions prevail over those of the legislation of the various states of the Union". The report goes on to say that "the recognition obtained

in favour of Italians resident in the United States is thus guaranteed also against any restrictive provisions contained in the laws of individual states".

According to the report of the majority, this concession stipulated in the Treaty is "all the more significant in that the US federal authorities are usually loath to interfere in matters reserved to the competence of the individual states". Apart from the fact that we dispute the assertion that international treaties have "*as it were*" the force of federal law in those matters in which US legislation grants the individual states the right to legislate, anyone with even a superficial knowledge of American legislation and political life knows very well that it would be impossible to guarantee the enjoyment by foreign citizens of a given nationality of privileges denied to foreign citizens of another nationality. This impossibility is particularly obvious in the case of Italians who, in the few specific cases in which they are considered as a nationality different from the others (see, for example, the immigration laws) constantly receive worse treatment than the citizens of other countries. The United States legislation has recently made exception only for the citizens of territories considered as colonies or quasi-colonies of the United States, such as Puerto Rico or the Philippines; in view of the specific nature of these exceptions, it would be odd if they were extended to Italy.

Likewise, the rights and privileges granted to Italian citizens in paragraph 2 of Article I, together with the rights granted by paragraph 2 of Article XI, which, in addition to commercial, industrial, processing, financial, scientific, educational, religious, philanthropic and professional activities, makes provision also for the right to engage in activities such as the editing, communication and collection of information intended to be made public, the use of the press, radio, cinema and other media and any other activity of this type reciprocally allowed to American citizens in Italy and to Italian citizens in the United States, as usual is applicable only to American citizens in Italy. Reciprocity is non-existent because, as far as Italian citizens resident in the United States are concerned, all activities of this kind, as in the case of all other foreigners, are regulated by the strict provisions of the fundamental US legislation known as the *Alien Act*, which categorically establishes that any foreign citizen carrying on this kind of activity in the United States at the behest of their own country or in any case at the behest of foreign agencies or individuals, must be registered in the United States as a *Foreign Agent* with all the considerable disadvantages that this term entails. This is a law which has no equivalent in Italy or any other country, since it can in no way be compared with the common law and order provisions applied to foreigners, which involve quite normal controls and imply at least a criterion of reciprocity between all States.

The *Alien Act*, on the other hand, has an incomparably wider scope and can affect the activities of foreigners resident in the United States in whatever form they are carried on, suppress them, restrict them or change their orientation.

Therefore, the freedom of the press, radio, cinema or other media, guaranteed for the Americans in Italy, will take on a completely different form in America since, however the provisions of paragraph 2 of Article XI are formulated, any attempt to use the press, radio, cinema and other media to express economic, political and artistic ideas and opinions, the expression of which in Italy is guaranteed and permitted by the Constitution, will perhaps be permitted to American citizens in America but, on the basis of the *Alien Act*, prohibited or even punished when carried out by Italian citizens, as well as by other foreigners, on the basis of the law against un-American activities in the United States.

With regard to the extension to the citizens of the other party to the treaty of the benefits described in paragraph 2 of Article XII (social insurance), it must be

said that the statement contained in the report of the majority is meaningless, namely, that this concession, hitherto free and spontaneous and therefore revokable by the American Government, has now become an internationally accepted obligation by virtue of the Treaty. In the first place, social insurance for foreigners is a law of the State and not a free and spontaneous concession; in the second place, it is not a concession made to Italians (as the Treaty makes out) but to foreigners from any country at all. Paragraph 2 of Article XII of the Treaty does not and cannot change anything, therefore, as far as the pre-existing situation is concerned, as it is absolutely inconceivable for anyone with even an elementary knowledge of American law that social insurance should be granted to foreigners of a given nationality and not granted to foreigners of other nationalities. This would clash with the fundamental principle of American legislation concerning foreigners, which is unalienably that of equality of treatment in order to encourage the rapid Americanization and the rapid national assimilation of all foreigners resident in the territory of the United States of America. For the above reasons these benefits are extended to everybody and, as far as Italians are concerned, therefore, they can neither be granted nor withheld by paragraph 2 of Article XII of the Treaty, so that the formulation of the article in question sounds very odd, stating as it does that the benefits provided for by laws and regulations establishing compulsory insurance systems *will be* granted to the citizens of each party to the treaty.

Point III. The trade agreement between the United States and Italy would really have been advantageous had it solved in Italy's favour the problem of the emigration of our labour. In fact, even though this matter is normally provided for in special conventions, it is not because of a formal reason of this kind that it has been excluded from the present Treaty. It has already been seen that one of the characteristics of the Treaty is to overstep its economic limits and to enter the fields of political and cultural relations, etc.; since the Treaty makes repeated mention of the treatment extended to Italian immigrants in the United States, it could have treated the problem of immigration in general outline, opening up brighter prospects for a treaty or specific agreement more favourable to Italy. The truth of the matter is that in this question, the only one in which a real advantage to Italy was possible, the Treaty makes no concessions to Italy. It must not be overlooked that the same wretched annual immigration quota allowed us is largely illusory in that, instead of being filled by migrants actually going to the United States from our country, it is filled by the immigration offices of the United States themselves who send to Cuba or to Canada the Italians resident in the United States but not included in the quota, in order to have them included in the immigration quota and thus legalize their position, filling the greater part of the quota without any migration from Italy actually taking place.

Point IV. In view of the characteristics of this Treaty and because the principles of equality and reciprocity on which it claims to be based are in many cases non-existent or purely formal, it would have been particularly important for the Italian Government to have reserved the right to take any necessary measures to protect the Italian economy and to restrict the economic and political penetration of United States imperialism in Italy. One of the reasons which increases our distrust of even the purely economic terms of the Treaty is that the present Government has displayed such an acquiescent attitude to the United States and has undertaken and continues to undertake such wide-ranging commitments as to exclude any government will to intervene in any way in future in the form of protective and restrictive measures in favour of the Italian economy.

This situation further worsens the terms of the contract and increases the responsibilities involved in any ratification of the Treaty. It would appear to be

no exaggeration to consider a number of aspects of this Treaty, and of the relations being established between the United States and Italy, rather than on a footing of equality and reciprocity, to be based on an economico-political footing resembling that of the *Open Door* policy previously adopted by the great powers vis-à-vis China, with all the implications and consequences this is known to have engendered. For these reasons we do not consider that the Treaty is an instrument working in the interest of our Country and we believe that Parliament should refuse to ratify it.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur for the minority.

Draft Bill of the Minister	*Draft Bill of the Committee*
Article 1	*Article 1*
The President of the Republic is hereby empowered to ratify, and the Government to give full and complete implementation to, the following Agreements signed in Rome, between Italy and the United States of America, on 2 February 1948: *(a)* Treaty of Friendship, Trade and Navigation; *(b)* Protocol of signature; *(c)* Additional protocol; *(d)* Exchange of Notes.	*Idem*
Article 2	*Article 2*
The present law shall come into force on the date of its publication in the *Official Gazette*.	*Idem*

Document 5

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, DEBATES, SESSION OF 24 MARCH 1949, PAGES 7396-7404

[Italian text not reproduced]

DISCUSSION OF THE DRAFT BILL: RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, TRADE AND NAVIGATION, OF THE PROTOCOL OF SIGNATURE, OF THE ADDITIONAL PROTOCOL AND OF THE EXCHANGE OF NOTES AGREED IN ROME, BETWEEN ITALY AND THE UNITED STATES OF AMERICA, ON 2 FEBRUARY 1948 (246)

Chairman: The item on the agenda is the discussion of the draft bill: Ratification and implementation of the Treaty of Friendship, Trade and Navigation, of the Protocol of Signature, of the additional Protocol and of the Exchange of Notes agreed in Rome, between Italy and the United States of America, on 2 February 1948.

I hereby declare open the general discussion.

The Rt. Hon. Pesenti is on the list of speakers.

He has the floor.

Pesenti: Honourable Colleagues, the draft bill, which has been submitted to us for ratification, bears a heart-warming title: it speaks of a treaty of friendship, trade and navigation. It thus appears, after the various unilateral impositions that we, I say we in the sense of this Chamber, and not of the Group that I represent, have had to accept through the various agreements, in particular the ERP agreement, we have finally been presented with a treaty, that is, an agreement negotiated between the two parties on an equal footing, which contains clauses equally safeguarding the interests of both parties to the treaty.

Moreover, this treaty also speaks of friendship, that is, it extends beyond clauses of a merely economic and commercial nature, in order to establish a situation of friendship which is embodied in a word dear to all those, particularly on our side, who want peace and friendship with all the nations of the world, with all countries, with all the peoples of the world, and thus also with the people and the State of the great North American Republic.

If, therefore, I shall personally show that I cannot give my consent to the ratification of this treaty, it is because the truth hidden beneath the title I have just read out is basically different; because it is neither a treaty nor a treaty which guarantees friendship, unless we mean friendship in the sense of the well-known proverb which runs "God protect me from my friends and I shall protect myself from my enemies".

The true situation indicates that this treaty is an instrument which is part of a whole set of instruments designed to implement what we consider to be the will to imperialistic expansion of the United States. Therefore also this treaty, in order to be understood, cannot be considered as standing alone; and even if it is considered as standing alone, it is nevertheless a serious matter and such as to jeopardize the interests of our Country. But its nature, its seriousness, vis-à-vis the interests of our Country increase if we consider it, together with the other instruments, as the expression of this will to expansion, to dominion, of United

States imperialism. All this is ignored in the report — whether the ministerial report or that of the majority by the Rt. Hon. Campilli — which is therefore unsatisfactory (to say the least) because I cannot imagine, particularly on the part of the Rt. Hon. Campilli, an ignorance of what I am going to say and of what will be said also by my colleague, the Rt. Hon. Berti, namely an ignorance of the arguments we shall present against the ratification of the treaty.

But if this general aspect, this particular characteristic of the treaty, in so far as it is an instrument of the will to dominate of the United States, is overlooked and is not mentioned either in the ministerial report or in that of the majority, it could be said to represent a political fact deriving from the overall policy of the Christian Democrat Government or of the Christian Democrat coalition and is therefore, I should say, a desired shortcoming.

But, in my opinion, the report — both the ministerial report and that of the Rt. Hon. Campilli — contains also technical shortcomings. This is even more serious since, if the task of the opposition is to approach the fundamental problems from a general point of view with regard to the Country's interests, the task of the majority should be at least to make a technical contribution to the solution of such problems; that is to say, having fully accepted the government's policy from the outset, to correct any technical defects contained in the legislative measures.

In my opinion the Rapporteur for the majority has not fulfilled even this task, which should indeed be carried out by the majority itself.

Allow me, therefore, honourable colleagues, to express the reasons underlying our disapproval of ratification, that is, to express the reasons for which we consider this treaty not to represent a free agreement — that is, a treaty corresponding to the interests of both parties — but to represent instead another instrument serving in particular a single party, the United States, and which does not guarantee that the interests of our Country will be defended.

We must of course have a treaty of trade and navigation with the Republic of the United States. Therefore, on the expiry of that of 26 February 1871 — as far back as 15 December 1937 —, and after the war and its aftermath with which we are all familiar, it is logical, as I have said, that a new treaty should be negotiated. But what sort of treaty of navigation and trade would it have to be to really correspond to the needs of our Country?

The 1871 Treaty was a normal trade and navigation treaty: there was no need to speak of friendship because the friendship derived from the good economic and trade relations it set up, from the most-favoured-nation clause underlying the treaty, from the facilities it accorded to citizens of the two countries in carrying on their actual business affairs. In other words, it was not a treaty of establishment or one with a broader cultural or political nature, and it took into account the basic inequality of the situation in the two contracting countries. That is to say, there was equality and reciprocity with regard to trade and navigation, freedom of travel, of residence in general, of doing anything deemed necessary for trade, under the same conditions for both parties; but it was limited to these points.

By this I by no means wish to challenge the statement of the Rapporteur of the majority that the economic relations between the two countries have expanded and it is therefore necessary also to go beyond the narrow limits of trade and navigation and take into consideration also the other relations of an economic nature between the two countries, relations which have become more complicated, such as in the currency and monetary fields and in that of the transfer of goods and persons; also because the transfer of capital in particular has increased, especially since the First World War. I therefore do not wish to mean that the

new treaty must be limited to the 1871 type. But there is the world of difference between the principle of extending the treatment to other economic relations and thus of making a wider-ranging treaty and ending up with the treaty we are examining because (as can easily be seen) the norms contained in this treaty establish, not a condition of equality, which is nevertheless repeatedly stated in the ministerial report and in that of the Rt. Hon. Campilli, but a condition of intrinsic as well as juridical superiority, that is, substantive as well as formal, of the United States in fields much broader than that of trade. Therefore, precisely because of the actual content of the treaty, which is so broad in scope and gives such extensive powers to the United States, it is clear that the treaty is part of that set of instruments which make up the expansionist policy of the United States. What do these instruments consist of? We have outlined them on a number of occasions here, in the Chamber, when defending our national interests, the interests of our Country, vis-à-vis all the international instruments that we have had to deal with here.

At the time when the Constituent Assembly discussed the Bretton Woods agreements (even though we too approved them to some extent) we declared quite clearly: gentlemen, this is not an international agreement in which all the countries are presented on an equal footing, here we are dealing with an international organization which regulates the currency exchange rates between the various countries through an international fund that is clearly dominated by the United States because, we said, both in the International Monetary Fund and in the International Bank for Reconstruction and Development 31 per cent of the votes are held by the United States; if to these votes we add the further 25 per cent held by the British Empire, we have an absolute majority for the Anglo-Saxon bloc and for the United States in particular.

We have pointed out this situation not only with regard to these agreements which represent what I should define as a permanent instrument of the United States policy of dominion, but also with regard to politically even more serious and obvious instruments that should be temporary, but are actually permanent.

We made similar and more firmly grounded statements when we discussed the ERP agreements, revealing their unfair nature and the economic and political predomination of the United States; their distinctive political nature is no longer denied by anyone, now that instead of wheat the idea is to send us arms. The non-temporary nature of these agreements is also revealed by the other complementary agreements, particularly now that you have approved an Atlantic Treaty which lays down the application of the lend-lease law for the armaments of the European countries.

These permanent instruments and those of a temporary nature, as it were, established by the ERP prior to 1952 (but which will become permanent precisely because they consolidate the situation of European dependency) lay the foundations of the economic and political predominance of the United States.

By means of these instruments and other precise, if not definitive, agreements such as the Havana Charter?, the basis of the American empire is ensured. Even the so-called principles of freedom, of trade, of the transfer of goods and persons, stated in the aforesaid Charter, today represent instruments of the absolute supremacy of the United States economy throughout the world, which is something serious for our Country both in the field of trade and in that of capital investment. In the strictly commercial field it must be recalled that our imports from the dollar area accounted for 19.47 per cent of total imports in 1938, 50.17 per cent in 1947 and 45.19 per cent in 1948, while our exports to the same area are far less important, amounting to 9.78 per cent of total exports in 1938, 5.93 per cent in 1947, 9.49 per cent in 1948. These few indicators could well seem

insufficient. However, with regard to the economic penetration of the United States in general I think little else needs to be said beyond confirming the opinion held by the man in the street who has seen our Country invaded by Coca Cola and the domination of American films without any defence by our industry, and the widespread presence of de luxe automobiles which did not exist previously.

It is against this precise background that this Treaty must be viewed, a new, permanent instrument in the conventional form, if you like, of a treaty of trade, navigation and friendship; in other words it is formally different from what clearly emerges at first sight from the bilateral agreements established in the ERP legislation, according to which we wholly accept an internal law of the United States, namely, the law of 3 April 1948.

Although this treaty appears to be a conventional instrument it is different in its substance; in its spirit it represents a new, albeit formally conventional, instrument, an instrument which, together with the others, serves the purpose of guaranteeing the predominance of the United States over our Country. And I am convinced that also the Rt. Hon. Campilli, even though he uses in his report those words which would be suitable just for his voters — who will perhaps believe them, as they believed them on 18 April — referring to the equality of rights between the two parties, to friendship, etc., I believe, I repeat, that also the Rt. Hon Campilli basically agrees with me (because I consider him an intelligent person) that here we are establishing an instrument that does not guarantee equal rights but which sanctions a substantive inequality between the two countries and thus guarantees a privileged position for the United States.

Moreover, whence comes this frantic desire of the United States for the freedom of trade, of settlement, of the movement of persons, goods and capital, precisely in a country which is historically known for its pronounced protectionism, for its savage customs tariffs. The history of the trade policy of the United States is well known: there is no need to describe it at length: it is the history of protectionism itself.

Suffice it to mention the customs tariffs, such as those laid down by the 1890 Kinsley customs law or the even more serious Hawley Smoot law of 1930 or the trade policy of supporting the companies set up by the oil and steel trusts for the purpose of penetrating the European markets, particularly that sanctioned by the 1918 Webb Pomerane law abolishing the anti-trust legislation in the case of these trading companies. Foreign trade has always been considered in the United States as a matter of national interest, a public, not a private concern. And how many institutes have been set up to encourage exports, that is, to create opportunities for the penetration of world markets! Only now has this frantic desire for the freedom of trade and navigation, for the free movement of persons and capital come to light. But we also find that this freedom is in someone else's house, not at home, that is, that this freedom is merely the expression of the present interests of the ruling class in the United States, that it represents the interests of the United States economy which occupies a position of substantial and undeniable predominance in the world; in other words, it serves the purpose of underpinning the power relations by means of which the weak, precisely by virtue of this freedom, can no longer defend themselves; it establishes equality between the dwarf and the giant. In this connection I should like to tell a story which may present the issue in a somewhat lighter vein, even though I am not a good storyteller. It is about a man who made canned lark's meat. When asked how one could possibly make canned lark's meat, he would answer that it was really not just lark's meat but also horsemeat — half and half, he would say, exactly half horsemeat and half lark's meat. This is the kind of equality that is being established. This is the freedom that the United States is demanding today — the

freedom of the stronger party. What I am saying also refers to other cases, honourable colleagues, particularly the Rt. Hon. Campilli and Togni who are concerned also with the Customs Union with France. Today, in this age of monopolies, the conventional instruments used to prevent the penetration of foreign goods change in meaning. Customs tariffs become less important because they are replaced by agreements between monopolies, between groups — between the groups, for instance, of the French steel industry and the Italian steel industry, between the *Comité des Forges* and *Compsider* — that is, agreements fixing the quantities and the sales markets and limiting trade with a greater benefit for the monopolies than with conventional customs formulae. Because, when the customs tariffs were in force, part of the revenue at least went to the State, which could then distribute it to the various categories of citizens according to the expenditure made by the State itself.

Today monopolistic groups make agreements amongst themselves and retain also that part which should go to the State as customs duties. But this does not change the substance, the fact that international economic relations are regulated according to the power relations existing between the monopolistic groups.

How can we defend ourselves in such a situation? By reasserting freedom, equality, that is, by spouting words that we could not believe if we were intelligent persons? By trying to deceive us, to deceive the Italian people, whose interests we should be defending, or instead by examining the truth carefully and trying to find suitable instruments to prevent this substantial inequality from weighing too heavily on our Country's economy?

But there is still one further aspect of a general nature. When a treaty is presented like this one, that is, so broad in scope as to place foreign persons and companies on an equal footing with national ones, when it becomes a treaty of settlement, of establishment, as a result of which — as we shall see more fully when the articles are examined — foreign citizens and companies can establish themselves in our Country, carry on commercial, cultural, political and informative activities, that is, carry on all possible kinds of activities, this treaty then becomes a political treaty.

This is a new principle, which is not found in the other treaties. That is, it is not true when the report says that this treaty does not add anything new; there is one important and very new fact that is not contained even in the treaties Germany established with Romania and Czechoslovakia (because those treaties contained a most-favoured-nation clause), namely, equality was established with foreigners not with nationals.

I do not wish to argue in abstract terms . . ., for instance, from an abstract point of view be an acceptable principle to establish something new, which would facilitate economic relations between the various countries. However, honourable colleagues, when we accept such weighty and serious clauses, I repeat, we transform a treaty of navigation and trade into a political treaty. In the first place, it is not true that there are no specifically political clauses, in so far as the clauses allowing cultural, religious and political activities are an expression of just this. From a general point of view these clauses may not even raise any problems: it depends on the possible extension given to such activities. The sect of the Mormons might spread, and I think that some of my colleagues present here would even not mind that; that horrible publication known as the *Reader's Digest* could spread. These are details. It is the principle that counts: that is, when these rights are summed up, we necessarily come to deal with a political content of a constitutional nature, I should say, which therefore calls for an examination of what constitutes the juridical and political system of the two countries party to the treaty, as well as their current policy; only in this way can the effective existence

of the alleged equality of the two parties be established. When this great novelty of the settlement and equivalence of foreigners to nationals is introduced, this principal must be examined from the juridical and substantive points of view, which is something that can be done, I repeat, only by examining the juridical and political systems of the two parties. As far as the substantive situation is concerned, I do not believe that it is necessary to insist for very long, I think it is clear that even if from the juridical standpoint the provisions contained in the Treaty represented an effective equality within an equal juridical system, no Italian capitalist would be able to export capital to the United States, that is, to compete with General Motors, United Steel or Standard Oil. There are obvious substantive differences which therefore lead to inequality.

We shall see that there is a single point in which this inequality could be partly compensated for, which was represented precisely by the possibility of Italian workers settling in the United States and thus carrying on their working activity there. But there is no provision for this not only in the juridical system of the United States but even in the treaty itself; however, this already comes under the second part of the inequality represented by the different juridical system and not in that represented by the substantial difference between the two economies.

But when we examine a Treaty, I say, if it contains clauses whereby a foreign citizen of the other party to the treaty is equated to a national and foreign companies are equated to national companies, we must consider the juridical system and the actual economic policy of the two countries that are party to the treaty.

In either case, that is, considering the juridical system of the United States and of Italy or the actual policy of the United States Government and of the Italian Government, we see that our Country is in an obvious state of inferiority. When more than one article of the treaty makes reference to morality (a word with perhaps little juridical significance) and to law and order, it must be remembered that this law and order is not only that which is dear to the Minister Scelba, but law and order in the broader sense which, in juridical terms, means that no provision of the contract can clash with the set of juridical institutions of that country. Therefore, it does not concern, for instance, only the refusal to allow entry to the son of the President of the Republic, guilty solely of wishing to attend a peace congress and of sympathizing with the party which intends to defend peace with determination. This may be the Scelba type of law and order, but there is also law and order in the juridical sense, established by the sum total of juridical institutions which exist in the United States.

And it is precisely for this reason, I say, that this kind of treaty becomes a political treaty which compels us to consider the juridical institutions of the individual countries party to the treaty and at the same time also their actual policy; when the Government of the United States decides today, for example, that the son of the President of the Italian Republic cannot go to a peace congress in the United States (which is only just, in so far as it would not be just for Giulio Einaudi, simply because he is the son of the President of the Italian Republic, to be treated differently from any other foreign citizen), it is nevertheless performing a concrete political act.

In this connection we have not got the laws that the United States have, by means of which the clauses laying down equality of treatment between nationals and foreigners can be rendered ineffective, the settlement of foreign citizens can be prevented and all the activities of foreign citizens can be prevented in so far as they are un-American activities. If in the United States one succeeds in discovering that the Americans themselves are un-American, to the extent that

they are brought before the Federal Court for un-American activities, there would be no difficulty in preventing foreigners from carrying on any sort of economic, political or cultural activity . . .

Togni: This is a judgment of intentions!

Pesenti: No, of reality, because this is how things really stand. Perhaps permission will be granted to a cheese manufacturer who causes no bother (for instance, a producer of parmesan or gorgonzola cheese) to go to the United States to do a bit of business, perhaps in a joint venture with an American industrialist. But the large-scale activity provided for in general terms in the treaty, the equality, the equivalence, will not only be substantially to their advantage, because only they will be able to come to Italy to set up companies, create industries and carry out oil prospecting, while it will certainly not be us who go to the Pennsylvania or California fields to prospect for oil or to compete with Ford, but it will also be to their juridical advantage because they will be able also juridically to prevent any activity of an economic, cultural, political or religious nature being carried on by Italian citizens.

The basic difference in the institutional juridical nature of the two countries, which is mentioned in several places in the Treaty, when it refers to norms that do not conflict with law and order (the Scelba type of law and order which is very well known in the United States since that is precisely where the riot police and tear gas bombs come from) acts against us by being added to a long series of contingent policy restrictions which can also be enforced against foreigners. Our present Government is well aware that it implements this contingent policy against its own citizens but it does not want to do so against foreigners, not only those from other capitalist States or the Ustase, particularly if they come from the star-spangled republic.

The Government we have gives us no guarantee in this regard, not only because of the lack, in our Country, of juridical institutions suitable for defending us, but also because of its contingent policy. I have no wish to criticize the United States juridical institutions; they are the product of their history just as ours are the product of our history. The fact is that we have no guarantees for the juridical system and we have even fewer guarantees for the concrete policy implemented by the Government now running this country.

And we who are above all defending our Country's interests cannot overlook the fact that the foreign policy of the Christian Democrat Government has already been censured in a few words by Vittorio Emanuele Orlando who referred to them using the terms greed and servility *(Interjections — Protests from the Centre).*

In the face of such a situation, of this inequality established in the Treaty, from a point of view which is not only substantial and relative to the economic conditions of the two countries, but also from the formal point of view of the juridical institutions, and thus from a juridical point of view, we detect a different attitude in the two Governments: the Christian Democrat Government has in fact shown on several occasions that it is incapable of defending the interests of our Country against the United States.

In such a situation it is clear that we cannot agree to ratify a treaty like this because, in addition to all the conditions of inferiority it establishes, there is also the lack of confidence in a government activity that could partly limit this condition of inferiority, that could take advantage of what is represented by the additional protocol — which establishes several, albeit temporary, compromises (but it is a known fact that temporary situations last much longer than those

considered permanent) — that is, the set of rules which can partly offset this inequality of a substantial, economic and juridical nature.

We have no confidence. The inequality between the two parties to the treaty is clear and obvious in all the articles which, in view of the late hour, I certainly do not intend to read, although perhaps some of my colleagues, who have had full, acritical confidence in the Government, have probably not even read them, as they know that the duty of the majority is to vote in favour of the Government. Therefore, perhaps, also a reading of the individual articles would not be a bad idea for some of these colleagues; however, I do not wish to afflict the few that are present, also because I believe *that there is no point in forcing people to feel* responsibility for their actions when they do not already feel it themselves.

Suffice it to refer to Article I, which contains the most important provisions: the possibility of carrying on commercial, industrial, processing, financial, educa*tional, philanthropic and professional activities*, except the exercise of the legal profession; the possibility of purchasing, owning and constructing (I should like to see how many Italians will go and build in the United States), to use agents and employees of their own choice, without regard for their nationality (they will probably be armies of spies). I repeat, what have we to use against this Article I, which continues into Article II, establishing the same privileges, the same rights, for companies; it continues into Article III, which emphasizes the section referring to the carrying on of industrial, commercial, philanthropic and religious activities? What have we got to offset Article IV, which establishes the possibility of carrying out prospecting with a view to exploiting mineral resources?

Lastly, Articles V and VI lay down the norms governing the transfer of property; Article VII presents an odd difference of treatment because the citizens and juridical persons and associations of each other party to the treaty will have the right to purchase, possess and dispose of real estate or other real rights in the territory of the other party to the treaty on the following conditions:

(a) in the case of citizens, etc., of the Italian Republic, the right to purchase *will* depend on the laws and regulations which are or come into force in the future in the United States of America;

(b) in the case of citizens and juridical persons of the United States of America, the right to purchase, etc., will be subject to conditions no less favourable than those granted or to be granted in future to the citizens and juridical persons of the Italian Republic, etc. This is, therefore, a difference also of a juridical nature established, sanctioned, by Article VII, between our citizens and those of the United States, that is, a condition of inferiority of our citizens vis-à-vis those of the United States.

And the series of articles continues in the same tone. As I have already said, no treaty has ever established such a high degree of favour for foreigners. Not even the Treaty between Germany and Romania and Slovakia before the Second World War. Our Treaty of Navigation and Trade of 1871 was much more prudent; its provisions did not extend to settlement and it provided a better guarantee of the interests of our Country.

At any rate, what is the only substantial benefit that we could have obtained from the substantive point of view, assuming that is that the United States legal system did not have the notorious *Alien Act*? *The only benefit would have been* the possibility of migration to the United States for Italians who, even if they unfortunately could not go there and set up companies in competition with the *Standard Oil Company*, or to carry out oil prospecting, or perhaps even to carry on *cultural or educational activities (except in the case of a religious congregation)*, could at least have gone to the United States to work.

The only benefit was the possibility of our millions of unemployed going to the United States and finding there an opportunity to work, to live, to make a future for themselves. And yet this possibility has been prevented; our only possible benefit is unavailable.

And in these very days all my honourable colleagues — indeed this very morning — will have received from the Under-Secretary of State for Foreign Affairs, the Rt. Hon. Moro, a letter recalling the regulations governing migration to the United States of America. This letter states that migration to the United States is rigorously governed by the restrictive law of 1924 which allows only a limited number of Italians to settle in that Federation each year.

The places not filled in the so-called preferential categories, which are limited to a few hundred per year, represent the isolated preferential quota, etc. This is followed by the list of documents required for this migration.

What becomes of this reciprocity of settlement when we are deprived of the only possibility of settlement open to our Country? Clearly this clause favours only the interests of the United States, so that the "Metro Goldwyn Mayer" can carry on its activity in Italy, purchase and own, using the profits deriving from the fact that Italian citizens are compelled to see not only the good films — which would be useful — but also the horrible films of the United States, and of political propagada related to the so-called cold war, like "Iron Curtain", etc. I have given the example of a film company, which is obviously likely to cause less trouble than others, because even if it buys a building or two, these are unlikely to be taken out of our territory.

But where is the equal footing, the equality, mentioned in the ministerial report and in that of the Rt. Hon. Campilli? Does the Rt. Hon. Campilli really believe in it? I have faith in his intelligence and believe that he does not: the inequality is quite clear, obvious. This treaty cannot be considered a treaty of equality, between equally sovereign countries, that is between countries defending their reciprocal rights with equal vigour; I would call it an "open door" treaty of the kind that more powerful, imperialistic, countries — such as Great Britain and the United States — are, or were, accustomed to establishing (and let us hope they will be unable to continue to do so) with China and Turkey at the time of their greatest decline, that is, with countries they deemed to lie in their own sphere of colonial or semi-colonial influence.

We cannot accept such a treaty; and we have all the more reason for not accepting it in so far as the present Government is doing practically nothing to make up for this state of substantial inequality. We cannot have confidence in a Government which supinely, without discussing it, accepts all the initiatives proposed by the stronger country, the United States; we cannot have confidence in a Government that does not accept discussion, which out of servility is always unwilling to impose controls and restrictions on the invasion by American capital, to impose substantial controls and restrictions on the intrusion of United States companies and citizens in our Country.

In other words, we have no confidence that the Christian Democrat Government can and will defend the interests of our Country in the same way as the United States defends its interests. But precisely because this instrument *per se* represents another link in the chain that is to bind the American world together and of which no country is allowed to shake off, that is, precisely because it is another link in the chain represented by the Bretton Woods accords, the Havana Charter? and the ERP agreements, and of the Atlantic Charter in the political field, precisely because this instrument sets out to sanction the inequality, the disparity, between the two parties thereto and does not defend the interests of our Country, precisely because the Government running our Country is not

capable of defending the national interests and is unwilling to do so, for this reason we cannot recommend the ratification of this treaty and invite all our colleagues to refuse to ratify it *(Applause from the Extreme Left).*

Chairman: The rest of the discussion is postponed until tomorrow.

Document 6

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, DEBATES, SESSION OF 25 MARCH 1949, PAGES 7427-7441

[Italian text not reproduced]

CONTINUATION OF THE DISCUSSION OF THE DRAFT BILL: RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, TRADE AND NAVIGATION, OF THE PROTOCOL OF SIGNATURE, OF THE ADDITIONAL PROTOCOL AND THE EXCHANGE OF NOTES, AGREED IN ROME, BETWEEN ITALY AND THE UNITED STATES OF AMERICA, ON 2 FEBRUARY 1948 (246).

Speaker: The item on the agenda is the discussion of the draft bill: Ratification and implementation of the Treaty of friendship, trade and navigation, of the Protocol of signature, of the additional Protocol and of the exchange of Notes agreed in Rome, between Italy and the United States of America, on 2 February 1948.

The next speaker is the Rt. Hon. Montini, who has the floor.

Montini: The Treaty of Friendship, Trade and Navigation between Italy and the United States of America, and the relative protocols, have already been amply discussed, first by the Committee for Foreign Relations and subsequently by the Committee for Treaties.

An objective examination of the Treaty from a negative point of view has already been made quite thoroughly by the Rt. Hon. Pesenti. Here, however, it is not a matter of discussing single points, as if the intention were to introduce possible modifications, but to decide "for" or "against" ratification.

From the historical point of view we are more or less in the same position as our colleagues in 1871, when the first ratification of a Treaty between our Country and the United States of America was being discussed. Precisely in that period a previous treaty agreed in 1838 was about to expire and Parliament was being asked to ratify the new treaty, which was ultimately signed by the Minister Visconti Venosta.

At that time the Minister had to defend himself because the opposition, which was lively also in those days, pointed out that the treaty did not safeguard a perfect reciprocity of rights; this was a somewhat similar position to that of today in that the fundamental objection made by the opposition is indeed the possibility of a lack of reciprocity between our Country and the United States.

It is interesting to see from the documents of the time how the proposing Minister had to defend himself against the reservation made by the United States of the right to coastal shipping, the right of river navigation and of the conventional tariff.

This is what the Minister of the time said:

> "This is all that we can ask of the United States in the meanwhile in so far as the parity that we are demanding is perfectly comparable to that of all the other States that are negotiating for the United States."

"Therefore", declared the proposing Minister at the time,

> "the fundamental overall position is as follows: either not to perform an act of peaceful negotiation with this nation or else to merely withdraw from the 1838 Treaty and remain in the position of not having any relations with the United States themselves".

Also today the discussion could be summed up in these terms: either to ratify or not to ratify. By ratifying — and I shall momentarily accept your overall argument — we do not obtain everything we want, we obtain less than what might be considered desirable. But, if this is your argument, it is no less true that ratification would in any case bring considerable benefits.

The opposition's objections however refer also to another point, namely, that it is not a protocol restricted to the regulation of trade and navigation relations and which remains within the narrow confines of the technical regulation of economic relations, but consists of a Treaty which is extended to cover a much larger sphere involving also the establishment of positions of friendship, thus entailing relations which are more than technical in scope and in which the opposition detects a political aspect.

It is very strange that such objections should come from this quarter. Since 1871 the general political situation has changed considerably and a different approach to internal relations and relations between States has developed historically. What in those days was merely a simple technical relation based on the principles of a liberal State must now be revised because the conception of State has changed completely; and since the State has constitutionally expanded its internal functions, so we now find ourselves in a different position also vis-à-vis the conception of relations between States. Today the 1871 Treaty can be said to regulate too little; of the present one we certainly cannot say that it regulates too much! Much progress has been made; suffice it to consider the large number of relations which regulate *the life of States and the need for them to cultivate* and accept relations of solidarity, in order to observe, in the course of history, that just as the means of transport, cultural relations, etc., have expanded, so it is necessary to predict and regulate increasingly broader areas of contact between States. We must decide whether it is necessary to stop short at the part strictly envisaged in the Treaty; from the historical point of view we consider that this Treaty is not only not a bad thing, but that it is a good thing, although (perhaps) *not as good as we might have hoped for.*

At the Committee level, the opposition has drawn our attention to another point: the technical point of view. During the discussion before the Committee a number of objections were raised concerning the issue of establishment, and it was pointed out that, while the Treaty states that "Equal conditions are recognized for the free exercise of the professions, except the legal profession", in actual fact United States legislation and practice would imply a deficiency of application because the legislation of the individual states making up the Federation would count as restrictive clauses to the broader scope granted by the Treaty.

We reply in the first instance that, in the states of the Union, wherever a restictive law is in force, the applicable law is more likely to be not the restrictive one but that of the Federation and in any case what should or is at least likely to occur is that the local laws, which could be less restrictive today, will gradually decline, possibly with the help of the Treaty itself.

If the bases provided by the Treaty ultimately increase the range of possibilities, it must be accepted that the Treaty itself can lead to possibilities which hitherto were excluded. Also for this reason it is obvious that, faced with the question of whether to ratify or not to ratify, it is better to ratify. Even if we were to think

that in the internal practice of the United States a current limit to application existed, we cannot help believing that the Treaty is likely to increase the possibilities rather than reduce them. Therefore either we remain inert and do not ratify, or by ratifying, we try to open this door wider than it has been opened so far.

The "most-favoured-nation" clause expressly included in the Treaty and which refers to both trade relations and all other kinds of relations, is a clause which existed in the preceding 1871 Treaty; therefore the present Treaty neither innovates nor improves the question with regard to this point. This is the observation made by the opposition. We reply that if you do not ratify the present Treaty this favourable clause is lost; it disappears.

Therefore, if we take an absolute negative view, we shall not have the advantage even of the positive aspect, that is, of this clause, which is recognized by everyone as favourable.

From the substantive point of view, the observation made by the opposition is the following: the perfect reciprocity glorified in the Treaty does not in fact exist; in so far as the treaty with the United States remains a symbol — to use the words of our colleague Pesenti addressed to the Foreign Affairs Committee — it represents a symbol of reciprocity and equality, but the substance remains unaltered, namely, a state of inequality between the two countries. And this inequality cannot be corrected by the Treaty. My answer is that before speaking of inequality in juridical terms it is a good idea to observe the bases of the discussion. And in this connection we have not heard and will not hear any serious objections concerning the reciprocity of rights between the two States party to the treaty. Perfect reciprocity means that Italy is on an equal footing with the States that have dealings with the United States, and that privileges are not used to breach the equality between the application of the internal Italian legislation and the application of the internal United States law, which forms the basis of the equality of rights.

Reciprocity, in so far as the United States treat us as they treat other nations, with the advantage that in some cases our position is more favourable. Parity, in so far as the respective citizens of the two countries are not subject to *a priori* limitations. Therefore, in the sphere of law, no inequality exists.

In the practical sphere the question of substantive inequality is taken to mean that the Treaty is blamed for the fact that the greatness of the United States, its financial power, the position of its capital, could become a means of supremacy vis-à-vis our weakness and shortcomings; in other words, this situation would be a fault, in that any nation negotiating with the United States would be negotiating with a stronger party. And the Treaty is blamed for not correcting this defect. But how can a treaty correct such a state of affairs? If we negotiated with the Republic of San Marino, as we do, would this very fact entail a perfect substantive reciprocity between the Republic of San Marino and Italy? The observation would seem so obvious that its logical meaning cannot be overlooked! So that of course if we negotiate with the United States we shall not demand equality of resources, aid and activities but a line of respect of rights and dignity. And we could well fear — if that is the right word — that the United States capital entering Italy affects our economic and financial positions.

But also on this point we must be careful not to reach negative conclusions because, either we actually do fear that any entry from abroad of foreign capital into our Country is dangerous, and therefore what we unconsciously wish to maintain is a state of autarky; and we are still suffering from the terrible consequences of him who gave us autarky! Or else we view the matter with a greater sense of realism and say that the entry of foreign economic resources into our Country must be discussed very carefully and the decision ultimately taken

as to where to situate our independence and our dignity. In other words, if we fear that the action of foreign capital and foreign economic resources affects our independence and our dignity, we should be placing both very low down on the scale for our Country. We know, however, that it is not by using material resources that independence and dignity can be affected. And were it legitimate to broach another matter in addition to that of treaties we should consider the fact that the aid we receive from the United States is not received by treaty, not for the above technical considerations or through a specific foreign policy, but we receive them through an act of international solidarity, which has no effect on our dignity or independence. No aid, no good, from whichever part it is received will affect the sense of inner freedom, the sense of dignity, as a result of which we are people who beg their bread in the morning without considering that at the end of a day's work we have produced as much as is required to give it back, and to have retained our dignity and independence.

This is basically the history of the last three years of our lives. Everything we have received from the United States — and this is a matter which is not clo . . . matter which obliges us to judge relations with other States — can be assessed as being worth millions and millions of dollars. All the reconstruction work (reconstruction of bridges, roads, railways, etc.) has been done by us, even if the material resources mostly came in the form of external aid. The aid we have received in this connection perhaps exceeds that granted to other countries, but if this aid is materially accounted for it can be seen that the capital now invested in our Country can be multiplied about seven-fold.

This means that one can be independent, not tied to any form of aid that entails loss of dignity or independence. I remember when in northern Italy we used to travel on "Belgian" railways and trams; I never felt that my dignity or freedom was being diminished by the fact of purchasing a ticket with "Belgian Tramway Company" written on it. Those railways and trams have continued to function up to the present time even after the original capital had been paid back and today no one can say that it has affected our independence and freedom.

The Treaty has been criticized because its provisions will have very little effect on migration. It is obvious that we are more likely to receive capital from the United States than the chance to place emigrants; and yet we were very interested in sending Italian labour to the United States. Also on this point shall we hear the opposition complain and demand that the Treaty modify this state of affairs concerning us? But also on this point we must point out that the Treaty lays firm juridical foundations; as for the actual facts we should perhaps negotiate special treatment for Italy vis-à-vis other countries and not conditions of equality. If this becomes possible in future, the Treaty will not prevent us from doing so; today in any case we have conditions of fairness.

I believe, therefore, that the position from which the Treaty is asked to correct fundamental differences is utopian and unconvincing.

For these reasons it can be concluded that the *a priori* objections raised by the opposition are unjustified. I do not know whether the opposition will raise the same objections to every treaty brought before the Chamber. Probably the logic of your opposition will lead you to adopt a hostile attitude to every treaty the Government brings before the Chamber for ratification; however, I maintain that if this is the general *a priori* condition, it has no particular significance in the case in point, unless too close a connection between a judgment of general relations between West and East has an effect also on this discussion, which would continue, outside its forum, the discussion carried on by many speakers in the last few days before this Chamber. The opposition will always be the opposition; this is in the nature of things; however, I think that when, in the near future, we bring the

Treaty with Russia here, either the opposition will have to change its present compulsory behaviour or else it will have to admit there is no difference between this treaty and that one. If there is any difference at all it consists in the fact that in that Treaty (the one with Russia), one goes even further, opening up lines of solidarity which do not keep to the strict juridical concept of the international treaties of the past.

In view of the aforegoing, I therefore consider that neither for historical reasons, nor for reasons of treaty technicalities, nor for substantive reasons, should a negative opinion be cast against ratification.

As it is not necessary to discuss the individual clauses, but only to decide between "yes" and "no", the position of the "nos" seems to be quite unjustified, while we should like to express our approval of ratification of the Treaty *(Applause)*.

Speaker: There being no further speakers on the agenda and no one else having asked the floor, I hereby declare the general discussion closed.

The honourable Rapporteur for the minority now has the floor.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur for the minority: It is true that there was a discussion before the Foreign Affairs Committee and the Treaties Committee, but it is also true that there was a certain tendency, particularly on the part of our colleagues of the majority, to gloss over a detailed examination in Parliament. If a colleague of the opposition had not taken the floor concerning the Treaty yesterday we should probably not have had any discussion except for the report of the majority and that of the minority.

I wonder why this should be so? Some colleagues have said: we have already performed an important political act which basically incorporates in its broader framework what we are called upon to perform today. We have already made a decision concerning the Atlantic Treaty, and today the Treaty of Friendship and Trade with the United States represents something of lesser importance, in a certain sense, something complementary. But what has the Atlantic Treaty to do with this? In the past we have had other political treaties, and military accords: the Triple Alliance, for instance; but when it came to discussing the treaties of trade with countries such as Germany and Austria, Parliament discussed them in detail. The States of the Triple Alliance also had a political and military accord, but all my colleagues know how long the discussions were in the French and British Parliaments concerning the treaties establishing the trade relations between Great Britain and France, or between France and Russia. It is therefore difficult to explain and understand why this Treaty is not viewed as a pact in its own right, but is viewed as something important, undoubtedly very important, but which it is not considered useful to discuss in detail because the discussion is already included in the parliamentary debates conducted for the ERP Convention, the bilateral Pact and, lastly, on the Atlantic Treaty.

Or else, another hypothesis must be advanced which unfortunately seems to be grounded on fact, and in a certain sense the colleagues of the majority who support it are justified: namely, this is actually a special treaty and not something independent, completely independent, of the political agreements we have negotiated or are about to negotiate with the United States, of the special economic agreements undertaken earlier. No, this Treaty is something complementary to the ERP Convention, the bilateral Pact and the Atlantic Treaty.

These are the grounds of our objections. Our colleague Montini has just spoken of an *a priori* position assumed by us. I should like to be very clear in this connection. Our position vis-à-vis trade treaties signed with the United States, Great Britain or Russia, with any other State, can on the whole only be favour-

able. Our Country is a country devastated by the war, by the defeat to which it was led by the fascist régime; a country which, particularly for its economic recovery, needs to resume its trade relations, its exchanges with all the other countries.

In the reciprocal interest of Italy and these countries therefore we must, we should negotiate treaties. Indeed we are particularly favourable to this kind of relations because they open up the give and take ledger in full independence.

Trade treaties should always be favourable, like any other commercial transaction, to both parties to them. This is the fundamental principle. Each treaty, therefore, should also contain a point in favour of Italy: the more points there are, and the wider their scope, the better.

We are favourable to these treaties as a general rule, with any country they are negotiated with, provided they are agreed in the Italian national interest, provided that they strengthen or are expected to strengthen our national economic independence.

Our objections to the Treaty we are called upon to discuss today are of a different nature precisely because of the different nature of this Treaty.

If the Treaty with the United States were purely a trade treaty, negotiated in the reciprocal interest of both parties, we could not raise any *a priori* objections here. We might question several clauses, as may be discussed in every treaty, but we should be obliged to declare our overall approval.

However, *in actual fact we are opposed to the specific text of this treaty* because this treaty is linked to the ERP accords, to the bilateral Pact and to the Atlantic Treaty. It is a complementary treaty to the overall accords we have agreed to with America: this is what gives this treaty its spurious, peculiar, political nature, even though the Rapporteur for the majority is unwilling to admit it.

Our colleagues of the majority may perhaps say: All right; in a certain sense this treaty takes for granted the ERP accords. So what? The ERP accords mean aid, albeit given to Italy under certain conditions, and therefore we should be all the more favourable to this Treaty. This is precisely what we are objecting to.

I have here the industrial production indexes for a number of countries. I have taken them from the monthly statistics bulletin of the United Nations published in November 1948. With few exceptions, these indexes are higher for the nations that are not included in the ERP Plan than for those that are.

The index of industrial production for the EIS countries is as follows: Belgium dropped from 96 in March to 85 in July, the UK from 108 in March to 99 in August, France from 112 in March to 104 in September.

Campilli, Rapporteur for the majority: But are these the latest figures?

Giuseppe Berti, son of the late Angelo Berti, Rapporteur for the minority: I shall listen to yours later. There has been an increase in the German and Austrian indexes because it is part of the ERP Plan directives to develop the German industry for the purposes of which we are all aware. But if we take the indexes of industrial production referring to the East European countries — and note that I have again taken the figures from the United Nations statistics bulletin — we see that the indexes increase appreciably over the same period, and these are countries which do not receive the so-called benefits of the ERP convention.

For instance, Bulgaria rose from 158 in March to 192 in July, Czechoslovakia from 99 in March to 102 in September, Poland from 150 in March to 157 in August. As far as the Soviet Union is concerned, industrial production in the third quarter of 1948 is found to be 123 per cent that of the third quarter of 1947 and 155 per cent of the third quarter in 1946.

These are the figures. Therefore, also, your claim that it does not matter whether it is a trade agreement or not, or a pact complementary to the ERP accords or not, since it is in any case an agreement which favours Italy on the whole can, in our opinion, be challenged. And it can be challenged for other reasons as well; because the characteristic of this treaty, which distinguishes it from all other treaties of the kind, is that it entails a certain degree of limitation to our trade with other countries. This is the point to which I wish to draw the attention of the Chamber. It is true that the United States have on several occasions declared that, while they intend to control exports towards Eastern Europe and the USSR, they have no intention of preventing them. In actual fact, I believe that the Rapporteur for the majority will agree with me that in 1948 trade between the Marshall Plan countries and the East European countries and the Soviet Union was very small indeed. If we take seven countries . . .

Campilli, Rapporteur for the majority: Take Great Britain.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur for the minority: I shall take the trade between the Western European countries, all the Western European countries, including Great Britain, with seven countries of Eastern Europe: Bulgaria, Czechoslovakia, Finland, Hungary, Poland, Romania and Yugoslavia. The figures for 1947 come to 44 per cent of those for 1938. Trade between East Europe and the Western European countries came to less than 33 per cent, that is, less than one-third of the 1938 figures.

And we shall immediately see what the reason for this is when we read some very recent news items, dating back to two or three days ago, which will show us the general character of trade agreements with the United States. Take for instance the item in the *Bulletin of the State Department*, that is, of the United States Ministry of Foreign Affairs, of 23 March — that is, two days ago — which informs us that the Government of Belgium — one of the countries most respectful, as it were, to US economic and political discipline, one of the Benelux countries, which the Americans generally consider as the countries most committed to their economic, political and military plans — well, Belgium has been fined 605 thousand dollars, that is, 360 million lire, by the State Department, for having purchased crude oil last year, not in East Europe, not in Romania, for example, not in Russia, but in Venezuela, that is to say, on American territory. On the basis of the ERP economic accords, the ERP administration considered this sufficient grounds for declaring a breach of the treaty and responded with economic sanctions.

Another news item from the day before yesterday was published in the Paris edition of the *New York Herald Tribune*: France and Poland have a trade agreement according to which Poland supplies coal in return for French manufactured products. Therefore, in order to receive Polish coal, France exported machinery. An American daily has reported the fact and announced that Marshall Plan officials will carry out an inquiry with a view to taking measures (for the time being economic sanctions) for what the United States considers a breach of the Treaty also by France.

It is therefore evident that we are dealing with extremely peculiar economic treaties, which are so bound up in an economic, political and military chain that they necessarily constitute a limitation of normal, independent economic development in the signatory countries (in this case Italy) in their free trade with the other countries in the world. These economic limitations are obviously also political limitations which lead our Country to adopt a policy such that it ultimately signs treaties of this kind, chaining itself to a given foreign policy

leading to certain consequences on which I shall not dwell as I do not wish to repeat the argument we had several days ago over the Atlantic Treaty.

Furthermore, also in the case of Italy there have been limitations of this kind. I wish to ask the honourable undersecretary: is it true or not that the EIS has banned the exchange of Romanian oil for Italian machinery? The information I have is as follows: the United States intervened to prevent this favourable exchange for Italy. *This is today's intervention; what will those of tomorrow be like?* We cannot tell. It is true that there exists a trade treaty with the Soviet Union; but it is also true that we do not know how this trade treaty has been received in the United States of America and to what extent, . . . it begins to be implemented, if it ever is, there will be similar interventions to those over Belgium and the Venezuelan oil or those over France when Polish coal was bartered for French machinery. However this may be I can only cite these facts to show that *this Treaty has peculiar features and that it is these peculiar features and not an a priori* judgment which have led us to oppose it.

Moreover, it would seem that these peculiar features have been noted in a number of quarters with regard to economic agreements with the United States. I shall not cite a large number of facts here. Suffice it to recall the position of Austria, of the Austrian National Bank, which has protested against EIS financial policy, which is causing inflation in that country. There is concern in Austria because trade relations between Austria and the United States based on the ERP accords threaten to limit production in the large Austrian factories, that of Steyr, for instance. This factory is unable to work at full capacity and the Marshall Plan envisages the importation of 20,000 American trucks by Austria!

Even in Turkey — and Turkey is a country that, for a number of politico-military, rather than economic, reasons has been greatly facilitated — the Turkish National party, a centre-right party that in no way shares our general position nor our ideas on internal policy, has raised objections against the economic consequences of the ERP Plan, which stands in the way of part of the Turkish exports and above all worsens the economic situation in the rural areas. Concern has been expressed also in the Benelux countries.

You will say that these are the negative aspects. To our mind these negative aspects are serious and weighty, perhaps not so much as regards the present but for the future, as has been the experience in other countries.

Futhermore, also economic aid is beginning to be adversely affected by military supplies.

You are all aware of the discussion which took place two or three days ago before the Foreign Affairs Commission of the United States Senate between the Chairman of the Foreign Affairs Commission, Connally, and several senators having considerable influence on US foreign policy, such as Vandeberg and Taft, who declared themselves in favour of reducing ERP aid to Europe on the grounds of the huge amount of military aid due under the lend-lease law; they said that the United States cannot bear the cost of this military aid involved in the lend-lease law and also go on with the ERP economic aid.

Therefore, also the positive aspects — if there are any in the economic aid provided by the United States in accordance with the ERP convention — will without any doubt tend to diminish in the months to come and we will have to bear the full force of the negative aspects, which are those that I have described earlier and which stand in the way of the autonomous and direct development in all directions of the economic and commercial life of our Country.

After these general remarks let us have a quick look at the Treaty as it stands.

The most serious and weighty remark made yesterday by our colleague Pesenti in his address, on which the Chamber should meditate, is that even the trade

treaties with Hitler's Germany with the Danubian countries simply contained the most-favoured-nation clause; they did not go so far as to establish for the Hitlerian nazis in the Balkans the same treatment as for the nationals of the Danubian countries. This clause, which does exist in this Treaty, is truly something new, a new fact in the history of trade relations between countries, as well as being a serious political fact which reveals the nature of this Treaty.

I shall not dwell at length upon this point. I am sure that here, in a political assembly, each person can draw all the required consequences from the statement of this fact.

The Rt. Hon. Montini, who has just spoken, told us that we are in the same situation as our 1871 colleagues. I do not think there is any similarity with the America of 1871, which had just come out of the Civil War, which was still inspired by the political principles of the great Abraham Lincoln and was a true symbol of democracy and progress in the world, and the imperialist America of today. There is no similarity between that America and between that Italy which had just come out of the war of unification, of liberation and in which there was a coalition of progressive forces to which, after all, also the democratic extreme left participated indirectly in some form or another, no similarity between those parliamentary debates (Honourable Montini, you have been to see the texts of the documents of the past and you must have noted how wide-ranging and substantial the debate was at the time) and the way we are discussing this Treaty, no similarity above all between the economic and political content of the 1871 Treaty and the content of this one. The 1871 Treaty was one of the milestones in the economic life of a Nation that, unified at last, was beginning its life in Europe and the world. Today's Treaty, as I have already said and do not wish to repeat, is a completely different matter.

There are two points in which we have, as it were, encapsulated our opposition and through which we have criticized this Treaty:

In the first place, we have denied that the Treaty is fair and reciprocal and we have denied this, Rt. Hon. Montini, not only because of the difference in the economic potential of the two countries. This is something that could happen not only with the United States but also with other countries. With England and with the Soviet Union there is a substantial difference in economic power but it cannot be reasonably claimed that this imbalance in economic power should be allowed to interfere with the trade relations between the economically weaker and the economically stronger country. This would be wrong. It is not on the basis of this inequality that we have denied the fairness and reciprocity of the Treaty. We refer to other factors which we have indicated concretely: We have said, for instance, that reciprocity is embodied in the fundamental article, Article I, which states that the citizens of each of the two High Parties to the Contract shall have the right to enter the territory of the other party, to reside there and to travel freely over it. This is not the case here. It is not true, nor can it ever be true. It is not true because there exists United States legislation, the immigration laws, which exert a severe control over entry to the United States for Italian citizens for whom parity does not exist. Italian citizens can enter the United States only by passing through the fine mesh sieve of this law and Article I will remain inapplicable. Then we shall see the political implications of this sieve today. On the other hand, the citizens of the United States can come and go as they please in Italian territory because we have not got the same laws as the United States.

There is no need for me here to repeat the facts I have already mentioned in the report.

Even a number of Italian deputies and senators, who wished to go to the United States to visit their families, their wives and children, not for political reasons, have had their application for a visa refused. This is what happened to our colleague Michele Sala, a deputy from Palermo. Yesterday or the day before the same happened to Einaudi, Girotti and others. They were supposed to go to a peace congress in the United States. In the case of our colleague Sala there was not even any political reason at all to justify this. We consider that the political reason is completely unjustified in the case of those who were refused an entry visa to the United States for the purpose of attending the peace congress. It seems appalling that a visa should be withheld from personalities of the world of art and culture simply because they are not in 100 per cent agreement with the policy currently being followed by the United States of America. However, the case of our colleague Sala is even more serious.

Article I seemed to open up wide vistas also for emigration. In actual fact, it has no effect on the situation. This is a feature characterizing the Treaty as a whole. Many of these articles, particularly those apparently more favourable to our country, in actual fact do not change the current situation in any way at all. I shall deal with emigration separately because I think that the considerations to be made are extremely important. Let us take paragraph 2 of Article I which states that the citizens of the two countries — and therefore Italian citizens in the United States — are guaranteed the right to freely exercise their professional activity, except for the legal profession. I have already said in the report that this is not true. The report of the majority states that, under United States constitutional law, international treaties have, as it were, the force of federal laws and therefore their provisions override the legislation of the various states of the Union. This is not so: anyone familiar with US legislation knows that in the policy of Americanization of foreigners, which has been known many years by the United States of America, there is only one law which counts, namely, that migrants must be assimilated as quickly as possible and therefore all migrants must have equal status whatever their country of origin. This is what the law says. It would be impossible to treat migrants of Italian origin differently from Polish, German or French migrants. Therefore this general provision is unenforceable. And it is unenforceable — and here I shall not go into detail — for a hundred other reasons as well. Among other things, the professional associations (doctors, engineers, various technical professionals) are so well organized that they can practically block access to the professions, which they do in actual fact, by any foreigners who do not pass special state examinations.

But these factors may appear to be only of secondary importance.

The fundamental factor which explodes the myth of the criterion of equality is the fact that there exists in America a law, the *Alien Act*, which has no equivalent in any other country in the world. The origin of this law is quite peculiar: it dates back to the time when the United States wanted to break the fetters of colonial oppression, free itself from British dominion and become an independent nation. They brought in a law at that time which was designed mainly to prevent foreigners — specifically the British at that time — from having an influence on the political, economic and social life of their country. This gave rise to the *Alien Act*, which was shaped by the peculiar characteristics of American history.

This ancient law is now being applied for quite different purposes. Every foreign citizen who has dealings with his own country of origin or with organizations or individuals based in his or her country of origin and who carries on commercial, economic, social, political or religious activities not approved by the United States Government or by one of the great trusts is immediately subjected to the

provisions of this law: he must register as an agent of the foreigner in the United States. Registration leads to such disadvantages that all concerned prefer to leave United States territory if they can. It should also be pointed out that whenever the Department of Justice accuses a foreigner of not having registered in time he is liable for heavy punishment involving a long term of imprisonment.

This law practically makes every un-American activity (even the term "un-American activity" itself is captious; a special commission investigates un-American activities; not anti-American activities, mind you, which would be understandable, but "un-American" activities) running counter to state interests or to the interests of corporations or individuals liable to sanctions.

You see that in such a situation, reciprocity collapses completely: not only with regard to visas, the right of Italians to enter United States territory or the recognition of the freedom to carry on certain professions, but with regard to activities of all kinds which are not approved of by the United States or by authoritative American organizations. In other words, much more seriously and directly than in the ERP Convention (s. 117 of which nevertheless subjected the agreements undertaken to United States legislation) the agreements undertaken with the United States through the present Treaty and which it is proposed to ratify are solely dependent on the laws and will of the United States of America. This is why this Treaty cannot be likened to a normal trade treaty and this is why the criterion of mutual parity is non-existent.

I should like to mention another fact. Paragraph 2 of Article XII (dealing with social security) states that "in accordance with paragraph 2 of Article XII social security shall be granted to each High Party to the Contract". This is perhaps not very much, but it reveals the characteristics of this Treaty. Anyone who has lived in the United States and is familiar with its laws and customs knows that the concession referred to in the Treaty is completely non-existent. Social security has long since been extended to all foreign citizens working in the United States, in addition to American citizens. It is a measure linked to the policy of Americanization and it would not be possible to grant social security to citizens of one nationality and not to those of another. The Treaty clause makes no difference to the existing situation: when it is read, I do not say by jurists, but by the humblest Italian workman living in America, who knows that social security has always worked like this and always will, it will make people laugh.

This brings me to the last point. Our colleague Pesenti has already spoken of emigration yesterday. Obviously, immigration quotas are what they are in the United States. Today there actually exists a small minority movement which is demanding an increase in the immigration quota. Why? Let us neglect the fact that these requests have been rejected and that the Treaty makes no provision for them; however, the reason why an increase in the immigration quota has been requested has nothing to do with commercial purposes. It is strictly political: this minority, which was beaten in Congress, and which requested an increase in the immigration quota for Italian workers, intended it as a means for combating certain political parties and certain political and trade union groups, and therefore as a means of interfering in the political life of our Country.

I shall mention a single, incontrovertible fact. In the recent parliamentary debate I had occasion to refer to a declaration by one of the members of the ECA Advisory Board, Mr. Johnston. On his return from Italy, he declared that a very considerable sum (about 30 billion lire) should be set aside to aid non-communist trade union organizations. Our colleague Bellavista — and I am sorry he is not here today — interrupted me at a certain stage to point out that although this money was to be used for this purpose (there is no doubt about this), it had been provided by some propaganda office or other, not by an espionage bureau

of the United States. I went into the matter very carefully and found out that this was not true. It is the Central Intelligence Service which is to carry out this function, an organization set up under a new law approved by the Commission for Military Affairs of the Chamber. The Central Intelligence Service organizes and manages the entire American espionage system abroad. This agency must give 30 billion to the trade union organizations which combat left-wing ideas, which combat communists and socialists. But the Central Intelligence Service is utilized also in matters concerning emigration policy.

The President of the parliamentary commission, Charles Winson (and as you know parliamentary commissions are far more important in the United States than in Italy), declared that this new law would allow all those persons in a position to pass on important information to the United States espionage service without being subjected to ordinary legislation or having to pass through emigration formalities. This is a peculiar way to conceive of emigration. The emigration quotas remain unchanged while the United States of America open up their doors to those Italian citizens willing to spy for the United States of America, presumably on our Italian State. It is so unbelievable that, unless I was certain of my information, I would not dare to state this here. I understand perfectly that, on the previous occasion, my colleague Bellavista, who was in perfect good faith, did not fully believe what I was saying, but as you see it was even worse. It was not only a matter of giving money from an espionage service to trade union organizations that combat the socialists and communists, constituting inadmissible interference in the internal affairs of Italy. It was something much more serious.

This is how the United States of America want to solve the problem of Italian migration to America! They want to offer the jobless hungry Italians in Italy to work for them, to spy on their behalf, on a mass scale; this has been stated clearly and explicitly in an official declaration by the President of the Commission for Military Affairs. In the face of these facts (because these are the facts that no one can challenge) all the fine words contained in the Treaty lose all their force. I do not know what to add to these sad considerations. I repeat — our opposition to the so-called Treaty of Friendship and Trade with the United States is not a preconceived opposition.

If the Chamber had been presented for examination with a trade treaty containing truly commercial characteristics we should have supported it in the interests of our Country, just as we shall support other trade treaties having such characteristics. But this Treaty is an additional link in the chain with which Italy is fettered, and I can assure you, honourable colleagues, that there is not a shadow of demagogy in my words. This chain is dangerous for our Country, dangerous even for our colleagues of the majority, because many of them are unaware of the extent to which we are committing our Country to a policy from which it will be difficult to withdraw.

This is why we invite the Chamber not to ratify the Treaty. Not only do we invite the Chamber not to ratify it, but we add that we shall present the facts of the matter to the country, to the people, in order to show that the Government and the majority have chosen to conduct our Country along a ruinous path. In the interests of Italy, honourable colleagues, I beg you to reject this Treaty, not to ratify it *(Applause from the Extreme Left)*.

Presidency of President Gronchi.

THE DISCUSSION CONTINUES ON THE DRAFT BILL: RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, TRADE AND NAVIGATION, OF THE PROTOCOL OF

SIGNATURE, THE ADDITIONAL PROTOCOL AND OF THE EXCHANGE OF NOTES SIGNED IN ROME BETWEEN ITALY AND THE UNITED STATES OF AMERICA ON 2 FEBRUARY 1948 (246).

Chairman: The honourable Rapporteur for the majority has the floor.

Campilli, Rapporteur for the majority: Our colleague Pesenti yesterday and our colleague Berti today have set out and stressed the arguments previously presented before the Foreign Affairs Committee and the Treaties Committee to oppose the draft bill submitted to the attention of the Chamber. The Rt. Hon. Berti introduced his points with several general considerations concerning relations between Italy and the United States, particularly with reference to the ERP Plan. I shall not follow my colleague in this direction in order to avoid too lengthy a discussion. I shall merely reply to two considerations made by the Rt. Hon. Berti, with whose equanimity I am familiar. In claiming that the ERP agreement represents a link between the Italian economy and the United States economy, and entails subordinating the European economy to that of the United States, he mentioned the fact that the ECA administration rejected a French application for an agreement with Poland to exchange machinery for coal. He took this fact as an example of the control and constraints exerted by the United States on the European countries. I must point out to my colleague Berti that if his argument is based on these premises, the constraint that he fears does not exist in reality since Italy managed to reach an agreement with Poland to exchange machinery for coal without any interference occurring and without any exception being taken by the ECA organizations. And this agreement was freely negotiated by us for the sole purpose of resuming trade with Poland even though it was not in our immediate interest to do so. There were two reasons for not doing so: first, because we received coal for machinery, while we could have received coal from the United States without giving anything in return, and second, because Polish coal is more expensive than American coal and represents a treasury outlay of more than one billion.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur for the minority: I did not say this; the agreement exists, but has not been implemented.

Campilli, Rapporteur for the majority: Another preliminary point raised by the Rt. Hon. Berti: trade between east and west Europe is obstructed by the ERP agreement. My reply to our colleague Berti is that Italy has always maintained, and will continue to do so, that trade with east Europe is complementary to its economy; an effort has always been made to expand it and the ERP programme provides for the long-term increase of trade between Italy and the whole of east Europe, including Russia. Furthermore, the ERP programme presented in Paris by the member countries envisages increasing east-west European trade to more than 2 billion dollars for exports and 2 billion for imports, that is, above the 1938 figures.

If trade with east European countries is as low as it is it is because these countries do not have the funds to pay. The process of industrialization undertaken by some of them in particular has led them to demand large quantities of capital goods without their typical raw materials and consumer goods outputs being large enough to offset the increased import demand. This is true to such an extent that at the UN European Economic Commission the east European countries have made requests to import capital goods, that is, machinery, from the west by opening lines of credit. This means that these countries would like to take indirect advantage of the ERP plan by asking the western countries for concessions that the latter could grant only with the help of American aid.

I do not think there is any point in dwelling further on this topic. Let us therefore go on and examine the Treaty of friendship with the United States. Our colleagues of the minority have stressed the political value that must be assigned to this Treaty and the Rt. Hon. Berti has, on this point, referred also to the section of my report which states that there is an evident interdependence between economic and social factors and political factors in the Protocol under examination.

I confirm the remark, also after the criticism made by the opposition colleagues and refer the opposition to Chapter IX of the United Nations Charter, which all countries, eastern and western, have accepted and countersigned, in the part which explicitly acknowledges that the development of economic and social relations is the most effective means of bringing peoples closer together and the best political means for fostering international peace. It is in this light that we have considered the agreement submitted today for your approval. Even the Rt. Hon. Berti has declared that he considers economic and trade treaties as the best means for achieving peace between peoples. However, in examining the Treaty submitted to you for approval the Rt. Hon. Berti has raised so many "ifs" and "buts" that he has actually voided his premise.

We, instead, are more consistent and can assure our colleague Berti, and all our other colleagues of the minority, that when the Italy-Soviet Treaty comes before Parliament, just as we did before the Foreign Affairs committee, we shall make no subtle distinctions in examining and approving it, precisely because we truly consider economic agreements as the best way of cementing the peace that is in our hearts and minds *(Applause from the Centre and Right).*

Our colleague Pesenti has said that this Treaty submitted to Parliament for examination is not a true trade treaty. This was actually clearly stated by us in the majority report. This could be neither a trade treaty nor an agreement on emigration: it is simply a treaty of trade, of the establishment of friendship, which defines the premises and lays down the general principles to be respected by the agreements that will follow, we hope soon, in order to regulate trade relations and emigration.

This Treaty cannot therefore be judged by the same yardstick as normal trade agreements: it is a general protocol, not a particular one; it is not an end in itself, but merely the basis for other agreements which will develop the relations between Italy and the United States on a positive basis.

It has been stressed that this Treaty is just another link in the chain binding Italy to the United States: it has even been added that this Treaty is complementary to the North Atlantic Treaty and to the ERP agreement.

I wish to point out to my colleagues that the need to revise the old 1871 Treaty was felt as early as 1946 and the decision to revise it was taken when we still had the tripartite Government in Italy: the delegation led by the Minister Lombardo, which left in mid-1947, completed its work before the end of that year; the agreement was stipulated on 2 February 1948 in Rome. The ERP agreements date back to 3 April 1948: it is therefore absurd to consider this agreement as complementary in that it preceded both the ERP agreement and, to an even greater extent, the North Atlantic Treaty.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur of the minority: The ERP accords were dealt with much earlier . . .

Campilli, Rapporteur of the majority: The drafting of this Treaty, even before the Lombardo delegation, was begun by our Embassy in Washington and by the Ministry of Foreign Affairs.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur of the minority: The tripartite Government would not have approved such a Treaty!

Campilli, Rapporteur of the majority: You say this today; but just as you accepted and managed UNRRA aid so you would have accepted this accord.

The opposition criticism has dwelt in particular on the alleged reciprocity and parity of rights. It has been said that this is a mere figment, a pretence. The different socio-economic structure and, even more, the absence of riders and guarantees, make the statements of parity contained in the Treaty completely null and void.

Our colleague Montini has already given his reply, if the different socio-economic structure should stand in the way of treaty negotiation, this would only become possible between power blocs of comparable strength and capacity.

All treaties are designed to achieve equality and reciprocity of rights. The objective of each negotiator is to place the weaker State on an equal footing with the stronger country. No treaty, however, has the power to offset the inequality of structure that exists between one country and another. Just as going from the international field to the national field the principle of the equality before the law of citizens cannot make up for differences of capacity and opportunity between individuals. This is true under all systems of government.

However, the critics object, in such cases provisos are established and guarantees introduced. This is true. But can it truly be maintained that no provisos or guarantees are envisaged in this Treaty?

Is not the most-favoured-nation clause, which automatically extends to Italy all the advantages and favourable conditions already granted or to be granted by the United States to other powers, the best of guarantees?

Moreover, our colleagues of the opposition, who are always such thorough and watchful perusers of documents, this time failed to focus their attention on the premise to the additional protocol. The additional protocol in fact states that

> "in consideration of the serious economic difficulties facing Italy and those that are foreseeable in view of the previous damage caused by military operations on Italian territory, and the war spoils taken by the German forces after Italy declared war on Germany, of Italy's present impossibility to satisfy the minimal requirements of its people without aid, or the minimal needs of Italian economic recovery, as well as of Italy's lack of foreign currency reserves"

a number of provisos and guarantees must be envisaged, as indeed has been done, for the precise purpose of protecting the Italian economy and finances against those of the United States.

The opposition then dwelt on other aspects and it is precisely on the strength of the latter that its criticism can be seen to be unfounded.

It was even attempted to invalidate the clause governing the exercise of professions and the recognition of degrees and diplomas issued by our universities and educational bodies. The wording in the report of the minority is as follows:

> "Suffice it, for example, to point out that, by means of an internationally inadmissible procedure, the State of Connecticut recognizes as valid only the degrees obtained at the Universities of Naples, Rome and Bologna."

I should like to point out to my colleague Berti that these matters are handled in the same way in Italy. The degrees granted by a foreign country are not entitled

to automatic recognition in this country but must be submitted to the final and definitive judgment of the senate and faculties, which have the power to accept or reject them, just as they may ask the applicants to take supplementary examinations. *(Interruption by the Deputy, Giuseppe Berti, son of the late Angelo Berti.)*

We cannot therefore expect others to grant what we ourselves are unwilling to concede.

Then there is the other question on which there has been further heated debate today — that of emigration.

It has been said that if the acknowledged equality is only a pretence, we should at least try of offset this by means of the effective facilitation of emigration. I can assure my colleague Berti that this issue, which is of vital importance to our Country, has never been neglected during negotiations. But no one is more aware than the Rt. Hon. Berti, who has lived in America for a long time, and who has lived in America in contact with the trade unions, of the delicateness and seriousness of the migration issue. Uncontrolled, mass emigration causes great anxiety among the body of workers. It must not be overlooked that, in the past two years, the IRO has made huge labour force transfers to the United States. The trade unions are concerned about exceeding the saturation limits and fear a return of the 1929-1930 crisis. At the political and governmental level, the United States has recently displayed greater sensitivity to our needs, although Italian migration is bound up with a complex issue that calls for careful examination. Furthermore, I am astonished that the criticism should come from the communist benches. Fears and reservations concerning our emigration do not come only from the United States. This is proved by a recent fact. As our colleagues are aware, the Franco-Italian Customs Union is about to be signed. However, our colleagues also know that the provision contained in this customs union, particularly in the case of the transfer of labour, has run into serious opposition from the French communists. Last week the newspapers published the following news item:

> "The French metalworkers, miners and farmers unions belonging to the General Confederation of Labour, have today issued a declaration against the entry to France of Italian workers envisaged in the agreement signed in January by Count Sforza and Robert Schuman. According to the unions, the agreement provides for the migration to France in 1949 of 87,000 Italian workers. The declaration states that there are 100,000 unemployed in France and while even one of them remains jobless there will be no question of recruiting foreign labour of whatever nationality."

This shows that the criticism made by the opposition is at least exaggerated.

The Rt. Hon. Berti meant — and I acknowledge his complete sincerity on this point — that his objections and those of his colleagues are not preconceived. But it is their political position which necessarily and logically leads to their opposition to the Treaty. The Rt. Hon. Pesenti stated so much quite clearly yesterday when he declared that his group will vote not only against the content of the Treaty but also in order to express the opposition's lack of confidence in the Government and in the latter's capacity to look after Italy's interests. There is, in fact, a twofold preconception in their approach which actually makes any objective examination of the Treaty provisions superfluous, namely, their opposition to the Government and that against any agreement with the United States.

The majority, on the other hand, requests the Assembly to approve the draft bill, certain as we are that it is in the country's interests *(Applause from the Centre and the Right)*.

Brusasca (Under-Secretary of State for Foreign Affairs): May I have the floor?

Speaker: Yes, you may.

Brusasca (Under-Secretary of State for Foreign Affairs): I merely wish to emphasize the time factor, as has already been mentioned by the Rt. Hon. Campilli. This Treaty was discussed, stipulated and signed before all the other international agreements, to which the present one is intended to be complementary, were negotiated. I further add that, during the debate, there was confusion between this Treaty, which is general and regulatory in nature, and normal trade agreements. The mistake lies in the fact that the agreements to which both the Rt. Hon. Pesenti yesterday and the Rt. Hon. Berti today were referring are merely a special development, limited in time, of the general rules normally provided for and established by general treaties of friendship, trade and navigation.

However, there is one point, honourable colleagues, which shows what was the main concern of the Government and to which I wish to draw your attention. Much mention has been made of reciprocity. It has been said that we cannot achieve reciprocity vis-à-vis a nation that is economically much more powerful than we are, as is true of the United States. However, there exists another kind of reciprocity which should provide much food for thought, for you opposition deputies in particular: this is human reciprocity. In Italy there are a few thousand United States citizens, almost all of whom living in excellent economic conditions who, precisely because of these conditions, can easily obtain the protection and assistance they need. Today there are more than 600,000 Italians in the United States who want and have been able to keep their Italian nationality. The Treaty of establishment — which is the essential and most important part of the accord we are discussing — has the express aim of defending these 600,000 Italians. Although among this number there will certainly be some who have succeeded in attaining very good economic conditions, the vast majority are salaried workers, retailers and professionals; we have tried to ensure that these fellow citizens of ours are treated in full equality with United States citizens, defending them, as it is our duty and right to do, and ensuring that their conditions are such that we may all be satisfied.

Giuseppe Berti, son of the late Angelo Berti, Rapporteur of the minority: What advantages do they get from the Treaty?

Brusasca (Under-Secretary of State for Foreign Affairs): It is true that, like all other States, we could not expect to limit the internal power of the United States by means of an international agreement. Therefore, our fellow citizens will be subject to the internal limitations imposed on them by the sovereignty of the United States; even the Rt. Hon. Berti, who has been to the United States and has seen also the disadvantages of life in the United States, must admit that Italian citizens living in the country enjoy a number of rights and conditions that I fervently hope will be enjoyed by Italian citizens in all the other countries of the world *(Applause from the Right and Centre).*

Speaker: We shall now proceed to examine the articles.

Let Article I be read.

Parri (Secretary), reads:

> "The President of the Republic is hereby empowered to ratify, and the Government to proceed to fully implement, the following Agreements signed in Rome, between Italy and the United States of America, on 2 February 1948:

(a) Treaty of friendship, trade and navigation;
(b) Protocol of signature;
(c) Additional protocol;
(d) Exchange of Notes."

Speaker: No amendments having been presented and no one having asked for the floor, I put it to the vote:

(It is approved.)

Let us go on to Article II. Let it be read.

Parri (Secretary), reads:

> "The present law shall come into force on the day of its publication in the *Official Gazette.*"

Speaker: I put it to the vote.

(It is approved.)

This draft bill will be voted on later by secret ballot.

Document 7

SENATE OF THE REPUBLIC, BILLS AND REPORTS 1948-1949, NO. 344-A, REPORT OF THE MAJORITY, PAGES 1-10, SENT TO THE OFFICE OF THE PRESIDENT, 28 MAY 1949

[Italian text not reproduced]

SENATE OF THE REPUBLIC, Report of the 3rd Standing Committee (Foreign Affairs and Colonies), on the Draft Bill approved by the Chamber of Deputies during the Session of 29 March 1949 (see Printed form No. 246).

Communicated to the Speaker's office on 28 May 1949

RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, TRADE AND NAVIGATION, OF THE PROTOCOL OF SIGNATURE, OF THE ADDITIONAL PROTOCOL AND OF THE EXCHANCE OF NOTES SIGNED BETWEEN ITALY AND THE UNITED STATES OF AMERICA, SIGNED IN ROME ON 2ND FEBRUARY 1948.

REPORT OF THE MAJORITY

Honourable Senators. The Treaty of Friendship, Trade and Navigation, which is hereby submitted and proposed for your approval deserves special consideration. After the signing of the peace treaty this is the first important treaty of a general nature, with a wide-ranging, comprehensive structure, to be stipulated with an important country. As such, and in view of the criteria on which it is based, it deserves the prominence of a document which lays down the guidelines to be followed in establishing this country's relation of a civil and economic nature with the other countries.

And since the special political value that the Treaty might have had at the time of its signature — 2 February 1948 — in view of the great importance that the definition of our relations with the United States has, and must have, for our country, can now be said to have been superseded by events and subsequent instruments, such as the bilateral agreement for ERP implementation and the act of joining the OEEC, it is therefore from the standpoint outlined above, that is, for its political technique value, that it should be examined.

GENERAL CHARACTER AND CRITERIA

Although it should be superfluous, several objections raised against the treaty make it necessary to outline its nature of a general treaty, which cannot have as its aim the stipulation of particular and contingent accords of a commercial, migration or cultural nature, etc., of which it merely lays down the required premises. It therefore provides a definitive, organic and lasting frame for the relations between the citizens of the two countries and the juridical status that each of them accords to the citizens of the other country resident in their own country. It is this Rapporteur's opinion that detailed implementation accords will have to be negotiated with regard to the civil matters it touches on.

Mention must also be made at this preliminary stage of the *sui generis* nature of this Treaty which, necessarily conceived for application in normal times and finding our economy in an abnormal, almost ruinous, state, has had to provide for exceptions to the commercial and currency agreements of a general nature which are, or may be, imposed by this state of necessity. This right of suspension with regard to several articles of the Treaty is provided for and defined in the "Additional Protocol", the validity of which or any possible modifications to which, are obviously linked to the further developments in this exceptional situation.

The underlying principles are simple and straightforward. Full respect of the respective sovereignties and full equality of the contracting parties, and thus reciprocity of treatment; systematic application of the principle of the most-favoured nation and thus mutual granting of the most-favoured treatment extended to foreign citizens and interests; spirit of friendship in the application of the Treaty, benevolence in cases not covered by precise regulation, and in any case fair play. Mention must be made of the great care taken to avoid all unfavourable discrimination in reciprocal treatment. Obviously a modern treaty could not be based on general principles which clashed with those mentioned above.

The Treaty under discussion replaces the one stipulated by Italy with the United States in 1871. The latter, now in disuse, was denounced in 1937, when the previous régime decided to replace it with a pact based on its nationalistic and autarchic premisses. In our historical phase of protected national economies, now moving however towards a healthy and necessary expansion, and thus towards a greater freedom of trade, while a return to the free-trade gold standard of 1871 is unfortunately impossible, the most-favoured nation clause with its capacity for reducing tariffs and barriers is without doubt the best instrument for achieving this purpose. It is common knowledge that the on-going Annecy negotiations tend towards an automatic generalization among all the numerous participating States of the most favourable tariff: if, as is fervently to be hoped, the Annecy negotiations overcome the thousand and one difficulties arising from clashing and interlocking interests and succeed in reaching a conclusion, a part of the provisions of the present Treaty will be superseded and transferred into a more general framework. A reservation in this sense is expressed in Article XXIV, paragraph 3, which also makes provision, obviously, in favour of Italy, for possible exceptions to the most-favoured nation rule in the case of a Customs Union. However, in view of the present long-term prospects, uncertain outcomes and in any case gradual application, the Treaty in the meantime represents a cautious guarantee of the healthiest and most favourable normal régime of Italo-United States trade relations.

ESTABLISHMENT CLAUSES

In the usual way, the Treaty deals with the following matters: *general treatment of citizens of the other party* (Arts. I-XIII), *trade and financial operations* (Arts. XIV-XVIII), *navigation* (Arts. XIX-XXII), *transit* (Art. XXIII). Articles XXIV-XXVII contain several general provisions and specify a number of exclusions, exemptions and reservations. A Supplementary Protocol, which interprets several provisions, the Additional Protocol mentioned above, and two notes exchanged between the negotiators envisaging and promising an integrative cultural agreement, all form an integral part of the Treaty.

The Treaty will be of ten years duration, although if not denounced within one year before its expiry, it shall automatically be extended for a further indefinite

period, although always with the possibility of withdrawal with one year's prior notice (Art. XXVII). Any disputes shall be referred to the International Court of Justice (Art. XXVI). There are special riders by the United States concerning non-extendable preferential treatment for Cuba, the Philippines, the Panama Canal Zone, and by Italy concerning the free territory of Trieste, the Vatican City and San Marino.

The "establishment clauses" are not innovative with respect to the customary provisions of international treaties, although they do respect the criterion of the most liberal interpretation and extension on the general basis of equality of treatment and always with the reservation that national laws and regulations must be respected. The federal constitution of the United States gives this reservation a special significance since in some cases provision is made for the extension to Italy of the most-favoured treatment granted to foreigners by the individual federal states: this may lead to limitations and inequalities. However, it should be noted that this condition is true for any foreign country entering an agreement with the United States (as with Switzerland), the principle of the most-favoured treatment continuing to work in our favour.

After guaranteeing the exercise of the natural rights of man (Art. XI), regulating military service by means of logical provisions (Art. XIII), it goes on to affirm quite emphatically the freedom, except in the case of the secrecy of military information, of publication and information (Art. XI). This Rapporteur sees no reason for objecting to this clause, and indeed considers it useful and fully to be approved, even if, for the sake of hypothesis, it were to act in favour of the other party only.

The first few articles, which are also the most important, guarantee for citizens of the other party, and for the juridical persons, commercial companies, organizations and associations established by them, the exercise of commercial and non-commercial activities in the broadest sense. Full rights are thus granted to carry on any activity: to acquire, own and manage movable and real property; to organize, direct, and control companies, to hold office; to make and receive legacies; to protect patents and trademarks, etc., with complete freedom to take legal action, and to enjoy protection from undue interference, etc. Taxation matters (Art. IX) are also regulated by applying the principle of reciprocity based on the most-favoured treatment, making sure that any discriminatory procedures are excluded and that the parties have the right to enter into special agreements with third parties under certain circumstances.

Article XII provides for extension to citizens of both countries of the benefits of compulsory social insurance. Even though this obligation is normal practice in the United States and provided for by its internal legislation, its formal embodiment in an international contract is an important fact.

OBSERVATIONS, OBJECTIONS AND SPECIAL CONSIDERATIONS

Whenever differences in American legislation could lead to limitations (Art. VII) of the exercise of real property rights or other real rights or of the free possession and disposal of goods obtained by succession, Italy grants a treatment equal to that of the state of origin of the American citizen. It should be noted that such differences are found in only a few states and it is to be hoped that, unless there is a further move towards uniformity, the coming into force of this Treaty will help bring about revisions favourable to Italy.

The same hope is to be expressed concerning the exercise of the liberal professions, which are in fact all permitted under Article I, except for the legal profession and those involving the appointment of public officials; however, difficulties or

inequalities are likely to arise as a result of the regulations governing recognized qualifications, which vary from state to state. The next important task will be to promote the adoption of common and liberal standards, in view of the interest we have in this type of emigration. But precisely because of this interest, the general terms of the Treaty, and the legal basis it provides for these activities, in themselves represent an undeniable advantage.

The condition cited above, by means of which the Treaty provisions are included within the existing framework of respect for local legislation has given rise to complaints in the other house of parliament to the effect that the complexity of American legislation concerning foreigners and the severity of the regulations governing entry and expulsion will necessarily cause the Treaty to be ineffective. However, it would not be reasonable to expect a general establishing agreement to change the laws of the contracting country, nor can it be denied that the formulation of a statute itself provides a legal basis, a highly advantageous starting point for the development of relations between the two countries, particularly by facilitating Italian migration towards the United States. Moreover, the conditions are those of equality, since it is at the request of Italy that the above-mentioned Article I, paragraph 4, makes provision for "reasonable surveillance" of foreigners and of "exclusion or expulsion" for specific reasons. Let us hope that the reasons for surveillance, exclusion and expulsion will cease to apply both in Italy and abroad. The two parties agree not to accord rights and privileges to political activities (Art. XXIV, para. 4).

Two points in the agreement deserve special mention. The first refers to the precise provisions concerning compensation in the case of expropriation and its unrestricted transferability (Art. V and Prot.); the guarantees covering private interests in the case of nationalization (Art. V), and, in the same spirit, a fair play rule to be observed by monopolies or privileged organizations (Art. XVIII) vis-à-vis citizens and interests of the other party. These appear to have been suggested less by Italian interest than by American concern, and are perhaps dictated by the unhappy experiences encountered by US capital outside Italy. In any case, there is nothing here that is likely to lead to conditions of privilege, or that is not legal or fair, or that is not in the interest of the Italian economy itself. This economy is in urgent need of foreign capital investment. Although these provisions will certainly not in themselves be enough to encourage an influx, it is nevertheless desirable to take these precautions against the possible onset of any kind of persecutory or discriminatory conditions.

The second point is related to the freedom "to carry out exploration and to exploit mineral resources" — again under the general conditions cited above and to which the provisions of Article IV are specifically devoted. These are reciprocal terms although the peculiarity of the mention is indicative of American rather than Italian interest. But also on this point there is no apparent reason to challenge its request not to be excluded, on equal conditions, from the Italian market also with regard to oil exploration. In this Rapporteur's opinion, American or foreign initiatives would be useful also to Italy. Everyone is eligible for the granting of concessions and it is the task of our economic policy to ensure that no one, whether Italian or foreigner, obtains a monopoly.

TRADE AND NAVIGATION

Articles XIV-XVI aim to set up general conditions of permanent validity, correctness, availability and publicity for the importation and exportation of goods. As mentioned earlier, the regulating principle is that of automatic equal application of the most-favoured treatment. The possibility of introducing mea-

sures unfavourable to third parties is specifically excluded. However, as mentioned above, the additional Protocol grants Italy, in consideration of the peculiar difficulties it faces, a temporary freedom of manoeuvre with regard both to trade quotas and to international payments regulated by Article XVII.

The same norms of freedom, facility and availability are mutually granted by the two parties to navigation and transit trade in Articles XIX-XXII. It is significant that the obligation to grant national treatment or most-favoured-nation treatment to fishing, coastal sea traffic and inland navigation has been excluded.

Apart from the above limited protective measures and of several justified bans and restrictions contained in Article XXIV, the Treaty explicitly renounces any measures standing in the way of competition, limiting the access to markets, or favouring the setting up of monopolistic situations. Full agreement can only be expressed with this, and the use of indirect forms of protection, such as those implemented by means of artificially severe health and hygiene controls on imports are to be rejected. This mention is not without reason, as Italy has occasionally had cause for complaint against this American practice in the case of food imports.

Italy is not, unfortunately, the right country to give lessons in free-trade economic policy; however, since both in the past and in the present, although to a lesser extent, one of the major obstacles to the expansion of international trade has been high American protective tariffs, it is worth expressing the hope that the tendency to reduce customs barriers will continue to grow in the United States.

ADVANTAGES FOR ITALY

The Treaty explicitly excludes (Art. XXIV, para. 7) any possibility of modifying the notoriously restrictive immigration laws in favour of Italy, as a result of which objections and criticism have been raised against it. However, this opposition is artificial because although Italy clearly has a great interest in increasing the unjustly restricted quota assigned to it, and while it is legitimate to ask the Government to do its best to obtain changes, improvements and amendments, such action could not and cannot be carried on through a simple general establishing treaty. The utility of this Treaty and the reason for approving it lies in the recognition it gives to our citizens who have migrated there of the best allowable conditions of freedom to carry on their activities. Similar conditions have been granted to American citizens in Italy. However, it is difficult to argue, in view of the huge number of our migrants and the variety of their interests that the Treaty also in this case is more favourable to the United States than to us.

The disproportion between the strength of the two parties is taken as proof that the Treaty will be ineffective in practice for the weaker party. This argument is unfounded. Legally speaking, based as it is on the strict principle of reciprocity, the Treaty does not set up conditions of privilege, even covertly. A single small possible condition of favour is accorded to the United States by paragraph 5 of the Additional Protocol should Italy be forced to block the payment of expropriation compensation: this is a very small price to pay for the more extensive advantages granted to Italy.

There is no doubt that the Treaty provisions reflect the different interests of the two parties. The United States have above all attempted to protect themselves against xenophobic tendencies in general and in particular against the possible onset of discrimination against their interests and possible exclusions or limitations of activity in the Italian market. Italy has attempted to obtain the broadest

possible conditions of work and the protection of special current needs of its trade balance and its balance of payments. How can it be said *a priori* that the Treaty is an instrument in the hands of the United States and that it is of no use to Italy? The Treaty will not open the door to the capitalistic interests of American citizens, but an incorrect or weak or corrupt economic policy could open it more than necessary or without the necessary supervision.

And it could be said that this instrument is more useful to the larger of the two parties if the smaller did not have huge interests in the former. In actual fact, Italian interests in the United States have a far greater importance for our country than the relative importance to America of its interests in Italy. Therefore our interest in the Treaty is greater and, in general, also its benefits to us, in that *it helps provide a better environment* for the development of all our activities, not only economic activities, in that country. The same preferential trade clause can presumably be of as great a benefit to Italy as it is to the United States.

The correctness of the principles underlying the Treaty, its logical structure and completeness, the desirable dovetailing of the interests of the two countries, the special importance of defining our relations with the United States, the *nature* of this instrument which, by enhancing the prospects of development of reciprocal relations, nevertheless places them in the framework of a liberal conception of the world economy, help to make it worthy of full approval.

Parri, Rapporteur of the majority.

REPORT OF THE MINORITY

Honourable Senators. The reasons which induced the minority of the Committee to table its own report can be summed up in the following points:

(1) The "Treaty of Friendship, Trade and Navigation" between Italy and the United States of America signed in Rome on 2 February 1948 and presented for discussion, with praiseworthy promptness, only 15 months after its signature, is not one of those treaties that, on the basis of reciprocal benefits and the respect of the political and economic independence of the two contracting parties, can be accepted with satisfaction or receive the favourable vote of colleagues from all sectors of the Senate. No. This time we are dealing with a treaty of a new *type that has no precedent* in the treaties so far submitted to us for approval. It is a treaty that, beneath its appearance of equality and reciprocity, actually sanctions a situation in which Italy is manifestly inferior and practically entails us giving up any attempt at defence against the political and economic penetration of North American imperialism.

The principle of "national treatment" (*mentioned in the preamble and which* then recurs in practically all the articles) has been given too wide an acceptance in the present Treaty and can only work to the exclusive advantage of the other High Contracting Party. It is true that the principle appears to have been applied on a footing of perfect reciprocity so that, while it is established that American citizens and American companies must receive a *no less favourable treatment* in Italy (for a wide range of issues) than that granted to Italian citizens and Italian companies, provision is also made for both to enjoy in the United States a treatment no less favourable than that extended to American citizens and companies. However, it is also true that the disproportion in the economic power of the two contracting parties is so great that the above-mentioned equality and reciprocity become quite illusory. Suffice it to consider Article I of the Treaty or Article IV in order to perceive immediately *who* actually benefits from the principle

of "national treatment", that is, *who* would and will be capable of carrying out the activities and investments mentioned in the articles cited, outside the borders of his own country. In drafting these clauses of the Treaty no account has evidently been taken of the *special* situation regarding Italy and its needs to be safeguarded. No thought has been given (deliberately or not) to the fact that we are very poor and the Americans are very rich. No steps have been taken to avoid American capitalism penetrating Italy without restraint and without controls, doing in our country what we should never be able to do in the United States.

(2) The solely apparent value of the aforesaid principles of equality and reciprocity appears clearly in all its harshness in one of the final provisions of the Treaty (Art. XXIV, para. 7). Here it is excluded that the Treaty can in any case

> "have any effect on the laws and regulations in force in each High Contracting Party concerning immigration or the right of each High Contracting Party to issue and enforce laws and regulations concerning immigration".

This means in practice that, in exchange for the huge range of action the United States has acquired for itself by means of the Treaty, we are denied even the small benefit of increased Italian migration to the United States, even a small relaxation of the discriminatory "quota" system which offends and damages us more than any other people. Article XXIV, paragraph 7, of the Treaty thus completely voids Article I which gives solemn assurance that the "citizens of each High Contracting Party will have the right to enter the territory of the other High Contracting Party and to reside and travel freely in the said territories". The immigration laws do not admit of any modifications and the only citizens who will be able to travel, reside, etc., will be the American citizens who wish to come to Italy. How's that for "equality and reciprocity"?

(3) Also to be criticized in our opinion is the widespread use of the *most-favoured-nation clause*, as a result of which (for the duration of the agreement), Italy will never be entitled to grant any advantageous or favourable treatment to the citizens or the economic relations with another country without this treatment having to be immediately and equally extended also to the United States. Clearly, it is intended to use this system to bind Italy even more closely to the Western bloc and to deprive her of all possibility of movement, of any different orientation in her international economic policy. This is effectively proved also by the exceptions envisaged in Article XXIV, paragraph 3, to the most-favoured-nation treatment: as is quite apparent, these exceptions will prevent our country from boosting its trade with the Soviet Union and Eastern Europe, that is, with that part of the world which is alone capable of absorbing our manufactured goods. This compulsory orientation, without any chance of change, for the duration of ten years, is condemned by us as damaging to the economic future of our country.

(4) Article V, paragraph 2, represents a reservation that is entirely in the interest of America, in the case of possible nationalization measures in Italy. Although the principle of the "prompt payment of a just and effective compensation" laid down in this article can be considered to correspond to the conceptions of the science of international law and to the established practice between States until the First World War, after that period, and even more so after the Second World War, the very principle has been shaken to the foundations and today even nationalistic doctrine is beginning to display some doubt in this connection. Under these circumstances, Article V, paragraph 2, tends to make it compulsory, *by treaty* between Italy and the United States, to accept a heavy obligation to pay compensation which would be questionable if it were really due (to the same extent and according to the same criteria of time and currency), in accordance

with the *general* international law currently in force. Clearly, were this clause not to have been dictated "less by Italian interest than by American concern" (the words between quotes are those of the rapporteur for the majority), the article in question could only have been expressed as follows:

> "The citizens and juridical persons and associations of each of the High Contracting Parties shall, in the case of expropriation of their property within the territory of the other High Contracting Party, be treated in accordance with the generally accepted principles of international law."

(5) The freedom of belief and worship that are guaranteed by Article XI, paragraph 1, to citizens of each High Contracting Party in the territory of the other High Contracting Party are no longer challenged or subject to special conventions in any civilized country. Since explicit mention has deliberately been made in this Treaty, we must ask ourselves why it was not decided to add an equally essential freedom, that of thought. The trial of the 12, the arrest and imprisonment of Howard Fast, the persecution even in foreign territory of the great anti-fascist Gerhart Lisler, dispense us from any need to discuss this matter further.

(6) The acceptance by the two High Contracting Parties of the "principles of the freedom of the press and the free exchange of information" (Art. XI, para. 2), although theoretically unimpeachable, actually benefit, as the rapporteur for the majority himself was forced to admit, only the other party, which is the only one in a position (and has already done so) to flood our country with his observers, informers, investigators, photographers, etc., as well as with his publications and films, none of which certainly contributes to the education and improvement of our people.

(7) Articles XIV, XV and XVI, which exclude all bans or restrictions on the importation, sale, distribution and use of any natural, cultivated or manufactured product by the other High Contracting Party, as well as making no distinction between necessary and luxury items, cannot fail to bring a smile to the lips of those familiar with the history of United States trade policy, which coincides with the history of the most stringent protectionism and the highest customs tariffs. A country that, in this field, has had laws of a severity without parallel, such as the Hawley Smoot customs law or the Webb-Pomerane law, cannot convert from one day to the next to free trade, free competition, and to the fight against monopolies. Also here all these wonderful things are used to create a *de facto* situation to the exclusive benefit of the United States: and when we read, in Article XV, that the laws, regulations and decisions referring to the customs classification of products or that customs duties

> "will be applied uniformly in all the ports of each High Contracting Party, except when otherwise specifically provided for in the legislation of the United States of America with regard to the importation of products in its own territory and island possessions",

we have the key to this peculiar, one-way conception of equality and reciprocity *which is to allow the United States to continue to do as they please in and with* our country.

(8) Article XII, paragraph 2, which extends to citizens of both States the benefits of the compulsory insurances (old age, unemployment, sickness, invalidity, etc.), adds nothing new to what already exists because this concession was granted some time ago by law to all foreigners in the United States whatever their country of origin.

(9) Article XIII of the Treaty is actually quite grotesque. It is quite obvious in fact that a State cannot, under international law, subject to service and duties of a military nature the citizens of foreign States present in its territory. Article XIII allows the contracting States to do (and clearly also in this case the United States is in the forefront) what is not allowed in normal practice. The only alternative for those concerned is to go and do their military service, in time of war, in the armed forces of the State whose citizenship they hold — that is, in any case to go and fight for the "common cause"! — should this be what they prefer to do. The question that instinctively comes to mind in the face of such a blatant waiving of the general principles of international law is: *cui prodest?*

(10) No less grotesque, and even a little cynical, are Articles V and VI of the Treaty where they guarantee that the citizens of each High Contracting Party imprisoned by the authorities of the other High Contracting Party shall receive *reasonable and humane* treatment, and where they establish that the homes and offices of citizens and associations of each High Contracting Party situated in the territory of the other shall not be subject to *illegal interference or entry*. To make public commitments of this kind means that here or in the United States (or indeed in both the High Contracting Parties) it is legitimate and customary to subject convicts to unreasonable and inhuman treatment and to enter the homes of citizens and molest and torment them! This Treaty is a precious confession, although we do not know to what extent our Ministry of the Interior and our Ministry of Justice agree with it!

(11) The continual references made in the Treaty clauses to the *laws, regulations*, etc., of the High Contracting Parties would require, in order to make an accurate evaluation of the benefits accruing to the Italian side, an extensive and detailed knowledge of the laws, regulations, etc., of the United States of America. Do those who have negotiated this Treaty and those who will have to implement it have this kind of knowledge? We fear not, and this lack of knowledge can only be of concern to us because we are convinced that the state of American legislation, made so complicated and unwieldy by its federal laws, the laws of the individual states and yet other laws, could hold yet further unpleasant surprises in store for us.

To cite just one example, the United States have laws ranging from the *Alien Act* of 1798 to the *General Act* of 1903 and the *Act* of 1907 on expulsion from the territory which can make the clauses establishing equality of juridical treatment between nationals and foreigners practically unenforceable, and can be used to prohibit the landing and settlement of foreign citizens and to prohibit all activities by foreign citizens as un-American activities.

(12) For the above reasons we consider that the clause of the Treaty which authorizes the citizens of each High Contracting Party to carry on their professional activities in the territory of the other High Contracting Party (Art. I, para. 2) must, as far as we are concerned, remain a dead letter in so far as the laws of the individual states contain clauses which restrict the wide-ranging freedoms granted under the Treaty and nothing is said about the possibility of repealing such laws. On the contrary, we believe that they will remain more solidly in force than ever and that our fellow citizens will not be able in future, as they have not been able in the past, to exercise their professions except in certain states and only after taking a certain number of examinations. Furthermore, on this question, even the rapporteur for the majority does not conceal his concern and is forced to admit that "difficulties or inequalities are likely to arise as a result of the regulations governing recognized qualifications, which vary from state to state" and concludes that "The next important task will be to promote the adoption of common and liberal standards".

In conclusion, we believe that in the "Treaty of Friendship, Trade and Navigation" between Italy and the United States of America which has been submitted to the Senate for approval no provision at all has been made to protect the reciprocity of rights which must be ensured at all costs in this kind of treaty. Although serious, this would not be irreparable if Italy had a Government capable of defending its interests as the Government of the United States defends the interests of that country: a Government which had the courage to ban an American film, to arrest a journalist carrying out spying activities, to refuse an entry visa to an American politician, as the United States Government did to our colleague, Senator Palermo. A Government which dared do this could, if necessary, limit or avoid the undue interference in our affairs by foreign citizens and organizations. Unfortunately, we have no such Government, except in our votes, and the men who govern Italy today have shown themselves more willing to serve than to discuss, more willing to accept supinely than to negotiate, more willing to sacrifice than to defend the interests of the nation. It is also because of our profound lack of confidence in the present Government that we consider the Treaty in question to be extremely dangerous and cannot bring ourselves to approve it.

The rapporteur of the majority considers the Treaty to have now been superseded by the bilateral agreement implementing the ERP and by the act of joining the OEEC. Unfortunately he is right as this is, as we have seen, not one of the customary trade and navigation treaties, but a specifically and substantially political treaty, a link in the chain fettering our country to North American imperialism. We express our objections to such a Treaty quite explicitly and call upon those colleagues who have our country's independence at heart to reject it.

Eugenio Reale, Rapporteur for the minority.

Document 8

SENATE OF THE REPUBLIC, PARLIAMENTARY PROCEEDINGS 1948-1949, CCXXI SESSION, DEBATES, 7 JUNE 1949, PAGES 8137-8139

[Including draft text of law No. 385, as in force on 15 June 1949]

[Italian text not reproduced]

OFFICIAL GAZETTE — THE SENATE — PARLIAMENTARY PROCEEDINGS, CCXXI SESSION, 7 JUNE 1949

DISCUSSION AND ADOPTION OF THE GOVERNMENT BILL FOR THE "RATIFICATION AND IMPLEMENTATION OF THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION, THE PROTOCOL OF SIGNATURE, THE ADDITIONAL PROTOCOL AND THE EXCHANGE OF NOTES, DONE IN ROME BETWEEN ITALY AND THE UNITED STATES OF AMERICA, ON 2 FEBRUARY 1948" (344).

(Approved by the Chamber of Deputies.)

President: The next item on the order paper is the debate on the government Bill, already approved by the Chamber of Deputies, *Ratification and implementation of the Treaty of Friendship, Commerce and Navigation, the Protocol for Signature, the Additional Protocol and the exchange of Notes, done in Rome between Italy and the United States of America on 2 February 1948.*
I call on the Secretary to read it.

Merlin Angelina, Secretary, then read document No. 344.

President: The floor is now open.
Since no one wishes to speak, I declare the debate closed. I call on the rapporteur for the majority, Senator Parri.

Parri, Rapporteur for the Majority: The text of this Treaty and the report I myself wrote do not, I believe, require a lengthy additional explanation from me. It is a straight-forward treaty, but one which is of special relevance not only because of the importance of our relations with the United States, but also because this is the first major treaty that Italy has entered into with a leading country. It is therefore a kind of specimen-treaty, on which others can perhaps be modelled, in the sense that it puts into practice the general principles of equal treatment, reciprocity and the most-favoured-nation clause, which should be the fundamental principles in treaties of this kind which are essentially of an economic and commercial nature.
This Treaty takes on particular relevance in view of the particular period through which Italy is passing, with a parlous economic and financial situation that makes it necessary for her to temporarily waive the normal principles which govern trade and business between countries; this is mainly covered in a Protocol annexed to the Treaty. Contrary to the view expressed by the rapporteur for the minority, (we consider) that this is of greater importance to our Country than to the United States, because the specific interests of individual Italian businessmen

are much more complex and relevant to the economy of Italy than the interests that the United States might have in regard to our Country. It is also a general treaty, a framework treaty, which does no more than to set out our civil, economic and commercial relations with the United States. So we cannot expect it to change the system for emigration to the United States which will evidently have to form the subject-matter of special negotiations to be handled by the Italian Minister for Foreign Affairs — continuous, assiduous negotiations, in view of the importance of this problem to Italy. Neither can it have the character of a particular commercial agreement. This means that as far as the Ministry of Foreign Affairs is concerned, it is still necessary to very carefully pursue the question of the right of establishment of members of the liberal professions, and above all the right for them to exercise their professions. The Ministry of Foreign Affairs does not need any recommendations from us: these are problems with which it is well acquainted and has been dealing with for a long time. However, it would be useful for the Senate to adopt recommendations of this kind, urging that the possibility of practising the liberal professions, in particular — because this might be relevant to a certain section of our emigrants — should form the basis of negotiations, in order to try to establish a single system in the legislation of the various States for the recognition of Italian academic qualifications. This would prevent, or alleviate, the difficulties which Italian professionals are currently experiencing, at least in some or quite a few states in the US Confederation. I will merely add that, as far as the state of Italian emigration to the United States is concerned, although the opportunities at present are not very great, I believe that something can be done, especially with regard to opening the doors to craftsmen wishing to settle in the large cities, and to raising Italy's immigration quotas.

All told, as I said in my Report, the Treaty is necessary not only because of its relevance to the Italian economy, but because it forms a starting point, a legal basis from which to improve the treatment of fellow Italians who migrate to the United States. I believe that the Senate will be able to approve the Bill, fully realizing that it is an extremely useful international instrument for the Italian economy and for the development of peaceful relations with the United States.

President: Since the Rapporteur for the minority, Sen. Eugenio, is absent, I give the floor to the Under-Secretary of State for Foreign Affairs, Mr. Brusasca.

Brusasca, Under-Secretary of State for Foreign Affairs: The Government would merely wish to underscore some of the points made by the Rapporteur, Sen. Parri.

This Treaty is a general one, and does not therefore deal with any specific subject-matter, because specific subjects are dealt with in particular treaties which States conclude from time to time. The essential part of this Treaty is the one which contains provisions governing establishment, namely, the provisions we have managed to obtain which give Italian citizens resident in the United States equal treatment with citizens of the United States. This is, in a sense, an achievement of genuine international democracy which enables the nationals of one State living in another State to enjoy the rights accorded to the nationals of that State. We hope that what has now been granted to the Italians in the United States will be extended to Italians living in every foreign country, and indeed to nationals of every State in whatever country they live. This would generate that international understanding and that mutual trust to which modern democracy aspires and demands.

President: We will now debate the individual clauses.

Clause 1

The President of the Republic is authorized to ratify and the Government to fully and wholly implement the following Agreements concluded in Rome between Italy and the United States of America on 2 February 1948:

(a) Treaty of Friendship, Commerce and Navigation;
(b) Protocol of Signature;
(c) Additional Protocol;
(d) Exchange of Notes.

(Adopted.)

Clause 2

This law shall come into force on the day of its publication in the *Gazzetta Ufficiale*.

(Adopted.)

Document 9

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, LEGISLATURE III, DOCUMENTS, BILLS AND REPORTS, NO. 537, PAGES 1-4, PRESENTED TO THE OFFICE OF THE PRESIDENT, 8 NOVEMBER 1958

[Italian text not reproduced]

OFFICIAL GAZETTE — PARLIAMENTARY PROCEEDINGS, III LEGISLATURE

BILL FOR THE RATIFICATION AND IMPLEMENTATION OF THE SUPPLEMENTAL AGREEMENT OF THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN ITALY AND THE UNITED STATES OF AMERICA, CONCLUDED IN WASHINGTON ON 26 SEPTEMBER 1951.

Lodged with the Office of the President on 8.11.1958.

Honourable Colleagues. In recent years, although the Italian economic and social situation has held down inflation and ensured a solid currency, there has been a large balance of payments deficit and, what is even more worrying, unemployment is tending to stay very high.

The main obstacle to boosting economic activity sufficiently to increase agricultural and industrial output and reduce unemployment is certainly the shortage of domestic capital: foreign capital is therefore warmly welcomed, and it is now unanimously acknowledged that something should be done to attract foreign capital.

In other words, we should augment the inadequate, though intrinsically high level of domestic savings, not only by the provision of government loans or grants, but by encouraging inflows of private capital investment into Italy.

Hence the need to take all the political, legal and economic measures that will facilitate private investment from abroad: in other words, to create a situation in which foreign investment is secure and given equal treatment. It is because of the need to increase domestic investment in view of our particular post-war economic situation that Italy has embarked on a policy to foster the inflow of private and public capital from abroad.

Inflows of capital from government sources, or public agencies, have been promoted through direct negotiations with governments.

We have endeavoured to encourage the inflow of private capital — a problem which is of more specific relevance to this report — by thoroughly overhauling the old legislation that had long placed restrictions on foreign investment. This far-reaching innovation was enacted in Decree No. 211 of 2 March 1948 which completely liberalized foreign capital investment in Italy, with a few restrictions, mainly relating to currency matters. To encourage the inflow of foreign capital investment, however, it is not enough just to create the appropriate opportunities and conditions at home, to which we referred earlier and which are essentially based on the political/administrative system. It is also necessary to ensure that the conditions we establish (exchange rate, investment security, transferability, etc.) match the ones that the foreign investors want or demand according to the legislation and the customs of their own countries.

And since "foreign investment" today means, above all, investment from the United States, we deemed it advisable to remove any obstacle to the inflow of private American capital by concluding a special agreement with the United States Government which, after painstaking negotiations, was eventually signed in Washington on 26 September 1951.

Beginning early in 1950, the Ministry of Foreign Affairs stepped up contacts with political and financial circles in the United States to foster the inflow of capital into Italy, meeting representatives of official agencies (the State Department, point 4, ECA) and private organizations (the American section of the international Chamber of Commerce).

As a result of these initial contacts, we now have a much clearer idea of what American investors are looking for, and realize the need for a special treaty between the two countries.

The needs of American investors may be summarized as follows:

the creation of a favourable economic, social and political climate in the country in which they invest;

co-operation on the part of the country in which the investment is made both through its investment policy and through the provision of local capital which American capital should complement, not replace;

protection of the rights of the American companies and individuals in the companies in which they invest;

possibility of repatriating invested capital and capital gains;

guarantees against discrimination;

guarantees against political risks;

fair and unequivocal tax treatment;

exchange rate guarantees.

What was therefore required was to guarantee the American investors any of the afore-mentioned conditions not already guaranteed, as far as possible, while at the same time protecting Italian interests, above all by defending the currency and obtaining direct, long-term as opposed to speculative, productive investment.

In February 1950, the Italian Government, through its Embassy in Washington, therefore proposed that negotiations should begin with the American Government to conclude an agreement to complement the Treaty of Friendship, Commerce and Navigation of 2 February 1948, specifically to increase two-way capital investment, but naturally with particular reference to American investment in Italy.

The United States Government accepted the Italian proposal, and on 9 March 1950 it submitted a draft treaty which was examined at a large number of meetings in March and April of that same year by the Italian Government departments directly concerned.

At the conclusion of these meetings, on 13 June 1950, Italy produced a counter-draft comprising a preamble and 11 articles. After receiving CIR approval it was once again submitted for examination to the American Government.

Despite repeated requests on our part, the American response to our counter-draft was delivered to the Embassy in Washington a year later, in May 1951.

The memo containing the American comments on it was then forwarded to the other Ministers concerned, for their counter-proposals, if any; with the agreement of the Italian Treasury, the CIR was empowered to examine the memo.

At the suggestion of the Department of State, a special clause on social insurance was also incorporated into the draft agreement.

The comments on the American counter-proposals drawn up by the Italian Government departments concerned were then discussed in Washington where,

during the visit of the Italian Premier to the United States, the Agreement was signed by the Italian Treasury Minister and the American Secretary of State on 26 September 1951.

The Agreement sets out, first of all, to ban any discriminatory measures that either country might adopt against the interests of citizens or legal persons of the other contracting State, designed to restrain their management or real control of the companies for which they have obtained the necessary permission for their purchase or establishment; or designed to restrain the exercise of any other rights or prejudice the interests of these companies or investments in whatever form they may be made.

It also requires the parties to remove any discrimination on terms for obtaining capital or the technical processes and inventions required for economic development.

In order to offer investors the maximum freedom of choice in respect of the companies they are planning to constitute or which they are already operating, or in which they have a financial holding, they are also granted the possibility of employing technical and administrative experts to conduct inspections and investigations and to draft reports, albeit solely in the ambit of the company, and solely on behalf of the investors, regardless of legislation governing the prerequisites for the exercise of a profession.

It also lays down the principle of the most favourable treatment for the transferability of invested capital, and extends this transferability to income accruing to the investment.

According to this principle, it will therefore be possible for an investor to obtain foreign exchange from his own country to transfer both capital and income of whatever kind (including wages and salaries, interest, dividends, commissions etc.), as well as the amounts required to repay loans or for the depreciation of capital assets.

To this end, special provisions have been drawn up to establish the rate of exchange applicable to such transfers. It shall be the exchange rate which the International Monetary Fund shall specifically approve for these transactions, or, in the absence thereof, an exchange rate which is both fair and reasonable.

The supplemental Agreement contains another special facility to foster investment in Italy.

Such investment will be eligible for the special tax relief and special rates of customs duty and freight charges available for the development of Southern Italy (Law No. 1598 of 14.12.1948) and for the development of the Apuana industrial zone, and the industrial zones of Verona, Gorizia, Trieste, Leghorn, Marghera, Bolzano and any others provided under current or future Italian law.

In periods of currency difficulties, it is nevertheless possible to apply exchange restrictions to the principle of the complete transferability of capital and income accruing thereto, in order to prevent an excessive fall in currency reserves, to slightly increase the reserves if they are deemed to be too low, or to guarantee the availability of sufficient foreign exchange to pay for the essential goods and services required for the health and welfare of the people.

Exchange rate charges may also be levied which are specifically authorized or requested by the IMF.

The Contracting Party which applies these exchange rate charges must, however, take other measures for the transfer of capital, income and funds for the repayment of loans, through appropriate consultations with the other State.

These measures will be re-examined by the Contracting Parties at intervals of not more than 12 months.

The supplemental Agreement also recognizes the validity of the clauses in contracts concluded by private citizens of both countries relating to the settlement of disputes through arbitration.

These clauses cannot be deemed invalid for the purposes of performance in the territories of the other Contracting Party on the sole ground that the place indicated for the arbitration procedure lies outside their territories, or because one of the arbitrators is a national of a country other than that of the other Contracting Party. It is agreed that before any arbitration decision can be enforced in the territory of either State, it must first be recognized by a national court.

A special article of the supplemental Agreement lays down the essential provisions of a convention on social insurance which must be concluded between the two countries as soon as possible.

Provision is made for citizens belonging to a social insurance scheme in either country to be able to count the periods spent in the other country towards the minimum period required to qualify for social insurance benefits.

This right applies for disability, retirement and survivorship pensions in which the period of insurance is of greater relevance for the purposes of risk coverage. Furthermore, Article 2 of the Treaty of 2 February 1948 already enshrined the principle of the equal treatment of citizens of the countries in relation to compulsory social insurance benefits and their rights subsequent to industrial accident or disease and civil liability.

Article 7 of the supplemental Agreement provides that as far as disability, retirement and survivorship pensions are concerned, benefit rights shall be determined according to the *pro rata temporis* system, which is the one that is commonly used, without prejudice to any provisions to the contrary contained in the 1935 ILO Treaty, if any, if ever the latter comes into effect between the two countries.

If, as is unanimously acknowledged, the Italian economy is gravely hampered by the chronic shortage of natural resources to meet the needs of its potential population and by the surplus manpower available in terms of the employment opportunities, and above all by the shortage of capital available to meet the country's needs, it would seem fair to conclude that if these gaps could be adequately bridged by using external resources, the economic cycle could be activated and accelerated, generating production, national income, and rapidly and gradually absorbing a substantial percentage of unemployment and improving the balance of payments.

Attracting private investment from abroad is one of the most important of these measures.

The supplemental Agreement signed in Washington on 26 September 1951 is designed above all to foster investment in Italy using private capital from the United States which is the most important, perhaps even the only, country today which has such resources at its disposal.

This government Bill, that was placed before Parliament in the 2nd legislature, expired with that legislature.

GOVERNMENT BILL

Clause 1

The President of the Republic is authorized to ratify the supplemental Agreement to the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, concluded in Washington on 26 September 1951.

Clause 2

The Agreement shall come fully into effect on the date of its entry into force as stipulated in Article IX of the Agreement.

Document 10

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, LEGISLATURE III, DEBATES, SESSION OF 7 OCTOBER 1959, PAGES 10829-10831

[Italian text not reproduced]

OFFICIAL GAZETTE — PARLIAMENTARY PROCEEDINGS, III LEGISLATURE — DEBATES ON 7 OCTOBER 1959

DEBATE ON THE GOVERNMENT BILL: RATIFICATION AND ENTRY INTO FORCE OF THE SUPPLEMENTAL AGREEMENT TO THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE ITALIAN REPUBLIC AND THE UNITED STATES OF AMERICA OF 2 FEBRUARY 1948, CONCLUDED IN WASHINGTON ON 26 SEPTEMBER 1951 (537).

President: The business on the order paper is: "*Debate on the Government Bill: Ratification and entry into force of the Supplemental Agreement to the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, concluded in Washington on 26 September 1951.*"

The floor is open for the general debate.

The first speaker is Mr. Assennato.

Assennato: Mr. President, you will agree with me that this is a strange Bill, a re-exhumed Bill previously tabled on 8 November 1958, for the ratification and entry into effect of an international agreement dated 2 February 1948, which was eventually concluded in Washington on 26 September 1951.

Neither the Government's report nor the report of Mr. Vedovato, who is usually so diligent, provides any explanation for this mysterious delay. An explanation would be in order.

Scelba, Committee Chairman: The measure has only been tabled today for adoption, having lapsed in previous legislature because of the dissolution of Parliament.

Assennato: You'll have to do better than that, Mr. Scelba. Since 1951, Parliament has only been dissolved twice.

I put it to you, Mr. President, that the subject-matter of this convention is now out of date. I believe that there was great reluctance to place it before Parliament, because it is an international agreement to attract foreign capital — more specifically American capital — into Italy. This is the substance of the agreement. Except that after the agreement was drawn up, the Law of 7 February 1956 on Foreign Investment in Italy was enacted, protecting foreign capital investment in Italy, giving investors the freedom to dispose of their investment and the certainty of making a profit on it. So there is already a law of the land which naturally also applies to foreign capital from the United States. This is the reason for the reluctance. You, Mr. Scelba, were Prime Minister then, and you know that the reason for the delay had nothing to do with it being overlooked or neglected.

The law-maker looks for a rationale, and the rationale in this case explains the reason for the delay: the enactment of a measure regulating foreign investment in Italy.

But what was it that drove the Government to dig up this measure again? In the Minister's report, Mr. Scelba, there are certain things which do little for our national dignity and for the unfettered operation of our constitutional institutions. It mentions the needs of the American investors, and maintains that this convention would protect them. We shall be seeing in a moment what these needs are. But first I have to say that in these articles there are no clues as to the way in which these needs are supposed to be guaranteed.

The report says this: "The needs of American investors may be summarized as follows: the creation of a favourable economic, social and political climate in the country in which they invest." What does that mean? Who was the simple-minded or naive person who used the word "creation" here? We could have understood it better if it had said something about a guarantee. And yet, in the most brazen, indeed the most heavy-handed and clumsy manner, the Bill speaks of creating a favourable economic, social and political climate.

Where is this assurance given, anywhere in the text?

Later on it says, "What was therefore required was to guarantee the American investors . . . the afore-mentioned conditions . . .". But none of these conditions are listed anywhere in the text of the agreement!

Mr. President, we intend to get to the bottom of this matter, because it has to do with the very existence of our parliamentary institutions. Because speaking about "creating a favourable economic, social and political climate" necessarily relates to our responsibility as parliamentarians. We construe this to imply the "freezing" of a particular economic, social and political situation that now exists. And it had better not mean anything different from that, because there can only be two alternatives, of which the one I just mentioned is simply the better of the two. The sentence in question can, in fact, be construed to mean a "freezing" of the *status quo*, or — what is even worse — the creation of a new situation.

I will pass over the reference to "guarantees against discrimination" which could also mean equal treatment accorded to other foreign capital. But, Mr. Scelba, we are bewildered to read in your report what it says about "guarantees against political risks". Since this document is signed by Giuseppe Pella for the Italian Government, in his capacity at the time as Minister of the Budget, the only political risk we can imagine that this agreement guarantees against is the *political risk that Mr. Pella does not become a minister again!* Or perhaps against the risk of his political party ruling the country for ever after? What other kind of political risk could there be? The Italian Constitution provides for different political groupings to take office in government depending on the results of the elections. All this talk about guarantees against the political risk of the party with a relative majority not being able to stay at the political helm of the country would therefore *appear to be not only unconstitutional but also nonsense.*

Mr. Folchi: Is it true to say that the original document contains something that is not written down here, which might shed light on the best way of construing this sentence? If so, we are not dealing with an international agreement for foreign capital investment, but we are faced with a problem that has to do with the international politics of the activities of the then Minister of the Interior, Mr. Scelba, regarding his assurances about "freezing" a given domestic political situation and a given economic structure as they stood at the moment the agreement was being ratified, in order to offer adequate guarantees to foreign investors.

I beg my colleagues to believe me when I say that there is no malice in my words; I am simply reading what is written in the text of the agreement tabled for ratification by the House.

I could, at most, understand an assurance against the risks of a fire breaking out and destroying the foreign capital deposited in the Bank of Italy; but I cannot for the life of me go along with any assurance against the political risk that the Christian Democratic Party might be thrown out of the government of this country. In this statement, there is something which degrades our country, which damages its dignity, because it commits the country to "freezing" the economic, social and political *status quo* in order to be able to benefit from the aid of foreign capital (and it remains to be seen whether the country as a whole is going to benefit, or whether only certain groups or sections of the country do).

Mr. President, what is even more depressing about it is the fact that this agreement is being bandied around as if it were something to boast about.

Since my suspicions were aroused, I tried to examine the archives — as I was duty-bound to do — to find the original report given by Mr. Vedovato. Usually, Mr. Vedovato is very punctilious and diligent, but this time he wriggled out of it with three words and a grin, and we absolutely refuse to accept this kind of behaviour, and particularly this offensive attitude which offends against our dignity as parliamentarians and humiliates the country.

What is all the mystery behind this assurance? Where in the agreement are all these assurances against political risks and against the unfavourable economic climate to investor countries, and the undertaking to create a new and more favourable one? I really would like to know where these things are written down, in which corner in the document they are tucked away, with what ink they have been drafted. Is there perhaps some secret schedule?

We cannot accept that an official document of the Italian Republic can say something which is against the provisions of the Constitution. You are undertaking a commitment which is blatantly against the Constitution, which is a violation of it — and I would go so far as to call it an act of treachery, because while you swear to be faithful to the Constitution which guarantees this new instrument as the country's economic structures progress and change, you commit yourselves to a foreign power to permanently create a situation which will hinder and halt these structural, economic and social changes in our country.

This is why we will vote against it, Mr. President, and we anxiously await the Government's reply.

President: After the speech by Mr. Assennato, and considering that the rapporteur, Mr. Vedovato, is absent, I think it is advisable to adjourn the debate to another day.

Scelba, Committee chairman: The Committee agrees.

Folchi, Under-Secretary of State for Foreign Affairs: I wish to take the floor.

President: You have the floor.

Folchi, Under-Secretary of State for Foreign Affairs: Mr. President, the Government supports your suggestion. I will wittingly provide any explanations that may be needed at a future session. But I would just like to make one remark to Mr. Assennato: this measure was approved by the Chamber six-and-a-half years ago, and we took it for granted that after six-and-a-half years, such difficult Constitutional issues as these would not have been raised.

President: The debate is adjourned.

Document 11

CHAMBER OF DEPUTIES, PARLIAMENTARY PROCEEDINGS, LEGISLATURE III, DEBATES, SESSION OF 15 DECEMBER 1959, PAGES 12272-12281

[Italian text not reproduced]

OFFICIAL GAZETTE — PARLIAMENTARY PROCEEDINGS, III LEGISLATURE — DEBATES ON 15 DECEMBER 1959

RESUMPTION OF THE DEBATE ON THE GOVERNMENT BILL: RATIFICATION AND ENTRY INTO FORCE OF THE SUPPLEMENTAL AGREEMENT TO THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE ITALIAN REPUBLIC AND THE UNITED STATES OF AMERICA OF 2 FEBRUARY 1948, CONCLUDED IN WASHINGTON ON 26 SEPTEMBER 1951 (537).

President: The business on the order paper is: "*Resumption of the debate on the Government Bill: Ratification and entry into force of the Supplemental Agreement to the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, concluded in Washington on 26 September 1951.*"

Mr. Giovanni Grilli has the floor.

Grilli, Giovanni: Mr. President, I must begin by expressing my astonishment that it is only now that we are being asked to debate a treaty that was concluded in 1951. It would be most interesting to know from the Government the reasons for this long delay. I am sorry that Mr. Pella is not here, because he is responsible for this wholly abnormal delay, and I am sorry that it is Mr. Folchi who has to answer the points I am about to raise, because when this Treaty was signed, Mr. Folchi was not even a Member of Parliament. Under Article 9, this agreement should not have been implemented until it had been ratified by both Houses of Parliament. The article itself states that "This agreement will come into effect on the day ratification is exchanged". And yet the agreement has already been brought into effect, and everything relating to the import of United States capital is governed by it already. This is a violation of the Constitution, which requires certain types of treaty to be ratified by Parliament, and it is also an infringement of the commitment undertaken when the agreement was signed. Article 80 of the Constitution states that

> "Both Houses of Parliament shall authorize the ratification of international treaties of a political nature, or which provide for arbitration or judicial settlements, or entail changes in the territory or financial charges, or changes in the law, by enacting a law to this effect."

No-one can doubt that the agreement signed in Washington in 1951 is a political document; one only needs to read the accompanying ministerial report to see that. The report says that as a result of the contacts leading up to the drafting of the agreement, certain demands of American investors had emerged, including the need to create a favourable economic, social and political climate, and hence, to create a situation guaranteeing protection against political risks. The same agreement also provided for changes in Italian legislation regarding

the import of foreign capital. Hence there is a twofold reason for necessarily submitting it promptly to Parliament for ratification. However, as I just said, the Government failed to comply with the provisions of the Constitution and failed to honour its commitment to implement the agreement only after it had been ratified by Parliament.

I will not waste my breath on this behaviour of the Government which we know is accustomed to breaking the Constitution, as we have been denouncing for a long time. But once again we are forced to call the House's attention to the seriousness of this Government's behaviour and the repercussions it is having on our institutions. The failure to respect the country's Constitution necessarily creates serious upsets in our national life, unless those of us who demand respect for the Constitution grow in strength and know how to impose compliance with it.

Before I examine the Bill, I should like to draw the attention of the House to the Minister's report accompanying the ratification Bill. It says that the idea of concluding this agreement was to guarantee as far as possible the sort of conditions that would be likely to attract foreign investment to Italy; and one of these conditions was the creation of a favourable economic, social and political climate, and the provision of guarantees against political risks. The document which says these things bears the signature of the present Foreign Minister, Mr. Pella. The same Mr. Pella, who, with Mr. Scelba and other Cabinet colleagues, undertook a commitment with a foreign government to create the political conditions which that government demanded, and to guarantee its investments in Italy against political risks. In other words, what the government to which Mr. Pella belonged undertook to do was not what our own people wanted or might have demanded, nor to respect the provisions of Italian law, but to agree to the demands of American investors. I really do believe that it would be impossible to sink any lower than that! Precisely at a time when all the colonial countries are angrily rising up against foreign domination and when even in the heart of Africa, hundreds of men are laying down their lives for their countries' independence, a minister of the Italian Republic is unhesitatingly able to state his readiness to give way to the requests of capitalists from other countries, ignoring the fact that these demands are against the Constitution and the dignity of our Country.

As far as the substance of the Bill and the convention is concerned, let me say at once that it has already been superseded by Law 43 of 7 February 1956. In general terms, the provisions of this law are more restrictive than the agreement which we are being asked to ratify. One might say that the 1951 agreement, which we are supposed to ratify today, was much more generous to foreign capitalists than the new law. Article 3 (2) of the agreement states that "Income, in the form of salaries, interest, dividends, commissions, industrial royalties, payments for technical services, or any other income, or funds to repay loans and for the depreciation of fixed investments" and the original capital invested here "can be freely transferred", in the currency of the investor's country.

Section 2 of Law 43 of 7 February 1956 places considerable restrictions on the repatriation of capital and profits, however, and in some cases the share of profits and dividends which may be exported is not allowed to exceed 8 per cent of the capital invested. The transfer of capital gains from subsequent disposals may not exceed the amount of foreign currency originally imported, or take place until two years have elapsed from the date of the investment. I must confess that these are not severe restrictions, but there is no right to freely transfer the capital which is sanctioned in the 1951 Italo-American agreement.

Further restrictions are provided in other sections of the 1956 Law. Section 6 states that before money and loan repayments can be transferred abroad, authori-

zation is required from the "Ufficio Cambi", for which an application is required to be made through the Bank of Italy or other institutions with these powers. Here again, there is a clash with the right to "freely export", enshrined in the 1951 agreement between the Italian and American Governments.

Perhaps we should be told whether it is the 1956 law or the 1951 agreement which applies to the transfer of currency to the United States. If we, today, in 1959, ratify the 1951 agreement, will this repeal the 1956 law? The Under-Secretary will probably reply that the 1956 law is still valid. If so, why is it that we are ratifying, today, an agreement which partly contradicts, or at least differs from, a law enacted by Parliament in 1956? I am not a lawyer, but one might suspect that the ratification of the 1951 agreement is tantamount to giving Americans with capital in Italy the possibility of using the provisions of the 1951 agreement, which differs from the 1956 Act of Parliament.

The Under-Secretary must therefore tell us whether this danger really exists, because if it does, by ratifying this agreement Parliament would be breaking a law which it has already enacted, to favour American citizens without having thoroughly discussed the issue.

An objection of quite another nature could be levelled against this agreement that we are being asked to ratify — an agreement which, as I have already pointed out, has been in force since 1951 without being sanctioned by Parliament. Many parts of the agreement clash with the law as it stood at the time it was concluded. Before Law 43 of 7 February 1956 came into effect, foreign capital investment in Italy was governed by Decree 211 of 2 March 1948, whose provisions differ substantially from those contained in the agreement. The 1948 decree — signed by Mr. De Gasperi and Mr. De Nicola, who was the provisional Head of State at the time — provided that applications for the transfer abroad of capital in the currency in which it had been invested could not be made for at least five years after the investment had been made. According to the 1951 Agreement, however, any capital investment, without qualification, can be freely transferred without any application or prior notice, and the investor can therefore obtain the equivalent value in dollars.

Article 3 (2), says that investors can

> "obtain the dollar equivalent of and freely transfer income, in the form of salaries, interest, dividends, commission, royalties, payments for technical services and any other nature, or the funds to repay loans and provide for depreciation of capital assets, and the capital actually invested".

But the 2 March 1948 Decree provided otherwise: it said that the following could be transferred abroad: (1) income, interest and capital gains from real estate or loans, and dividends and interest from investments in securities and debentures purchased and subscribed in Italy, up to one percentage point more than the annual statutory interest; (2) capital gains from disposals, up to the original amount of currency imported, and only if the transfer is requested at least two years after the investment was made.

As you see, the agreement gives rise to a number of doubts, quite apart from other contradictions between our law and the agreement between Mr. Pella and Mr. Acheson.

And so how could Mr. Pella take the liberty to strike an agreement with a foreign power, whose clauses were in contrast to the laws of the Republic? And secondly, how could that Government, and the ones that followed it, bring that agreement into effect? There would be no need for this question if both Houses of Parliament had enacted a law ratifying the agreement after it had been drawn up. But so far, no authorization or ratification has been forthcoming. This means

that everything that the Government has done since 1951 to implement the agreements concluded by Mr. Pella is manifestly illegal and therefore can be invalidated by anyone.

Deputy President Targetti then took the Chair.

Grilli, Giovanni: Now we can see where the servility mania of those who have ruled us for the past ten years, and still rule us today, has got us. I have used the expression "servility mania" advisedly, Mr. Folchi, because what Mr. Pella and Mr. Acheson agreed to in 1951 was not at all necessary to protect and develop the Italian economy.

There is no doubt that the Italian economy was, and still is, short of capital, even though today there is 8,000 billion lire sitting in the banks without being able to find any productive investment for it, to meet the country's needs. Yet we are not a capital-rich country, and eight years ago capital from abroad would have been very welcome if it had been invested in such a way as to meet our country's needs. But in the agreements that Parliament is now being asked to approve, no criteria are given for establishing priorities for American investment in Italy; importers of capital are placed under no obligations. Indeed, all the provisions governing the import and transfer of capital are manifestly designed to benefit only the American owners of the capital brought into Italy and, as I already said, they go much further than Italian law allows. In addition to this, a substantial share of the imported capital has not been used to strengthen the Italian economy, but rather to strengthen the hold of the main monopoly corporations in our Country. Another portion has been used to increase our investment in infrastructure, or in ventures which are not directly productive, thereby heightening the distortions in our investments and in the whole of our production policy — that distortion which has been created by the general action of the various governments that have taken turns in power.

It is not improbable that some of the imported capital has been used to boost the economic fortunes of some of the friends of these governments. Unless I am mistaken, Mr. Folchi, among the importers of capitals into Italy is the Hilton Company: the one which is preparing to build a hotel on Monte Mario with the Immobiliare Company, of which quite a few friends of the present and past Governments are members, and probably the American chemicals company, Squibb, the Chairman of whose Italian subsidiary is — lo and behold! — the parliamentarian, Mr. Ivan Matteo Lombardo, who was a member of several previous Governments. Then the Italian Underwood Company, which we assume has imported capital under the protection of this agreement, is chaired by a man who is a friend of the Government, Mr. Malavasi, the former Chairman of ENAL. As you can see, in all these cases, imported capital has been used to help people who are friends of the Government, but not the economy of our Country.

For all these reasons, we believe that the House must not endorse what the Government has done by voting to approve and ratify the agreement which has been submitted to us, after such a long delay. If the House wants the Constitution, its prerogatives and current legislation to be honoured, and if it wants to protect its own dignity, it must necessarily reject the Government's request to ratify the agreement which has been submitted to it for discussion, after more than seven years since it was concluded.

It should also be noted that the retarded ratification of the agreement does not legitimate any of the acts performed in implementation of the agreement, leaving open the possibility of asking them to be revoked at any time.

This, Mr. Folchi, serves to show the thoughtless way — to put it euphemistically — the Government signed the agreement which was equally thoughtlessly accepted by the Cabinets which followed *(Applause from the Left).*

President: Since no one else has asked for the floor, the general debate is now adjourned.

Mr. Vedovato has the floor.

Vedovato, Rapporteur: Mr. President, honourable colleagues, as the President of the House has told you, when the debate on this Bill began I was abroad on official business.

On the resumption of the debate, Mr. Giovanni Grilli added new material to what his honourable friend, Mr. Assennato, had raised when the debate on this Bill began.

Mr. Grilli has committed one factual error and one legal error. He intends to depict Mr. Pella as the author of the agreement; his criticisms, like Mr. Assennato's, do not refer so much to the actual agreement itself, but rather to the report accompanying it. This is the factual error. The report was drafted by Mr. Fanfani, who was the Foreign Minister at the time. But I do not believe that in a parliamentary debate one can criticize the report and not the actual text of the agreement. We will see why, shortly. As far as the legal error is concerned, I trust that Mr. Grilli will permit me to say that matters did not go quite as he has presented them to the House. There are various ways of ratifying international agreements. There is the simple ratification procedure, when it is acknowledged that the agreement is in full compliance with the Constitution, and there is the implementation procedure — which is the one we are dealing with today. In other words, by approving the Bill before the House today, authorization is given to the Head of State to ratify it, and the international agreement then becomes fully effective domestically.

The effect is practical: when the instrument becomes law after going through the usual procedures, it becomes *ipso facto* effective. Another effect is that until the ratification of the Bill is approved, the international instrument to which it refers has no practical value. So it is not true at all, as Mr. Grilli maintains, that this agreement has already been brought into effect and that the Italian Government has performed acts in implementation of it, in defiance of the Constitution.

And then, Mr. Grilli, you asked whether foreign capital in Italy is to be governed by the February 1956 Law, or by the agreement which we are about to ratify. There is no shadow of doubt: the legal validity of this instrument supersedes the earlier law, wherever they differ. In other words, where this later law contains provisions which clash with the earlier law, it is the later law which takes precedence, not the earlier one.

Having clarified that point, and having established that the Italian Government has not violated the Constitution, I will turn to Mr. Grilli's other objections with regard to the way foreign capital investment in Italy is governed, and the income from this investment is transferred.

The fact that Mr. Grilli is not — if I may put it this way — as adequately informed as befits a person who wishes to express such heavy-handed criticisms as he, can be deduced from the way he quoted the Bill we are to vote on, the 1956 Law, and the 1948 Law, at one and the same time and without distinction.

If there is a rationale behind the law, and if we really do want to know exactly which legal provisions govern investment and the subsequent export of the income accruing to it, we have to see whether and where the 1956 law introduced innovations to the provisions of the 1948 law, and whether and where the Bill

before us introduces innovations to the provisions of both the 1956 Law and the 1946 Law.

It has been claimed that the agreement we are proposing to ratify entails serious legal violations. More specifically, Mr. Grilli referred to Article 3 (2), which he read out twice during his speech.

At this point, I am very tempted to repeat the famous saying, "Give me a sentence out of context, and I can send you to the gallows".

If Mr. Grilli, who has read the agreement so carefully, had not ignored certain things, he would have seen that immediately after Article 3, there is an Article 4, which states this:

> "Notwithstanding the provisions of Article 3 of this agreement, both contracting parties retain the right, in periods of currency difficulties, to apply *(a)* exchange restrictions to the extent needed to ensure the availability of foreign exchange required for the payment of goods and services essential to the health and welfare of the people; *(b)* exchange restrictions to the extent needed to prevent the monetary reserves from falling very low, or to slightly increase very low monetary reserves; and *(c)* particular exchange restrictions which are specifically authorized or requested by the International Monetary Fund."

This means that notwithstanding the principle of full freedom set out in the preamble to the international instrument, there is a range of restrictions which are specifically set out in Article 4 which, in periods of currency difficulties, will certainly help to protect the operation that has to be performed. And if, with all these limitations, there should emerge any clash with section 2 of the Investment Law of 7 February 1956, it is obvious that we can find out the general current legal situation governing foreign investment and the transfer abroad of income from Italy by harmonizing the provisions of the 1948 Law and the 1956 Law and the present Bill.

With regard to some of the comments made about the strengthening of certain Italian companies as a result of foreign capital, I have a list before me of American investments in Italy, and — lo and behold! — the main examples are those in which American capital has been invested in companies belonging to the State-owned IRI Group.

With regard to agreements for manufacturing under licence, the type which the Left is so keen on raising, the example I have is the agreement drawn up between an American corporation and the Florence-based "Nuovo Pignone" company which, as you all know, belongs to the State-owned ENI Group. But apart from these considerations, I would like to emphasize the fact that despite the six years that have passed since it was drawn up, this agreement is still as topical as ever, not only because of what I have just said but also in the light of two other aspects of the agreement. And it is very astonishing that neither Mr. Grilli nor Mr. Assennato mentioned these two points. I am referring to the sections dealing with social insurance and international disputes.

As far as social insurance is concerned, the agreement lays down principles regarding the conclusion of a convention under which social insurance rights accrue in both countries. I believe that this is an extremely important principle and one that is particularly favourable towards the working classes in both countries.

Yet — inexplicably — no comment was made on this clause.

Grilli, Giovanni: It was the least you could ask for!

Vedovato, Rapporteur: I could answer that with a well-known English saying: You are throwing the baby out with the bath-water *(Applause from the Centre — murmuring)*. We are faced with two very lively and spirited children here: social insurance and the settlement of international disputes.

As far as social insurance is concerned, this is a *pactum de contrahendo* to protect the interests of our migrants.

Another part of the agreement makes provision to extend the clause governing the settlement of disputes by arbitration. These provisions make it possible to obviate objections on the grounds of nullity to the detriment of the parties and makes it possible to streamline the settlement of economic and trade disputes, which boosts the development of trade between the two countries, albeit indirectly.

In his speech on 7 October, Mr. Assennato asked why it was that the 1951 agreement was submitted for ratification at the end of 1959, when it had been overtaken in February 1956 by the famous law on foreign investment in Italy. He sought the reasons for this inexplicable delay and made a number of remarks in regard to them. All his arguments were already anticipated in the Minister's report accompanying the instrument. Mr. Assennato, like Mr. Grilli a few moments ago, firstly criticized some of the remarks in the Minister's report which sum up the needs of American investors: the creation of a favourable economic, social and political climate, and the guarantee against political risks. He then pointed out that these things were not mentioned in the agreement, and asked whether they might be contained in some secret accord to freeze the present economic, social and political situation. Mr. Assennato insinuated, without actually saying so in so many words, that this would explain why the agreement was being re-submitted for parliamentary approval after seven years, even though the non-secret part had been superseded in the meantime.

The Government is in a better position than I am to address the question of whether there is a secret international instrument, camouflaged under the guise of an instrument submitted to Parliament. But it is evident that this charge of unconstitutionality and secrecy levelled by Messrs. Assennato and Grilli relate to certain expressions in the report on which they have pounced claiming (and the people who write reports to accompany legal instruments had better watch out!) that these remarks either reveal the existence of a secret agreement against a democratic alternation of parties in power, or a guarantee that it will not occur and claim that, being part of an official document, this relates to the responsibility of members of Parliament.

Now, let me just say — for the sake of clarity and also to dispel any suspicions, doubts or uncertainties that have been expressed — that the ministerial report, which was long-winded and susceptible to biased and one-sided interpretations, was drafted seven years ago, and as usually happens when a Bill is tabled again after the dissolution of Parliament, the only parts that have been changed are the ones that refer to the 1956 law. But when it was originally written, the part of the report that Mr. Assennato criticized does nothing more than confirm the intention not to change the democratic system enshrined in the Constitution of the Republic, which guarantees the preservation of an economic, social and political climate that is favourable to foreign investment precisely by enabling the people to freely choose the men they want to run the country's affairs.

Grilli, Giovanni: Today, people are rebelling against certain guarantees even in Africa.

Vendovato, Rapporteur: You are twisting the issues. One of the bases for developing the Italian economy according to the Vanoni model is to attract foreign investment to Italy, but it is obvious that no such thing exists as a set of

rules that will automtically channel foreign investment into Italy; foreign investment only goes to the countries where there are fewer problems. If you prefer to invest capital in Russia, go and invest there; but obviously, if Russia does not guarantee you security, including political security, businessmen will not go and put their capital there.

The parts of the Minister's report that Messrs. Assennato and Grilli particularly attacked related to certain specific demands of the American investors — not specific government assurances that it would create a climate that was favourable to their investment (how could such an assurance be given?), or assurance of "security against political risks" by a sort of immobilism that any democratic government, such as Italy's present Government is, must necessarily shun. The fact is that the comments that have been made, simply for the sake of argument, necessarily referred to certain expressions taken from the report, placing a biased and partisan interpretation on them. But as far as the actual agreement itself is concerned, there were absolutely no grounds for such comments, partly because in both speeches on it, little or nothing was said about the agreement (now Mr. Grilli has spoken about it, and we have demonstrated that the charge of unconstitutionality does not hold water). How could it have been otherwise? Nothing could be said about the agreement because the first part of it, which is certainly the most important, refers to the free transfer of capital and income by natural and corporate persons from the two contracting States, and their freedom to manage the companies which these natural or legal persons establish or procure. It contains a set of provisions which are designed to foster foreign investment in Italy, and especially American investment. At present, despite the long period of time that has elapsed since the supplemental agreement was concluded, they have now become fully relevant in the light of both the liberalizing provisions of the Law of 7 February 1956 governing foreign investment in Italy (of which so much has been said) and of the entry into force of the Treaty of Rome for the establishment of the European Economic Community.

I was saying earlier, and I will say it again, that one of the pillars of the ten-year model is the policy to foster the expansion of loans and foreign investment in Italy. Let us see what the situation was before the entry into force of the 1956 law, and then see what happened after that date. Before the Foreign Investment Law of 7 February 1956, foreign investment had been 6 million dollars in 1951, 15.1 million dollars in 1952, 16.6 million dollars in 1953, 52.6 million dollars in 1954, 70.2 million dollars in 1955, and 99.2 million dollars in 1956, making a grand total of 259.9 million dollars. 1957 was an experimental period for the new Italian foreign investment law and the results were generally positive, despite the unfavourable state of the international capital market as a result of the shortage of funds and the anti-inflationary measures, which led the British to raise the bank rate in October last year. This trend was partly reversed in 1958 but the repercussions were strongly felt.

Since the language of figures is the one we prefer, let me say that foreign investment rose from 89.7 million dollars in 1957 to 172.9 million dollars in 1958, while in the first eight months of the current year they had already reached 126.3 million dollars, most of which came from the dollar area. Indeed, special mention should be made of private investment from the United States which, at the end of 1956, totalled about 206 million dollars.

This kind of investment, which in previous years had been restricted to the oil industry, is now spreading to other particularly vital sectors of the Italian economy. American companies have been stimulated to negotiate technical and production agreements with companies in other European countries and with Australia, as well as with Japanese and New Zealand companies, in order to

manufacture more cheaply abroad the things which would cost so much more to make in the United States that they could not compete with the international market prices. This stimulus has coincided (as we hinted earlier) with the steps taken by the countries of the European Economic Community to attract industrial investment in the Common Market, and with the policies adopted by a great many American companies to set up manufacturing bases in the Common Market to carve out a place for themselves inside the citadel of the Common Market.

About 3,000 American companies have been placing industrial investment abroad for a long time, worth some 30 billion dollars. The value of production from these American companies abroad in 1958 was about 32 billion dollars, which was twice the value of America's aggregate exports.

According to the American press, and bearing in mind their needs, and the findings of a well-known American economic research publishing group, in 1959, American industrial corporations intended to increase their foreign manufacturing investments by 5 per cent over 1958 to 2.1 billion dollars, and about the same again in 1960. These figures are supplied by companies that already account for 75 per cent of United States industrial investment abroad. And unlike what happened in the past — and this is the essential point — American companies are reportedly intending to invest more in Europe than in Canada or Latin America in 1959 and 1960. Now, according to these surveys and indications, we have reason to believe that a substantial share of this investment has been, is being, and will be channelled into Italy. This is a source of great satisfaction to everyone who is really concerned about the economic development of our Country. There are basically three forms that American technological and production ventures take in Italy: setting up an industrial plant in Italy under the direct control of the American parent companies; joint-venture agreements with Italian companies (and I just quoted a few actual examples); and granting manufacturing licenses to Italian companies.

Taking all this into account, anyone can see the great relevance of the problem of foreign investment, and United States investment in particular, to the development of the Italian economy. The inflow of foreign investment, particularly from the United States, bringing with it new financial strength which it places at the disposal of Italian industry, is also increasing the supply of capital available to the remaining companies. And it is precisely in this connection that our diplomatic representatives abroad have been given strict instructions from the Italian Foreign Ministry to do what they can to attract foreign investment into Italy by explaining the current statutory facilities available, including the 1956 Law, which have been shown to offer the best guarantees to foreign investors.

This shows how topical the supplemental agreement under discussion really is. To complete the picture, let me add that Article 4 of the agreement contains special provisions for the application of restrictions to the transfer of capital between the two countries in times of currency difficulties which might obviously arise, in order to ensure that they have the liquidity they need to pay for the goods and services that are essential to their well-being.

Let me finish by recalling something that Mr. Assennato said on 7 October:

> "Since my suspicions were aroused, I tried to examine the archives — as I was duty-bound to do — to find the original report given by Mr. Vedovato. Usually, Mr. Vedovato is very punctilious and diligent, but this time he wriggled out of it with three words and a grin."

It may be that I still have that grin even today, but I must point out to Mr. Assennato, who evidently did not read my written report very carefully, that I added a further 33 words orally to the three words of my written report.

I do hope that these explanations and this documentation eliminate all the doubts and all the perplexities, but at least to induce that section (of the House) *(pointing to the Left)* to think again more carefully about their attitude to a measure which, according to the opinion of the Committee, will have beneficial effects on the Italian economy. I therefore move that the House adopt this Bill, with a majority that I really do hope will be overwhelmingly in favour *(loud cheers from the Centre)*.

President: I give the floor to the Under-Secretary of State for Foreign Affairs.

Forchi, Under-Secretary of State for Foreign Affairs: Mr. President, honourable colleagues, the customary vote of thanks to the Rapporteur must be much warmer on my part than usual, because Mr. Vedovato has given a thorough account, answering the comments made during the debate on 7 October by Mr. Assennato, and taken up again, with a few remarks of his own, by Mr. Grilli.

The representative of the Government only needs to briefly sum up the arguments raised, recalling in particular that the criticisms levelled against the Bill relate to three different aspects of it. Firstly, Mr. Assennato spoke of the mystery of the delay in tabling this Bill. Then followed a detailed discussion on the subject-matter of the convention which, according to Mr. Assennato, would appear to be superseded by the 5 February 1956 Law. Lastly, Mr. Grilli brought in a side-issue to the treaty in question.

As far as the delay in tabling the Bill is concerned, I will not inflict on the House a list of all the dates on which the measure went through the pipeline. I will merely add to what Mr. Vedovato has just explained with such diligence that the measure was properly approved by the Chamber of Deputies on 12 February 1953, but that because of the dissolution of Parliament it could not be approved by the Senate. The climate was different then, and the House raised no objections to it *(Protests from Mr. Grilli)*. I could easily quote, Mr. Grilli, from the proceedings of the debate. That would show you that no particular remarks were made about the measure before its ratification, despite the fact that the treaty had only to be signed shortly before that and the financial situation was such that the criticisms raised in this debate were much more in order then than they are today.

The measure was taken up again on 19 October 1953. But although it was set down on the order paper it was not debated and therefore lapsed when Parliament was dissolved. When it was taken up for the third time it was debated in the House. Considering the procedure it has followed, I do not consider that the frequent complaints about the shortcomings or inefficiency of the Foreign Ministry are justified. The Ministry, on this occasion as always, has done its duty with praiseworthy diligence.

With regard to the question as to whether or not the agreement has been superseded, I wholly endorse what has already been said by Mr. Vedovato. First of all, this agreement does not refer solely to capital investment in Italy, but also the submission to arbitration of certain disputes, and the discipline governing certain insurance matters. It is in the interest of everyone that these last two issues are properly regulated. Parliament should therefore take heed of the old Chinese proverb (Chinese proverbs are very fashionable nowadays) which Mr. Vedovato mentioned.

Mr. Grilli expressed his concern that the measure we are about to vote on will offer better terms to foreign investors than the terms provided under the 1956 law. But he forgot to say that in some respects the agreement is more restrictive than the 1956 Law. For example, the 1956 Law provides that capital may be freely transferred even if the original investor has disposed of all or part of the assets acquired in Italy to another foreigner. This provision did not appear in

the agreement. Furthermore, the 1956 Law allows investors to transfer capital abroad in a currency other than the currency in which it was originally imported (a provision of considerable relevance and interest), whereas the treaty requires the same currency to be used. In the present international monetary and currency situation, this is of great relevance. Lastly, Article 4 of the agreement confers the right to restrict capital transfers under certain conditions, whereas the Law makes no mention of any such limitations.

Mr. Grilli alluded to substantial available funds in the banks, but he might have recalled, with equal relevance, the substantial funds Italy has available abroad today. If there were any political problem here, it would have to be the problem of mobilizing these huge available reserves both domestically and abroad. But this is not the place to deal with problems of this kind.

I will not dwell on the second and third parts of the agreement, because they do not present problems.

But I would like to go back to the question raised earlier, to which Mr. Assennato referred: namely, the question of the Minister's report which has been put in the dock. What did it actually say? It spoke of the need to create a favourable economic, social and political climate in the countries in which investment is made. Generally speaking, all those who invest capital abroad wish to do so in a country which offers certain guarantees of security, equilibrium and internal peace. No one would doubt that, I imagine. And for the benefit of Mr. Grilli, I should like to re-state, in the words of one of his distinguished Party comrades, the fact that these investments are a necessity for the revitalization of the Italian economy, and this was particularly true at the time the agreement was signed. Unless I am mistaken, way back in 1947, Mr. Pesenti, the Minister of Finance at the time, gave a widely acclaimed lecture in English in Rome, in particularly solemn surroundings, in which he argued the thesis that the reconstruction of Italy needed the intervention of foreign capital. And as Minister of Finance, with the responsibility of laying down the policies our country had to follow, it was logical for him to concern himself with this matter, just as we have since concerned ourselves with it, through a number of instruments. All of us can understand that when this capital came to Italy it needed to find a favourable climate. In all sincerity, this expression, which we agree was unfortunate and to which Mr. Fanfani put his signature just as Mr. Pella had done (because the Fanfani report merely repeated the Pella report, word for word), cannot possibly be construed in the way it has been construed, but was intended to mean something else which is perfectly comprehensible.

Moreover, as far as the favourable conditions for the free repatriation of capital which Mr. Grilli is complaining about are concerned, I hardly need cite the experience and the authority of economists and financiers to recall the fact that the easier it is to recover invested capital, the longer the investment will last. In other words, the greater the certainty that the investor can repatriate his capital at any time, the longer that capital will remain invested in a country.

I wanted to add these comments to facilitate the adoption of the measure by the House, and also because I am duty-bound to say that — contrary to what Mr. Assennato said — there are no secret agreements of any kind whatsoever. But I have to agree with him when he said that the unfortunate expression in that report did not refer to any agreement or provision in the treaty. The Government, through me, hereby declares that nothing has been agreed between it and the United States apart from what is enshrined in this Treaty. It can therefore be adopted, without difficulty, by the House, as far as this matter is concerned.

The agreement has already been ratified by the United States; but I wish to tell Mr. Grilli and the House, in confirmation of what the Rapporteur has just said, that this agreement will not come into force — and could not possibly come into force — until the ratification is exchanged between the parties signifying, according to the sound norms of international law, that the contracting parties are in agreement, and hence that the provisions of that agreement can be put into practice.

Similar agreements have already been made by the United States with West Germany, the Netherlands, and many countries in Latin America, and most recently with France. I therefore believe, as the Rapporteur said in his conclusions, that in all conscience I may move that the House adopt the ratification of the agreement *(Applause from the Centre)*.

President: We will now examine the articles. Please read the clauses (which are identical in both the Committee's and the Government's texts). Since no amendments have been tabled, I put it to the vote.

Franzo, Secretary, reading:

Clause 1

The President of the Republic is authorized to ratify the Supplemental Agreement to the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 Februry 1948, concluded in Washington on 26 September 1951.

(Adopted.)

Clause 2

The Agreement shall come fully into effect on the date of its entry into force as stipulated in Article IX of the Agreement.

(Adopted.)

President: The Bill will be voted through in a secret ballot at another session.

Document 12

SENATE OF THE REPUBLIC, SESSIONS OF THE COMMITTEES, 23 MAY 1960, PAGE 22

[Italian text not reproduced]

SENATE OF THE REPUBLIC — PARLIAMENTARY PROCEEDINGS — SESSIONS OF THE COMMITTEES — PAGE 22 — 23 MAY 1960

The Foreign Affairs Committee, during the reporting stage, subsequently begins the examination of the bill: "Ratification and execution of the Agreement supplementing the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, signed in Washington on 26 September 1951" (931), already passed by the Chamber of Deputies. After a few remarks on the legislative *iter of the provision* on the part of Senators Bosco and Berti, to whom Under-Secretary Russo replies, the Committee confers upon the Rapporteur, Senator Jannuzzi, the mandate to submit the report to the Assembly.

Document 13

SENATE OF THE REPUBLIC, PARLIAMENTARY PROCEEDINGS, LEGISLATURE III 1958-1960, BILLS AND REPORTS, DOCUMENT NO. 931-A, SENT TO THE OFFICE OF THE PRESIDENT, 8 JULY 1960, PAGES 1-3

[Italian text not reproduced]

RATIFICATION AND EXECUTION OF THE AGREEMENT SUPPLEMENTING THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE ITALIAN REPUBLIC AND THE UNITED STATES OF AMERICA OF 2 FEBRUARY 1948, SIGNED IN WASHINGTON ON 26 SEPTEMBER 1951

Honourable Senators. The Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, signed on 26 September 1951, has the following content:

Citizens and juridical persons of each of the Contracting States will not be subject — in the territory of the other country — to arbitrary or discriminatory measures aimed at impeding management or control of enterprises for which they have received the required license to purchase or establish, or any measure aimed at obstructing the exercise of their other rights or interests relative to such enterprises or to those in which they have participated with their capital.

They can employ, irrespective of the professional requirements determined by the legislation of the place where they operate, technical and administrative experts for the purpose of carrying out — in such enterprises — book-keeping inspections, technical surveys, and drafting reports with regard to planning or operating their enterprises.

The Contracting States undertake to grant the most-favoured treatment for the transferability of capital and, in all cases, to allow the free transfer:

(a) of income of any nature (including, therefore, salaries, interests, dividends, commissions, industrial patent rights, payments for technical services and funds for amortization of loans and depreciation of direct investments;

(b) of funds and capital, by obtaining the currency of one's own country for these transfers.

However, in periods of monetary difficulties, exchange restrictions can be applied for the purpose of:

(a) guaranteeing the availability of foreign currency for the payment of goods and services essential to the health and well-being of one's own population;

(b) preventing the drop of monetary reserves to a very low level or producing a moderate increase in very low monetary reserves;

(c) complying with the restrictions authorized or requested by the International Monetary Fund (this rule of course is abandoned after the abolition of this Fund). Tax, customs and tariff allowances concerning transport, established by the Italian legislation for the industrialization of Southern Italy, for the development of the Apuana industrial area and of the Verona, Gorizia, Trieste, Leghorn, Marghera and Bolzano areas "and other allowances set forth by the Italian

legislation" currently in force or which can be enforced "in the future" will be applied to the investments made by the United States in Italy.

The clauses containing the settlement of controversies through arbitration, entered into in the contracts between citizens of both States, will not be considered invalid merely on the basis of the fact that the place chosen for arbitration is outside the territory of the contracting States or the arbiters are not nationals of these States.

Should the same conditions be present, arbitration awards legally rendered will not be considered invalid or non-enforceable either, subject to the rules on judgments giving a foreign sentence legal effect.

The Agreement recognizes the principle of allowing counting of periods of coverage that have accrued in favour of the citizens of each Contracting Country in its own territory when these citizens are working in the territory of the other country, with regard to old-age and survivor's insurance, except for any overlap or duplication, subject to the faculty — for whom it may concern — to waive this rule.

When the 1935 Convention on the maintenance of pension rights of emigrants comes into force, its dispositions will have precedence vis-à-vis the rules contained in this Agreement.

All matters arising from this Agreement supplementing the Treaty will be dealt with on a friendly basis and with appropriate consultations.

The agreeement will come into force on the day of the exchange of ratifications.

The exclusion of any discriminatory treatment or of arbitrary measures causing harm to citizens, juridical persons or Italian or American associations operating in the territory of the other country, the opportunity of free control of enterprises, the most-favoured-treatment granted to transferability of capital, tax relief, etc., are rules which, appropriately supplementing those rules contained in the Treaty of Friendship of 26 September 1951, help the economy, especially the Italian one, since they are aimed at furthering US capital investments in Italy.

The Agreement also contains a rule of juridical and social nature which deserves full approval, namely, the rule guaranteeing to the worker who moves from one State to the other the right to avail himself, in one State, of the benefits achieved in the other country with regard to disability or survivor's insurance. This is in compliance with a healthy principle of safeguarding the worker's rights, irrespective of the place where he/she carries out his/her activity.

The Commission expresses to the Senate its opinion in favour of the ratification of the Agreement.

(Signed) JANNUZZI,
Rapporteur.

BILL

Article 1

The President of the Republic is authorized to ratify the Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the Italian

Republic and the United States of America of 2 February 1948, signed in Washington on 26 September 1951.

Article 2

The Agreement cited above takes full effect as of the date of its coming into force, in compliance with Article IX of the Agreement itself.

Document 14

SENATE OF THE REPUBLIC, PARLIAMENTARY PROCEEDINGS, LEGISLATURE III, SESSION 291ST ASSEMBLY, 19 JULY 1960, PAGES 13758-13759

[Italian text not reproduced]

SENATE OF THE REPUBLIC — PARLIAMENTARY PROCEEDINGS — PAGES 13578 AND 13579 — LEGISLATURE III — 291ST SESSION (MORNING), ASSEMBLY — STENO REPORT 19 JULY 1960

PASSING OF THE BILL: "RATIFICATION AND EXECUTION OF THE AGREEMENT SUPPLEMENTING THE TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE ITALIAN REPUBLIC AND THE UNITED STATES OF AMERICA OF 2 FEBRUARY 1948, SIGNED IN WASHINGTON ON 26 SEPTEMBER 1951" (931).

(Passed by the Chamber of Deputies.)

President: The agenda brings the debate on the bill: "Ratification and Execution of the Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, signed in Washington on 26 September 1951", already passed by the Chamber of Deputies.
I declare the general debate open.
Since no one calls for the floor, I declare the debate closed.
The honourable Rapporteur has the floor.

Jannuzzi, Rapporteur: What is involved is an agreement supplementing a Convention already entered into, which is aimed at improving more and more the system of investment of United States capital in Italy and of Italian capital in the United States. The Convention, the way it is formulated, appears quite advantageous for the Italian economy. In particular, it displays a social aspect which should not be neglected, since it allows counting of periods of coverage that have accrued in favour of the citizens of each Contracting Country in its own territory when these citizens are working in the territory of the other country, with regard to old-age and disability insurance, except for any overlap or duplication. This principle is socially and juridically just, and for this reason as well, the Convention must be passed.
The Senate can ratify this supplemental Agreement with a clear conscience and in the conviction of doing something useful for the Italian economy.

President: The Honourable Minister of Foreign Affairs has the floor.

Segni, Minister of Foreign Affairs: Mr. President, Honourable Senators, I add my voice to the points raised by the Rapporteur, and I ask the Senate to pass this Convention, whose date, incidentally, is rather far back, so that the delay in passing it is causing harm to our economy.

President: We now move on to the discussion of the articles. I call upon the Secretary to read them.

Russo, Secretary:

Article 1

The President of the Republic is authorized to ratify the Agreement Supplementing the Treaty of Friendship, Commerce and Navigation between the Italian Republic and the United States of America of 2 February 1948, signed in Washington on 26 September 1951.

(It is approved.)

Article 2

The Agreement cited above takes full effect as of the date of its coming into force, in compliance with Article IX of the Agreement itself.

(It is approved.)

President: I put the bill to the vote. Those who are in favour are requested to rise.

(It is passed.)

Document 15

HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, EIGHTIETH CONGRESS, SECOND SESSION, ON A PROPOSED TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION, BETWEEN THE UNITED STATES AND THE ITALIAN REPUBLIC, 30 APRIL 1948

PROPOSED TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES AND THE ITALIAN REPUBLIC

Friday, 30 April 1948.

United States Senate,
Committee on Foreign Relations,
Subcommittee on Italian Treaty,
Washington, D.C.

The subcommittee appointed to study the proposed treaty of friendship, commerce, and navigation between the United States and the Italian Republic met, pursuant to call, in room 312 of the Senate Office Building, Washington, D.C., at 10 o'clock a.m., Senator Elbert D. Thomas of Utah (chairman of the subcommittee) presiding.

Present: Senators Thomas of Utah and Lodge.

Also present: the Honorable Willard Thorp, Assistant Secretary of State for Economic Affairs; Mr. Winthrop G. Brown, Acting Deputy Director, Office of International Trade Policy and Chief, Division of Commercial Policy; Mr. Walworth Barbour, Chief, Division of Southern European Affairs; and Mr. Vernon G. Setser, Acting Assistant Chief, Division of Commercial Policy, Department of State; Mr. Thomas C. Blaisdell, Jr., Director, Office of International Trade, Department of Commerce.

Senator Thomas of Utah: The committee will please be in order. The committee is meeting today to consider the proposed treaty of friendship, commerce, and navigation between the United States and the Italian Republic.

This is an important day in the development of our relations with Italy. We are opening hearings today on a treaty of friendship and commerce with Italy which is of significance for both our countries. For the United States, it is the first treaty of its kind negotiated with any European country since 1934.

The treaty, furthermore, marks another milestone in the traditionally cordial relations between the Italian and the American peoples. These relations have been marked by our extension of relief and other aid to Italy, our quick ratification of the treaty of peace with Italy, and our passage of the European recovery program in which Italy plays an important role.

For Italy, this treaty is a further development in the resumption of her customary responsible position in the family of nations — a position which, we hope, will soon be fully restored by her admission to the United Nations, a step which I have urged for a long time. Incidentally, there I might say that it became my honor and duty to make the motion and to deliver a speech inviting Italy into the International Labor Organisation in 1945. In this treaty, the first of its kind negotiated by Italy since the return to normal relations, the Italian Government,

moreover, has given evidences of support of the liberal principles of business and trade which the United States has advocated for many years.

Now that the Economic Cooperation Administration has begun its operation, it is of the highest importance that normal commercial relations with the participating countries be reestablished so that the greatest possible use can be made of private channels of trade, as specified by the provisions of the Economic Cooperation Act. The present treaty, therefore, provides a stable framework within which American businessmen, with assurances of protection and absolutely fair treatment, can make a great contribution to the success of the European recovery program and the revival of the Italian economy with the many mutual benefits which can be derived from these two important objectives.

Now I would like to ask some questions in a rather categorical manner dealing with the treaty and the background leading up to the treaty. Some of these questions we will ask Mr. Blaisdell to answer and some Mr. Brown, so that if they all will offer the answers when they have them I will appreciate it, because it is background and foundation that we need in dealing with the treaty.

ALIEN PROPERTY

First of all, how does this treaty affect our Alien Property Custodian's work in the United States?

Mr. Brown: It does not affect it at all, sir.

Senator Thomas of Utah: In other words, all that the Alien Property Custodian may have of Italian property will be administered and the property will be returned or adjudicated, or whatever it is they do with it, entirely independent of any provisions in this treaty.

Mr. Brown: That is correct, sir, and after it goes back to the Italian national, then he is able to claim the rights under the treaty.

Senator Thomas of Utah: Those, then, are the rights of an ordinary Italian citizen, and not a former alien enemy.

Mr. Brown: Yes, sir.

Senator Thomas of Utah: Do we need any more information with regard to that, Mr. Brown? Can I say categorically that the treaty in no way affects any of the relationships which come about as a result of the administration of the Alien Property Custodian law?

Mr. Brown: That is my understanding, Senator.

Senator Thomas of Utah: One more of a general kind: Is there anything in this treaty which will in any way affect any cases which we may have under the Trading with the Enemy Act?

Mr. Brown: No, sir.

Senator Thomas of Utah: Ordinarily, the Trading with the Enemy Act is a prohibition against American citizens; is it not? Still, as this is a mutual commercial treaty, we may have cases dealing with American citizens under that act which might in some way be related to this treaty. Can any of you think of anything that we should know about?

Mr. Brown: It is my impression, Senator, that there is no possible conflict there, but I would like to check that specific question with our legal people and give you a firm memorandum by tomorrow.

(The matter referred to is as follows:)

RELATIONSHIP OF TREATY WITH ITALY TO THE TRADING WITH THE ENEMY ACT

It is the understanding of the Department of State that there is no conflict between the present proposed treaty and the Trading with the Enemy Act or regulations issued thereunder, and that the treaty will interfere in no way with the functions of the Alien Property Custodian. The provisions of the treaty relating to property are not intended to apply to situations in which the property of the nationals of Italy are controlled in this country as a result of a state of war. There are treaty commitments with respect to the protection and disposition of property in a number of treaties now in force between the United States and other countries, and these provisions have not been invoked with respect to situations resulting from a state of war. It is thought that, in most instances, measures taken under the Trading with the Enemy Act would be covered by an express exception in Article XXIV, paragraph 1 *(e)*, of the treaty with Italy for measures taken "for the protection of the essential interests of the country in time of national emergency".

Senator Thomas of Utah: And if there is anything that should go in the record in relation to either the Alien Property or the Trading with the Enemy Act, I would like to know about those things in a rather substantial way; not long, but so that I can be positive in the answers I give.

Mr. Brown: We will try to give it to you in one sentence.

Senator Thomas of Utah: Fine.

TREATY OF 1871

In 1937 the 1871 Treaty of Commerce with Italy was terminated. Why was that treaty terminated?

Mr. Setser: There were certain provisions in it which were not being applied by the Fascist Government wholly to the advantage of American interests, and for that reason it was mutually agreed to terminate the treaty.

Senator Thomas of Utah: The treaty was not renounced by the United States?

Mr. Setser: No, sir. A new treaty was negotiated and agreement reached upon the provisions but it was not concluded for the reason that there was the question involved of the recognition by the United States of the conquest of Ethiopia, and the treaty fell for that reason.

Senator Thomas of Utah: Then the fact that Italy had moved into Ethiopia made the new treaty impossible, so that there were international political aspects when it came to writing a new treaty, is that correct?

Mr. Setser: That is correct.

Senator Thomas of Utah: But there were no international complications — that is, international political complications — aside from disagreement with Fascist theories, that caused us to renounce the treaty of '71, is that correct?

Mr. Setser: No, sir. It was wholly considerations affecting the commercial provisions which were not adapted to the situation existing in 1937.

EXISTING TREATY RELATIONSHIPS

Senator Thomas of Utah: Since the termination in 1937 of the 1871 Treaty of Commerce with Italy what, if any, treaties are in effect between Italy and the United States, apart from the peace treaty of 1947?

Mr. Thorp: There are a number of treaties which have been revived, and I think perhaps the most helpful thing would be for me to offer the press releases from the Department of State in connection with these matters.

(The matter referred to is as follows:)

DEPARTMENT OF STATE

For the Press February 11, 1948.
No. 108.

The Department of State announced today that on February 6, 1948, the Italian Government was given official notification, in accordance with the terms of the Treaty of Peace with Italy signed at Paris February 10, 1947, regarding the pre-war bilateral treaties and other international agreements with Italy which the United States Government desired to keep in force or revive. Following is the text of the note from the American Ambassador at Rome to the Italian Minister for Foreign Affairs giving such notification:

I have the honor to refer to the Treaty for Peace with Italy signed at Paris February 10, 1947, which came into force, in accordance with the provisions of Article 90 thereof, on September 15, 1947, upon the deposit of instruments of ratification by the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and France. Article 44 of the Treaty of Peace reads as follows:

"1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present treaty, which of its prewar bilateral treaties with Italy it desires to keep in force or revive. Any provisions not in conformity with the present treaty shall, however, be deleted from the above-mentioned treaties.

2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.

3. All such treaties not so notified shall be regarded as abrogated."

I have the honor, by direction of the Government of the United States of America and on its behalf, to notify the Italian Government, in accordance with the provisions of the Treaty of Peace quoted above, that the Government of the United States of America desires to keep in force or revive the following prewar bilateral treaties and other international agreements with Italy:

Arbitration

1. Arbitration treaty. Signed at Washington April 19, 1928. Ratified by the United States May 15, 1928. Ratified by Italy November 27, 1930. Ratifications exchanged at Washington January 20, 1931. Effective January 20, 1931. (*Treaty Series* 831, 46 Stat. 2890.)

Aviation

2. Air navigation arrangement. Effected by exchange of notes signed at Washington October 13, and 14, 1931. Effective October 31, 1931. (*Executive Agreement Series* 24; 47 Stat. 2668.)

Conciliation

3. Treaty for the advancement of peace. Signed at Washington May 5, 1914. Ratified by the United States March 17, 1915. Ratified by Italy November 29, 1914. Ratifications exchanged at Washington March 19, 1915. Effective March 19, 1915. (Article II was abrogated and replaced by Article I of the treaty of September 23, 1931). (*Treaty Series* 615; 39 Stat. 1618.)

4. Treaty modifying the terms of Article II of the treaty to advance the cause of general peace of May 5, 1914. Signed at Washington September 23, 1931. Ratified by the United States June 25, 1932. Ratified by Italy February 18, 1932. Ratifications exchanged at Rome July 30, 1932. Effective July 30, 1932. (*Treaty Series* 848; 47 Stat. 2102.)

Consuls

5. Consular convention. Signed at Washington May 8, 1878. Ratified by the United States June 4, 1878. Ratified by Italy July 9, 1878. Ratifications exchanged at Washington September 18, 1878. Effective, September 18, 1878. (Article XI, which was annulled by the Convention of February 24, 1881, and Article XIII, which was abrogated under act of Congress approved March 4, 1915, are not to be considered as revived by this notification.) (*Treaty Series* 178; 20 Stat. 725.)

Debt funding

6. Debt-funding agreement. Signed at Washington November 14, 1925. Effective as of June 15, 1925. (Combined Annual Reports of the World War Foreign Debt Commission (1927) p. 222.)

7. Agreement modifying the debt-funding agreement of November 14, 1925 (moratorium). Signed at Washington June 3, 1932. Effective as of July 1, 1931. (Published by the Treasury Department, 1932.)

Extradition

8. Extradition convention. Signed at Washington March 23, 1868. Ratified by the United States June 22, 1868. Ratified by Italy July 19, 1868. Ratifications exchanged September 17, 1868. Effective September 17, 1868. (*Treaty Series* 174; 15 Stat. 629).

9. Additional article to extradition convention of 1868. Signed at Washington January 21, 1869. Ratifications exchanged at Washington May 7, 1869. Effective May 7, 1869. (*Treaty Series* 176 (printed with 174); 16 Stat. 767.)

10. Supplementary convention to extradition convention of 1868. Signed at Washington June 11, 1884. Ratified by the United States April 10, 1885. Ratified by Italy August 8, 1884. Ratifications exchanged at Washington April 24, 1885. Effective April 24, 1885. (*Treaty Series* 181 (printed with 174); 24 Stat. 1001.)

Narcotic drugs

11. Arrangement for the direct exchange of certain information regarding the traffic in narcotic drugs. Effected by exchange of notes signed at Rome, January 5, and April 27, 1928. Effective April 27, 1928. (*Treaty Information Bulletin* No. 5 (July 1929) 2d supp.)

Navigation

12. Agreement relating to the reciprocal recognition of certificates of inspection of vessels assigned to the transportation of passengers. Effected

by exchange of notes signed at Washington June 1, August 5, and August 17, 1931. Effective August 15, 1931. (*Executive Agreement Series* 23; 47 Stat. 2665.)

Passport visa fees

13. Agreement relating to the waiver of passport visa fees for nonimmigrants. Effected by exchange of notes signed at Rome February 11, 21, and 26, 1929. (Not printed.)

Postal

14. Convention relating to exchange of money orders. Signed at Washington March 31, 1877, and at Florence April 20, 1877. Effective July 2, 1877. (20 Stat. 683.)

15. Additional convention to the convention relating to exchange of money orders signed at Washington March 31, 1877, and at Florence April 20, 1877. Signed at Washington August 24, 1880, and at Rome August 9, 1880. Ratified by the United States August 25, 1880. (21 Stat. 788.)

16. Parcel Post Convention. Signed at Washington October 11, 1929. Ratified by the United States October 18, 1929. (Post Office Department print; 46 Stat. 2397.)

Taxation

17. Arrangement for relief from double income tax on shipping profits. Effected by exchange of notes signed at Washington March 10, and May 5, 1926. Effective from January 1, 1921. (*Executive Agreement Series* 10; 47 Stat. 2599.)

Trade-marks

18. Declaration for the reciprocal protection of marks of manufacture and trade. Signed at Washington June 1, 1882. Effective June 1, 1882. (*Treaty Series* 180; 23 Stat. 726.)

This notification will be deemed to be effective on the date of the present note.

It is understood, of course, that either of the two Governments may propose revisions in any of the treaties or other agreements mentioned in the above list.

Further, it shall be understood that any of the provisions in the treaties and other agreements listed in this notification which may be found in particular circumstances to be not in conformity with the Treaty of Peace shall be considered to have been deleted so far as the application of the Treaty of Peace is involved but shall be regarded as being in full force and effect with respect to matters not covered by the latter treaty.

The reciprocal copyright arrangement between the United States and Italy effected pursuant to the exchange of notes signed at Washington, October 28, 1892, and the exchanges of notes signed at Washington, September 2, 1914, February 12, March 4, and March 11, 1915, will be the subject of a separate communication.

The agreement for the protection of trade-marks in Morocco, effected by exchange of notes signed at Tangier June 13, July 29, and December 19, 1903, and March 12, 1904, will also be the subject of a separate communication.

In compliance with paragraph 2 of Article 44 of the Treaty of Peace, quoted above, the United States Government will register with the Secretariat

of the United Nations the treaties and other agreements which are by this notification kept in force or revived.

* * *

DEPARTMENT OF STATE

For the Press. March 16, 1948.
No. 207.

In the notification given to the Italian Minister for Foreign Affairs on February 6, 1948, regarding the prewar bilateral treaties and other international agreements with Italy which the United States Government wished to revive or keep in force (see press release 108 of February 11, 1948) it was stated that the reciprocal copyright arrangement and the agreement for the protection of trade-marks in Morocco would be the subject of a separate communication. Following is the text of a note delivered on March 12, 1948, to the Italian Foreign Office by the American Embassy at Rome:

"I have the honor to refer to my note of February 6, 1948, giving official notification, in accordance with Article 44 of the Treaty of Peace with Italy dated at Paris February 10, 1947, regarding the prewar bilateral treaties and other international agreements with Italy which the United States desires to keep in force or revive. It was stated in that notification that the reciprocal copyright arrangement between the United States and Italy and the agreement for the protection of trade-marks in Morocco would be the subject of a separate communication.

I have the honor to inform you now that the Government of the United States of America wishes to include the reciprocal copyright arrangement between the United States and Italy effected pursuant to the exchange of notes signed at Washington October 28, 1892, and the exchanges of notes signed at Washington September 2, 1914, February 12, March 4, and March 11, 1915, among the prewar bilateral treaties and other international agreements with Italy which the United States desires to keep in force or revive. Accordingly, it is understood that the afore-mentioned arrangement will continue in force and that the Government of each country will extend to the nationals of the other country treatment as favorable with respect to copyrights as was contemplated at the time the arrangement was entered into by the two countries.

The Government of the United States of America also desires to continue in force or revive the agreement for the protection of trade-marks in Morocco, effected by exchange of notes signed in Tangier June 13, July 29, and December 19, 1903, and March 12, 1904."

* * *

Mr. Thorp: The subject-matters involved are copyrights, arbitration — this is not a commercial arbitration but a political arbitration treaty — aviation, conciliation, consular convention, debt funding agreement — which has to do with the moratorium of 1925 — extradition convention, narcotic drugs, navigation, passport visa fees, postal conventions, arrangement for relief from double tax on shipping profits, and trade-marks. That is the list of the previously existing treaties which have been revived by declaration by this Government.

Senator Thomas of Utah: Revived as a result of the peace treaty of 1947?

Mr. Thorp: As a result of the peace treaty, which gave authority to revive them on such notification. Any other treaties which were not so notified lapse under the peace treaty.

Senator Thomas of Utah: That is, there remained in the United States the power to revive or the power to not revive any agreements that existed before the war?

Mr. Thorp: That is correct.

ACTION BY THE ITALIAN GOVERNMENT

Senator Thomas of Utah: What steps have been taken by the Italian Government to ratify this treaty, Mr. Thorp?

Mr. Thorp: We have been informed by the Italian Embassy that the Italian Government wishes to proceed in parallel with the United States on the matter of ratification. The newly elected Italian Parliament convenes on May 8. They will undoubtedly have certain organization business to do, but it is our expectation that this will be considered by them as soon as practical after May 8. In other words, there is approximately a parallel consideration by the Italian Parliament and by our Congress of the treaty.

RELATIONSHIP TO PEACE TREATY

Senator Thomas of Utah: What is the relationship of this treaty to the treaty of peace with Italy?

Mr. Thorp: The treaty of peace with Italy contained in Article 82 some general economic provisions which were to be applied for a period of 18 months. I can say, because I was involved in negotiating this article, that the provision was intended to govern the situation while it was possible to negotiate more elaborate treaties, and it was for that reason that the peace treaty contains a rather general formula for an 18 months' period. There is nothing in this proposed treaty which is in conflict with the peace treaty. We have had it examined by the legal adviser's office in the Department of State and have such an opinion. There is nothing in this treaty that would prevent the revision of the peace treaty if that should be desirable, or that bears on one of the most important undetermined problems, and that is the final disposition of the Italian colonies.

Senator Thomas of Utah: Will you say something about that? Will this disposition have any effect upon this treaty under consideration?

Mr. Thorp: No, it would not. It would, I suppose, follow that if some or all of the Italian colonies were returned to Italy, then this treaty would have a bearing on the applicable procedures in those colonies.

Senator Thomas of Utah: That is, the treaty would be extended to cover the colonies?

Mr. Thorp: Yes; that is correct.

Senator Thomas of Utah: Does the treaty reach the colonies today?

Mr. Thorp: No, I do not think it does. Those colonies today are not under the jurisdiction of Italy.

Senator Thomas of Utah: Under whose control are they?

Mr. Thorp: May I ask Mr. Barbour?

Mr. Barbour: The colonies were surrendered by the peace treaty, and in accordance with the decisions of the Council of Foreign Ministers, a commission is now examining with a view to reporting its findings at an early date concerning the disposition of the colonies. If within a year no decision is made, the question of their disposition goes to the United Nations.

Senator Thomas of Utah: Who administers the government in those colonies at the present time, an inter-Allied commission of some kind?

Mr. Barbour: They are still under British military administration.

Senator Thomas of Utah: The British have all of them?

Mr. Barbour: The British military mission is in all of them, I think.

COMPARISON WITH PREVIOUS TREATIES

Senator Thomas of Utah: In what way does this treaty constitute a departure from prewar commercial relationships with European colonies, Mr. Thorp?

Mr. Thorp: There are a number of new developments in connection with treaties which are signified in this case. In the first place, one of the conspicuous differences is the general recognition of the rise of the corporation as an important economic instrument.

CORPORATIONS

Senator Thomas of Utah: When you speak of "corporation", that immediately arouses something in my system, or in me, because of the Fascist or Mussolini's theory of the corporate state. Is there any relationship?

Mr. Thorp: No, there is no relationship at all. I am thinking of the corporation merely as a form of organization for doing business in the sense in which we have corporations in this country.

Senator Thomas of Utah: A body created by law.

Mr. Thorp: That is correct.

Senator Thomas of Utah: And "corporation" in Italy means the same as "corporation" in the United States, and wherever the word is used in this treaty it has the same legal significance as it has within the United States? Is that true?

Mr. Thorp: That is true except, of course, as between different countries there are differences in corporation law in its details, but fundamentally it is correct that we are talking of this form of economic organization with which we are all familiar.

Senator Thomas of Utah: It has nothing at all to do with the old political concepts?

Mr. Thorp: It has nothing to do with a corporate state which was a highbrow name for the old Nazi organization in which whole industries were organized on a basis of a central control.

Another element that is new in this treaty is the paragraph with the article in it relative to freedom of information. This is a new type of provision and, I think, is perhaps one of the most important new developments. This is in Article XI in the treaty.

Then there are a series of provisions having to do with exchange difficulties which are necessary because of the monetary problems that have developed since

the war, and recognition of those and protection against discriminatory operation in connection with exchange controls.

Then there is a new approach to the problem of what happens when a government goes into business and then the necessity, if there remain private enterprises in competition, for a fair opportunity being given to those competing private enterprises, and there is in this treaty a provision creating obligations for fair treatment of private enterprises when they are in a position of competition with public enterprises. In the past there have been — I think perhaps they are tightened up in this treaty — provisions with respect to a complete change; that is, nationalization, but now I am referring particularly to cases where there exist side by side public and private operation.

Those are the chief new developments that occur to me. Do you have any to add, Mr. Brown?

Mr. Brown: No; those are the major ones.

FREEDOM OF INFORMATION

Senator Thomas of Utah: Tell us a little more about the information provision, Mr. Thorp.

Mr. Thorp: This is the first treaty to come before the Senate which has contained a specific provision for giving effect internationally to the ideal of freedom of information. This principle is already endorsed by the Congress in a concurrent resolution adopted in 1944, and the United Nations Conference on Freedom of Information at Geneva has recently completed a formulation of certain recommendations looking toward a multilateral approach to this problem. The provision in the present treaty offers a minimum standard of treatment which we hope may be included in many bilateral treaties hereafter and which should provide worthwhile protection for American nationals engaged in information activities. When I describe it in terms of Americans in Italy, of course this is a mutual treaty and the same privileges would be given to Italians in the United States.

It permits nationals, corporations, and associations to engage in such activities in the other country as writing, reporting, gathering of information for dissemination to the public; it provides freedom of transmission of material to be used abroad for publication by the press, radio, motion pictures, and other means. It provides freedom of publication in the territories of the other party under whatever may be the applicable laws and regulations on the same terms as nationals may have in that country. It does not provide a special privilege, in other words, but it provides a national treatment in connection with publication.

The term "information" as agreed to here refers to printed matter, motion pictures, recordings, photographs, written communications of all kinds.

Senator Thomas of Utah: Does anyone have anything to add to that?

PROTECTION FOR AMERICAN BUSINESS

What new features and protections are provided for American business? For example, protection against discriminatory exchange?

Mr. Brown: The treaty recognizes the fact that it may be necessary, under certain circumstances, when there are great shortages of exchange, to exercise control. The main thing that the treaty does is to provide that when such controls are necessary they must be exercised in a nondiscriminatory manner, and that where there are limitations on the transfer of dollars, for example, everybody

should get the same treatment, both in terms of exchange rate and in the share of the amount of dollars proportionately that they are allowed to take out. The principle of nondiscrimination is the basic one.

Senator Thomas of Utah: You already mentioned State trading and monopolies. Have you anything more to say about that — the ideas behind trading by State and monopolies?

Mr. Brown: The treaty provides that where either party engages in State trading, the State-trading organization must be guided in its operations by the ordinary commercial principles of price and quality and terms of sale and that type of thing that the ordinary businessman would be controlled by in a completely private-enterprise system. I think it is only fair to say that that is a difficult standard to administer, but it sets a principle and it gives an opportunity for representations if it is not lived up to.

And the second thing that the treaty does is that it provides that if the state-trading enterprise gets any particular benefits from the Government, those benefits must be extended similarly to the private enterprise of the other country if it is in competition in the same business. That is to say, if there were an American corporation doing business in Italy and there were an Italian state-trading enterprise engaged in the same business, the American firm would be entitled to receive any, shall we say, tax exemption or special privilege which was accorded to the competing Italian State enterprise, and vice versa.

STATE TRADING

Senator Thomas of Utah: This provision, your state-trading and monopoly idea, the actual monopoly, is a rather one-sided provision. Are you not thinking more of Italy than you are of ourselves?

Mr. Brown: Yes, of course; the Italians are much more likely to use that form of enterprise than we would be.

Senator Thomas of Utah: Do you call those corporations that traded under the China Trade Act of '22 state-trading organizations?

Mr. Brown: No, sir. They are simply a private corporation incorporated under a Federal law instead of a State law.

Senator Thomas of Utah: And organized for the purpose of trade? But we did not do any State trading, did we, under that act?

Mr. Brown: Oh, no. They were purely private enterprises, and in fact the only way in which they were different from any other corporation was, first, that they had a Federal charter instead of a State charter; and secondly, that they received certain tax exemptions in this country.

Senator Thomas of Utah: In our system, have you an example of State trading at all?

Mr. Brown: Oh, yes. The Government does a good deal of procurement. The Treasury Department buys; the Agriculture Department buys grain; the Metals Reserve Corporation used to buy for stock piling; the Rubber Reserve Corporation bought rubber; so that we have had in this country a certain amount of State trading, and that would be a kind of State trading enterprise.

Senator Thomas of Utah: The treaty will not interfere with that.

Mr. Brown: It will not interfere with that. It will cover the situation that if there should be an Italian corporation doing the same thing, we would have to give them fair treatment, but we think the chances of that are pretty remote.

Senator Thomas of Utah: Have we a private monopoly at all in America that we have to think about?

Mr. Brown: A private monopoly would not come under this clause at all.

Senator Thomas of Utah: It is not recognized in this at all?

Mr. Brown: There is a provision in the treaty which says that the parties recognize that business practices restraining competition — in words, cartel practices and monopolies — are undesirable, and if the nationals of either get in trouble in that kind of situation there will be consultation to see what can be done about it. That is the only case in which it is mentioned.

Senator Thomas of Utah: In other words, these provisions, so far as the United States is concerned, are put in there for the benefit of our own traders against what might happen in the other country?

Mr. Brown: That is the principal idea that we had in mind.

NATIONALIZATION

Senator Thomas of Utah: In the same way, nationalization and expropriation — are we thinking primarily of what might happen in Italy, too, there?

Mr. Brown: Oh, yes.

Senator Thomas of Utah: Have we any example of nationalization, aside from stock piling?

Mr. Brown: We would have examples of expropriation under eminent domain, but it would be our normal practice to give prompt and just satisfaction in terms of convertible currency.

Senator Thomas of Utah: We have never considered eminent domain as being a practice that brought about confiscation; have we?

Mr. Brown: No, sir. It is something that is done rarely, and then only on fair and full compensation adjudicated by the Court.

Senator Thomas of Utah: Do you think this treaty is powerful enough to extend those theories, so far as our citizens are concerned, to Italy?

Mr. Brown: There is a formal commitment in the treaty stating that the Italian Government will give prompt, just and effective compensation. The difficulty that is likely to come up there would be the difficulty of providing the foreign exchange to our national in payment for his property, and on that score we are covered in the exchange provisions. We get the best treatment, or as good treatment as either an Italian national or the national of any other country gets. That is the most you can do if there just are not enough dollars to go around.

EFFECT OF THE PROTOCOLS

Senator Thomas of Utah: The two protocols beginning on page 23 of the Senate document seem to cancel out some of the treaty. What is the effect of these two protocols, Mr. Thorp?

Mr. Thorp: I think perhaps Mr. Brown had better answer that.

Mr. Brown: The first protocol is mainly corrective. The second one recognizes the current difficulties in which Italy finds herself because of the shortage of foreign exchange, and it relaxes some of the provisions of the treaty which obligate Italy to give advantageous treatment with respect to foreign exchange

when they are in a condition where their reserves are very low or where they are in real balance-of-payment difficulties, and it was felt that it was better to get a good, firm, satisfactory rule in the treaty itself, which would last for the long term, and then recognize what we hope will be the transitional difficulties of the current period in a protocol giving, so to speak, a temporary waiver of those provisions, than it would be to take a weaker provision in the treaty itself.

The protocol, generally speaking, permits the Italians to depart — this is principally for the benefit of Italy, of course — somewhat from the rules in the treaty with respect to foreign exchange by imposing restrictions which would be permitted under the articles of agreement of the Monetary Fund, or restrictions on the transfer of exchange which are similar to those which we have negotiated with other countries in such documents as the general agreement on tariffs and trade recently concluded at Geneva. But this is simply a recognition of the fact that when a country is extremely short of dollar exchange, it will have to take some very tight control, and sometimes discriminatory control, measures, simply to get what it must have in order to survive, and it is in our interest as well as theirs to recognize that fact, but simply to be sure that they do not do it except when they really need to.

Senator Thomas of Utah: In other words, your hope is that the protocol provisions will be temporary?

Mr. Brown: Paragraph 2 of the additional protocol states that the provisions which it gives are limited to situations where it is necessary for Italy to restrict imports in order to forestall serious decline in monetary reserves, or to get necessary imports which they could not possibly get in any other way. Those are the only cases in which it applies.

ITALIAN TREATY OMITS COMMERCIAL ARBITRATION

Senator Thomas of Utah: The Italian treaty omits mention of commercial arbitration which is included in the China treaty. What is the reason for this?

Mr. Thorp: In this case, Mr. Senator, the provision in the China treaty was a difficult one for the Italians to accept because of their belief that it was incompatible with their own Italian law. This is not left out because of a fundamental disagreement with respect to the desirability of commercial arbitration, but the difficulty of finding a formula that was acceptable. As you, of course, know, the problem with these treaties arises from the fact that we have certain things which we should like, from the American point of view, to place in the treaties, but we know that when we arrive at agreement with the other country there will be deviations among all of the treaties. It does not mean that there is a difference in our American approach, but that there necessarily must be some adaptation to the wishes of the other country and their legal position.

This particular case is one where we have had difficulty in working out something that will fit both of our legal structures with respect to arbitration.

REFERENCE TO SOCIAL-SECURITY PROVISIONS

Senator Thomas of Utah: The reference to social security and other compulsory insurance schemes is an innovation in this kind of treaty, is it not?

Mr. Brown: Yes, sir, Senator.

Senator Thomas of Utah: Why is it in the treaty?

Mr. Brown: The Italians really were the spark plug on this provision. They were very anxious to work out some extremely elaborate provisions about social-security benefits with which we were not able to go along, and this brought a modest provision which simply says that either party can have the benefit of the schemes in effect in the other country. That was what we finally came out with.

Senator Thomas of Utah: What is the practical aspect of this? Take a concrete example of an Italian national who has been working in our country. He has a social-security number here and goes over and works in Italy. Does he take any equity with him?

Mr. Brown: No more than if he went to any other country. Nothing in the treaty would give him any benefits except what he would be entitled to under his social-security number.

Senator Thomas of Utah: Now then, reverse it.

Mr. Brown: I think this would say that you could not exclude an Italian citizen resident here and otherwise entitled to social security.

Senator Thomas of Utah: In other words, if you are giving social security to all of the workmen in some big corporation in our country, if an Italian immigrant comes in and gets a job, he will enjoy the same rights of social security, and he will have to live up to the same obligations?

Mr. Brown: That is correct.

Senator Thomas of Utah: And he will not be treated in any way different from the American national. If he quits his job, whatever he is entitled to he gets, and what he is not entitled to he cannot get, even if Italian law — and he may still be having some advantages over in Italy from an old social-security arrangement — is more liberal.

Mr. Brown: Oh, yes. All he gets is what the American gets under the American law. And all the American national in a comparable position in Italy gets is what the Italian would get under the Italian law.

Senator Thomas of Utah: We are not in any way modifying our Social Security Act?

Mr. Brown: No indeed.

Senator Thomas of Utah: All right.

FREEDOM OF INFORMATION

Article XI, section 2, contains a "freedom of information" provision. That has been mentioned. Now let us see if there is something more we want to ask about that. It was suggested that it is new.

Mr. Thorp: Yes; this is new.

Senator Thomas of Utah: Give us the relationship between the article and what we have attempted to bring about in the World Conference on Freedom of Information at Geneva, Mr. Thorp.

Mr. Thorp: I think they are both directed at the same objective. Our fundamental objective is to achieve all that is meant by the phrase "freedom of information" — the opportunity of individuals to go in and make inquiry, regardless of what the jurisdiction over the area may be; their freedom to send reports out and the freedom of publication within the area as much as freedom may exist within the area. There is no distinction, really, between the objectives that are

incorporated in this treaty and the objectives of our delegation at the recent conference.

Of course, at that conference there was a great deal more in the way of elaboration of such problems as who was responsible for honesty on the part of the press, and so forth. But this is really taking action as between ourselves and Italy in a field in which the United Nations is trying to write policy but has not yet reached a point where action as such is on the horizon.

Senator Thomas of Utah: Can we go so far as to say that what we are doing is quite experimental?

Mr. Thorp: I think that is true. I think I would prefer to call it pioneering rather than experimental. It is a new area.

Senator Lodge: What is the United Nations doing about it?

Mr. Thorp: The Freedom of Information Conference, which has recently been held was for the purpose of trying to develop an international opinion which might be incorporated into conventions or a multilateral agreement that would establish certain principles with respect to freedom of information.

COMPARISON WITH PREVIOUS TREATIES

Senator Lodge: Has the State Department made a list anywhere of the features of this treaty which are different from what we have done in the past?

Mr. Thorp: I have summarized that briefly in an earlier statement, but we can make a very exact and formal statement on it if you would like.

Senator Lodge: I would like to have it exact. I do not want to have it too formal. I would like just a general idea of how this is different from what we usually do. That is, after all, what we have to confront up here. Can you do that? It seems to me it is pretty hard to reach a decision on a matter of this kind which is as long as this is, and as intricately written as this, unless you know what is new and what is merely repeating the traditions.

Mr. Thorp: I think the total picture should be clear if you take the material that was presented to this committee with respect to the China treaty, where there was a fairly general discussion of both the standard provisions and some new provisions, and if we incorporate in the record, or if I present the statement which I have prepared, which outlines things that are new in this treaty or things which are different from the China treaty —

Senator Lodge: Can you not save us the labor by comparing the whole thing? Can you not give us a brief list of the things in this treaty that are new?

Mr. Thorp: I will be glad to give it to you or to outline again, if Senator Thomas wants me to, a brief list that I gave before.

Senator Thomas of Utah: I think as a sum-up of what has already been said in answer to Senator Lodge's question, we could have it all in one paragraph.

Mr. Thorp: All right.

Senator Lodge: You can see for yourself the things that are traditional, that we have always done, are matters that on the committee we can put to one side, but things that are new are the things that we can put the magnifying glass on.

Mr. Thorp: We will prepare such a statement.

(The statement is as follows:)

Comparison of the Treaty with Italy, Signed February 2, 1948, with Previous Treaties of Friendship, Commerce, and Navigation Concluded by the United States

In the period from 1923 to 1938, during which the Department of State was engaged in an extensive program directed to the conclusion of treaties of friendship, commerce, and navigation, about a dozen treaties of this general type were concluded, including treaties with Germany (1923), Austria (1928), El Salvador (1926), Finland (1934), Honduras (1927), Hungary (1925), Norway (1928), Latvia (1928), Poland (1931), Siam (1937), and Liberia (1938). These treaties differ among themselves as to detail but are generally similar. The last two in the group, the treaties with Siam and Liberia, have more points in common with the treaty with Italy now under consideration, than do the earlier ones in the group.

For the purpose of more detailed comparison with the treaty with Italy, the treaty with Norway, signed at Washington June 5, 1928 (IV Treaties (Trenwith) 4527), may be taken as representative of the group enumerated in the preceding paragraph. There are a few quite obvious differences between the two treaties. The Norway treaty deals extensively with consular rights. This is true of most, but not all of the treaties in the 1923-38 group. It is now the practice of the Department of State to deal with these matters in separate consular conventions.

Much subject-matter is common to the two treaties and the standards of treatment established is the same in a large number of the provisions. In the treaty with Italy, however, most of the provisions have been restated with *the object of making them more specific, more explicit, of adapting them* more fully to the coverage of situations which experience has indicated are likely to arise, and of bringing them wherever practicable into more complete accord with United States law and judicial decisions thereunder.

There follows a tabular comparison of the provisions of the two treaties.

(Note). — The statements in the following tabulation are designed to provide guidance to, and to facilitate the consultation of, the provisions of the two treaties to which they refer, and should not be construed as interpretations of those provisions.)

Subject	Treaty with Italy	Treaty with Norway
1. Entry of persons	Arts. I (1,3), XXIV (7). Rights of entry, travel and residence, limited by reservation covering immigration laws.	Art. I and Additional Article. Provisions comparable, though differently stated.
2. Activities of persons	Art. I. Rights to carry on specified activities on national treatment basis, and to acquire buildings and lease lands for specified purposes.	Art. I. Provisions comparable, though differently stated. List of activities somewhat more restricted than in Italian treaty.
3. Recognition of status of corporations	Arts. II (2), V (4). Juridical status to be recognized and access to courts permitted.	Art. XII. Provisions comparable.
4. Activities of corporations	Art. II (3). Rights to carry on specified activities on national treatment basis.	Art. XII. No comparable provisions. Activities of corporations made wholly subject to local laws.
5. Participation in domestic corporations	Art. III (1). Rights to participate in, manage and control corporations for any purpose on most-favored-nation basis. Art. III (2). Unqualified right to participate in, control and manage corporations for specified activities. Art. III (3). Right for domestic corporations participated in, managed or controlled by nationals of other party to carry on specified activities on basis of national treatment.	Art. XIII. Rights much less extensive than in Italian treaty. Most-favored-nation treatment as to participation in domestic corporations, but right of corporations participated in by aliens to carry on corporate activities wholly subject to the local laws.
6. Development of mineral resources	Art. IV. Most-favored-nation treatment with respect to exploration and exploitation.	Art. XIII. Most-favored-nation rights accorded for the mining of coal, phosphate, oil, oil-shale, gas, and sodium on the public domain.
7. Protection of persons and property	Art. V (1). Constant protection assured, and rights specified for persons in custody. Protection also to extend to property of corporations. National and most-favored-nation treatment standard applicable in this subject-matter.	Art. I. General rule as to protection almost identical with that in Italian treaty, but there is no reference to rights of persons in custody or specific reference to corporations. No reference to national or most-favored-nation treatment.

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Subject	Treaty with Italy	Treaty with Norway
8. Expropriation	Art. V (2). Right of expropriated person to prompt, just, and effective compensation. Right to withdraw compensation through obtaining foreign exchange. National and most-favored-nation treatment standard applicable in this subject-matter.	Art. I. Rule as to compensation almost identical with that in Italian-treaty, but no reference to withdrawal of compensation. No reference to national or most-favored-nation treatment.
9. Access to courts	Art. V (4). Freedom of access to courts, and right to employ counsel. National and most-favored-nation treatment.	Arts. I, XII. General rule on access to courts comparable to that in Italian treaty. No reference to national or most-favored-nation treatment.
10. Freedom from search	Art. VI. No unlawful entry or molestation. National treatment as to conditions and procedures as to lawful entry and search.	Art. III. Provisions comparable with those in Italian treaty.
11. Acquisition of real property	Art. VII (1). National treatment for American nationals and corporations in Italy. Rights of Italians in US subject to US laws. Italy not required to accord national treatment to citizens and corporations of states that do not accord national treatment to Italians.	No comparable provision.
12. Succession to real property	Art. VII (2). If local law bars alien from succeeding to real property, he shall be allowed at least 3 years to dispose of property.	Art. IV. Provisions similar to those in Italian treaty.
13. Personal property	Art. VII (3, 4). Right of disposition specified, and charges and restrictions to be no less favorable than those applicable in case of nationals. Most-favored-nation treatment as to acquisition and disposition.	Art. IV. Rights as to disposition comparable to those in Italian treaty. No reference to rights to acquire personal property or to most-favored-nation treatment.
14. Industrial property	Art. VIII. National and most-favored-nation rights as to patents, trade-marks, etc.	No comparable provision.
15. Internal taxation	Art. IX. Nondiscriminatory treatment stated in terms related to provisions of existing United States tax legislation. Exception for double-taxation treaties and reciprocity arrangements.	Art. I. National treatment is specified, without exception, except that the national treatment rule is not to apply to taxes related to the exploitation of waterfalls, mines, and forests.

16. Commercial travelers	Art. X. Most-favored-nation treatment with respect to customs and other rights and privileges.	Art. XIV. Provisions similar to those in the Italian treaty.
17. Religious activities	Arts. I (2), II (3), XI (1). Unqualified right to liberty of conscience and freedom of worship, and to hold religious services. National treatment generally for persons, corporations, and associations to carry on religious activities.	Arts. I, V. Provisions similar to those in Italian treaty, but without reference to the rights of corporations and associations.
18. Burial of dead	Art. XI (3). Right to bury dead according to religious customs in suitable and convenient places.	Art. V. Provisions nearly identical with those in Italian treaty.
19. Freedom of information	Art. XI (2). Adherence to principles of freedom of press and free interchange of information. Freedom of transmission of material to be used abroad for publication.	No comparable provision.
20. Civil liability for injury or death	Art. XII (1). National treatment under laws establishing civil liability or granting to person right of action or pecuniary compensation.	Art. II. Provisions similar to those in Italian treaty.
21. Social insurance	Art. XII (2). National treatment with respect to application of certain compulsory insurance laws.	No comparable provision.
22. Military service	Art. XIII. Nationals of one country within other to be exempt from service in armed forces, or contribution in lieu thereof except when 2 countries are engaged in common military action, when either may draft nationals of other, offering them opportunity to serve in own national forces.	Art. VI. In event of war with third state, either country may draft nationals of other who have declared intention to become citizens of that country, unless such nationals depart within 60 days after declaration of war.
23. Import and export duties and restrictions	Art. XIV. Most-favored-nation treatment generally as to treatment of articles, national treatment as to application of laws to persons.	Art. VII. Provisions generally comparable though differing in some details.

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Subject	Treaty with Italy	Treaty with Norway
24. Quantitative restrictions on imports and exports.	Art. XIV (4). Total quantity or value to be imported or exported to be made public. If quota assigned to one country, other party must be given share based upon representative period.	No comparable provision, except to extent that provisions according most-favored-nation treatment could be construed to cover subject-matter.
25. Customs administration	Art. XV. Laws, etc., to be published. Advances in rates imposed by administrative authority not to apply to articles en route at time of ruling. Procedure for appeal from decision of customs authorities to be provided.	No comparable provision.
26. Treatment of imported articles.	Art. XVI (1). National treatment of imported articles with respect to internal taxation, sale, distribution, or use.	Art. VIII. Same treatment to be accorded imported articles as to domestic articles, but provision is less specific than in Italian treaty.
27. Treatment of articles produced in one country by nationals and corporations of other	Art. XVI (2). National treatment to be accorded.	No comparable provision.
28. Export bounties, etc.	Art. XVI (3). National treatment with respect to export bounties, customs drawbacks, and warehousing.	Art. VIII. Provision comparable to that in Italian treaty.
29. Exchange controls	Art. XVII. Nondiscriminatory treatment in application of such controls as they affect products, and nationals and corporations.	No comparable provision, except to extent general provision for most favored-nation treatment could be construed to cover subject-matter.
30. Monopolies and state trading	Art. XVIII (1-2). Fair and equitable treatment as to purchases or sales, and purchases and sales to be influenced solely by commercial considerations.	No comparable provision, except to extent general most-favored-nation provision could be construed to cover subject-matter.
31. Restrictive trade practices	Art. XVIII (3). Harmful effects of such practices recognized, and each party agrees to consult with the other regarding such practices and to take such measures as it deems necessary to eliminate harmful effects.	No comparable provision.

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32. Entry of foreign vessels	Art. XIX. Recognition of national status of vessels of other. Most-favored-nation treatment for vessels and cargoes as to entry into ports.	Art. VII. *Provision comparable to that in* Italian treaty, except that in latter "vessels" is defined to include publicly owned and operated vessels as well as those privately owned and operated.
33. Treatment of foreign vessels	Art. XX. National treatment of vessels and cargoes.	Art. IX. Provisions similar to those in Italian treaty.
34. Imports and exports in foreign vessels.	Art. XXI. No discrimination between national vessels and vessels of other party with respect to articles permitted to be imported or exported, and no discrimination in payment of bounties on goods imported or exported.	Art. VII. Provisions comparable to those in Italian treaty.
35. Loading and unloading of vessels — coasting trade	Art. XXII. Each party to permit vessels of the other to *unload portions of cargo at one* port and then to proceed to other ports with remainder. No rights accorded as to coasting trade or inland navigation.	Art. XI. Provisions comparable to those in *Italian treaty except* that in treaty with Norway, most-favored-nation treatment is to be accorded with respect to the coasting trade and inland navigation.
36. Transit	Art. XXIII. Freedom of transit for persons and property.	Art XV. Provisions generally comparable to those in Italian treaty.
37. General exceptions	Art. XXIV. The list of exceptions from the coverage of the treaty as a whole, from the most-favored-nation treatment provisions, or from specific provisions of the treaty, is more extensive than in any similar treaty now in force.	Arts. I, VII. The treaty with Norway does not contain an article dealing solely with exceptions, as does the Italian treaty. In Articles I and VII, however, there are a number of exceptions comparable to some of those in the Italian treaty. The list is much less extensive, however.
38. Waiver of immunities of *publicly controlled* enterprises	Art. XXIV (6). Immunity from taxation, suit, etc., *not to be enjoyed* by a publicly owned or controlled enterprise of one party engaged in business in territories of other party.	No comparable provision.
39. Rights of private enterprises in competition with public enterprises	Protocol (2). Rights of an economic nature enjoyed by public enterprises in business in competition with private enterprises shall, with certain exceptions, be extended to such private enterprises.	No comparable provision.

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Subject	Treaty with Italy	Treaty with Norway
40. Territorial scope	Art. XXVI. With certain exceptions, treaty to extend to all territory under sovereignty or authority of either party.	Art. XXIII. With certain exceptions, treaty to extend "to all areas of land, water, and air over which the parties respectively claim and exercise dominion as sovereign thereof".
41. Adjudication of disputes	Art. XXVI. Disputes as to interpretation or application of the treaty to be submitted to International Court of Justice, unless parties agree to settlement by other means.	No comparable provision.
42. Duration and termination of treaty	Art. XXVII. Treaty to remain in force initially for 10 years, terminable thereafter on 1 year's notice.	Art. XXIX. Treaty to remain in force initially for 3 years, terminable thereafter upon 1 year's notice.
43. Protocol	Purpose of the provision of protocol is to clarify and construe certain provisions of treaty.	There is no protocol to this treaty.
44. Additional protocol	Purpose of the additional protocol is to relax certain provisions of treaty as necessary during period of Italy's economic recovery from the war.	There is no protocol of this nature attached to this treaty.

OWNERSHIP OF REAL PROPERTY

Senator Thomas of Utah: Does this treaty make any significant changes in the provisions for the ownership of real property?

Mr. Thorp: This makes no significant changes that I think open up possibility of criticism. Actually it is one of the most favorable treaties that we know of with respect to the treatment of Americans, because nationals and corporations of the United States are to be accorded national treatment in Italy with respect to acquisition and holding of real property. This is an unusually liberal provision, and I think has to be recognized as a real sign of good will on the part of Italy, because there is no corresponding provision with respect to the United States. In our instance, this is a matter of regulation by the States rather than the Federal Government with respect to landholding. Italy does have the right, if it wishes to do so, to refuse to accord this national treatment to citizens and corporations of someone of the United States if that State denies national treatment to the nationals and corporations of Italy.

But in general what has happened here is that Italy, with respect to itself, has provided full national treatment, and we have had to leave it to the States in terms of the kind of reciprocal treatment which we will provide.

Senator Lodge: Does this go into the matter of exploitation of minerals and natural resources?

Mr. Brown: The provision is that we are only obligated to give most-favored-nation treatment.

Senator Lodge: Well now, when you say most-favored-nation treatment with regard to exploitation of minerals, just how does that work? Can you give me an illustration?

Mr. Brown: It would mean that if we gave any rights in the Federal domain to nationals of another country, we would have to be prepared to give the same terms of treatment to an Italian national. We could not say to the Italians, "We won't let you into our national domain at all on any terms, simply because you are an Italian" if we had allowed a Frenchman or an Englishman to come in. But we are not obligated to give them any rights at all.

Senator Lodge: We are not? I can see the justice of that. But in none of these treaties are we putting an alien citizen on the same footing as the American citizen?

Mr. Brown: Not with respect to minerals on the Federal domain.

Senator Lodge: What about with respect to minerals on the State domain?

Mr. Brown: We cannot do anything about that. We are committed to the most-favored-nation treatment only.

Senator Lodge: On State-held lands too?

Mr. Brown: Yes.

Senator Lodge: Thank you.

FREEDOM OF RELIGION

Senator Thomas of Utah: Precisely what are the rights of Americans concerning freedom of religion in Italy?

Mr. Thorp: That appears in a number of articles in the treaty. Article I provides national treatment for natural persons to carry on religious activities. Article II

provides national treatment for American corporations and associations to carry on religious activities. Article III provides for national treatment with respect to the carrying on of religious activities by Italian corporations if organized, controlled, and managed by American nationals and corporations.

In Article XI the right if provided, without any qualification or reference to national or most-favored-nation treatment, that nationals be permitted to exercise liberty of conscience and freedom of worship, and conduct religious services. The only limitation is that their teachings or practices not be contrary to public morals or public order.

In the China treaty there is national treatment for natural persons, but the rights for corporations are somewhat different, and the basis is generally most-favored-nation treatment rather than the national treatment which is present in this one.

In Article XII in the China treaty there is a qualified right for Americans to establish schools for the education of their own children. The rights with regard to freedom of worship in the two treaties, however, are substantially the same.

Senator Thomas of Utah: In our peace treaty with Italy there is an article on freedom of religion and freedom for religions, is there not — Article XIII?

Mr. Thorp: That is correct.

Senator Thomas of Utah: What has the status of American religionists been in Italy up to the beginning of the last World War? Have we had any treaty rights there at all?

Mr. Barbour: I will have to look up the record on the treaty rights, but as a matter of practice there has been complete freedom in the exercise of religious freedom.

Senator Thomas of Utah: Throughout all of Italy?

Mr. Barbour: Throughout all of Italy.

Senator Thomas of Utah: Has there been very much religious proselytising carried on in Italy, as there has been in Germany?

Mr. Barbour: I think not.

Senator Thomas of Utah: So that probably it is a provision in the treaty that will not be very much used, is it not?

Mr. Brown: The right to worship and to educate American children and to conduct services, and the schools to be attended by Americans will certainly be used, and is being used, in many parts of Italy. Whether there is likely to be extensive missionary activity I do not know. The right is there. Whether it is likely to be used or not I do not know.

Senator Thomas of Utah: That is new, is it not? Let me know about that in other treaties, will you — whether we had that right in prewar treaties?

Mr. Thorp: There are no provisions in our prewar treaties with Italy relating to freedom of conscience or worship. With respect to religious activities, American citizens were subject to Italian law, there being no treaty provision on that subject.

I might say one other thing, that in the peace treaty there is a provision providing for freedom of worship. The provisions, however, of this treaty would amplify that a good deal. It would be a question as to whether freedom of worship, for example, gave you the right to put up a church building and hold religious property, and there will be a number of things that are collateral to the right to worship which are spelled out as rights in this treaty, although the basic principle was established in the peace treaty.

Senator Thomas of Utah: That would hold also for educational work, would it not? You might have a right to teach school, but you might not have a right to build a school.

Mr. Thorp: Yes; that's right.

Senator Thomas of Utah: Is there anything else in the treaty that deals with the right of Americans to establish and conduct schools in Italy?

Mr. Thorp: That is covered in the first article in the treaty where, in the list of the types of activities where national treatment will control, educational activity is included.

Senator Thomas of Utah: So that if Italians wanted to come here and establish a school, they could, and if we wanted to go there and establish a school we could.

Mr. Thorp: They could within whatever were the general principles that apply to the nationals of our country.

Senator Thomas of Utah: If they meet the requirements of the States, and so on and so forth?

Mr. Thorp: That is right.

BUSINESS PRACTICES

Senator Thomas of Utah: This treaty, Article XVIII, section 3, page 17, seems to make more specific the reference to the International Trade Organization than did the treaty with China. Is there any significance in this?

Mr. Brown: Senator, I am a little bit perplexed by the reference. XVIII (3) is a provision which says that the parties agree that business practices which restrain competition, limit access to markets, or force to monopolistic control might have harmful effects upon the commerce between the two countries, and that if such situations arise, there is provision for consultation and an effort to take corrective measures. That, of course, is directed at the cartel or monopoly situation and is one of the subjects which is dealt with in considerably greater detail in Chapter VI, I believe it is, of the ITO charter. It was thought it would be desirable to have a recognition in this treaty that those activities of private concerns might have very undesirable effects and to provide a mechanism for doing something about it.

The general relationship of this treaty with the ITO charter is the same as that of the China treaty; namely, that the objectives of the two to establish a stable and orderly basis for trade relations, commerce relations, between countries are exactly the same, and that this treaty deals fundamentally with the rights of persons and corporations, and the ITO, if it should come into operation, deals more with the restrictions on the movement of goods. But there is no necessary organic connection between the two of any kind.

RELATIONSHIP TO EUROPEAN RECOVERY PROGRAM

Senator Thomas of Utah: Is there any conflict between this treaty and the bilateral agreement foreshadowed in the Economic Cooperation Act of 1948?

Mr. Thorp: No, sir. Our legal adviser has informed us that there is no such conflict.

Senator Thomas of Utah: Will this treaty help in any way the development of the European recovery program and the work of the Administrator?

Mr. Thorp: I think one should say here that they will be supplementary of each other. This treaty does not provide any direct assistance to the Administrator but it does, we believe, establish a favorable climate or environment for the revival of trade and for the extension of private investment by Americans into Italy, and both of those are part of the objectives which the ECA Administrator is seeking. So that this should be helpful in the achievement of the purposes of his operation.

FISSIONABLE MATERIALS

Senator Thomas of Utah: Article XXIV, section 1, refers to protective measures concerning fissionable materials. The China treaty did not mention this.

Mr. Thorp: That is entirely because of the fact that the China treaty was negotiated before the Atomic Energy Commission was organized and before there was any branch in the Government which had determined on the importance of a provision of this kind. This is a new provision in a treaty. It has not appeared before.

Senator Thomas of Utah: It is put there because we have a law, not because of the chances of these materials being found in Italy; is it not?

Mr. Thorp: This has no relationship to any special concern about the Italian situation or its supplies. I think it is reasonable to say that this would be a provision in any treaty which we negotiate with any country from this time on.

Senator Thomas of Utah: From now on; yes.

MOST-FAVORED-NATION TREATMENT

By way of summary, in what respect does this treaty accord the United States, first, national treatment; second, a conditional most-favored-nation treatment; and third, unconditional most-favored-nation treatment?

Mr. Brown: Sir, that is an extremely difficult question to answer, because of the complexity of the conditions and the way they are interrelated. I think you could sum it up by saying that in the first place there are no provisions for conditional most-favored-nation treatment. There are one or two cases where most-favored-nation treatment is provided for with an exception, such as, well, the exception with respect to treaties for the avoidance of double taxation. But we do not interpret that as being a conditional most-favored-nation treatment provision. It simply says it does not apply in this particular case.

You can enumerate a number of cases where there is definitely unconditional most-favored-nation treatment, such as all of the provisions with respect to customs duties; the access of vessels to ports; the treatment with respect to exchange controls; the treatment with respect to commercial travelers; the handling and disposition of personal property; and the one that we just discussed with Senator Lodge, the rights in exploitation of mineral resources.

In most of the cases, however, in this treaty, the treatment is national treatment or, as in the case of freedom of worship, given on an absolute basis, without any reference to national or most-favored-nation treatment.

I really think that to attempt a specific list of each item would not be too helpful to the committee.

Senator Thomas of Utah: No; it would not.

PLANS FOR OTHER TREATIES

We now have before us treaties with China and Italy. Is there any indication of a well-planned effort to develop such treaties with other countries?

Mr. Thorp: Mr. Senator, we are definitely engaged on a program of that sort. We feel that it is important to revise, to bring up to date, and to establish, where there have not been such, treaties with other countries, and at the present time we have outstanding proposed drafts at various stages of negotiation of treaties with a number of different countries.

Senator Lodge: About how many?

Mr. Thorp: And whenever we have had the opportunity in connection with discussions with them on any particular specific matter, we have raised the question of whether we ought not have such a treaty.

Mr. Brown: There are about a dozen — between 12 and 15.

Senator Lodge: And they are more or less along this same line, of this same general nature?

Mr. Brown: This is the model from which we begin, and then we have to make adjustments, of course, because of the particular situations in particular countries. But the subject-matter and the general treatment are basically what is in the treaties that you have now before you.

But each time we are able to improve one or two articles, and it is a progressive process.

Senator Thomas of Utah: Mr. Thorp, do you want to go on with your statement, then, please?

Mr. Thorp: I think it may be helpful to have pulled together in one place a number of the points that we have discussed this morning, so if you will pardon me, I may duplicate on some of the points, but it is not a very long statement at any rate.

The treaty of friendship, commerce, and navigation with Italy which the committee is now prepared to consider is the second postwar treaty of this type which the Department of State has negotiated; that with China, also before the committee, being the first. The conclusion of these two treaties represents significant progress in a broad program which the Department has undertaken with the objective of expanding and modernizing this country's network of commercial treaties. Although there are now in effect more than a score of these general commercial treaties, many of them may be considered as antiquated, several having been concluded in the first half of the last century. Many of those of more recent date are not well adapted in all respects for meeting present-day needs with regard to economic, cultural, and other intercourse between nations. Between the United States and a number of countries, including Italy, there are no treaties of this type now in effect.

It is a happy circumstance that the first postwar treaty of friendship, commerce, and navigation to be made by the United States with a European nation should have been concluded with the new Italian Republic, and that Republican Italy's first general treaty should be with the United States. Negotiated in an atmosphere of the most cordial friendship and based upon the principle of mutuality, this treaty confirms Italy's adoption of liberal principles of international economic intercourse, and is evidence of the intent of the Italian Government to accord fair and nondiscriminatory treatment to foreign economic enterprise.

Obviously, the provisions of treaties of this type which the United States concludes with all other countries will be basically similar. In the hearings on the treaty with China before this committee on April 26, the Department presented an extensive statement of policy with regard to this type of treaty, a summary of the treaty articles, and explanatory statements on a number of provisions. Much of the information submitted at that time is also applicable in connection with the consideration of the treaty with Italy, and it is thought that it will be unnecessary to burden the record with a repetition of those statements.

There are, however, some important differences between the two treaties to which I should like to refer. The treaty with Italy contains a number of provisions not found in the treaty with China. Among these are clauses relating to freedom of information, Article XI; nondiscrimination in the application of certain compulsory insurance laws, Article XII; a provision for the waiving of the immunities of publicly owned or controlled enterprises carrying on business activities, Article XXIV, paragraph 6; and a provision that rights enjoyed by the publicly owned or controlled enterprises of one party shall be extended by that party, with certain exceptions, to the private business enterprises of the other party.

FREEDOM OF INFORMATION

I believe that this is the first treaty to come before the Senate which contains specific provisions for giving effect internationally to the ideal of freedom of information. The Congress of the United States formally endorsed the principles of freedom of information in a concurrent resolution adopted in 1944 (58 Stat. (pt. 2) 1119), and the United Nations Conference on Freedom of Information at Geneva has recently completed formulation of recommendations for dealing with this subject on a multilateral basis. The provisions in the present treaty set forth a minimum standard of treatment adapted for inclusion in bilateral treaties of this sort, which should provide worth-while protection for United States nationals engaged in informational activities.

The provisions in this treaty relating to the treatment to be accorded foreign corporations and associations are thought to be very advantageous. The standard of national treatment is clearly set forth for the carrying on of commercial, manufacturing, processing, financial, scientific, educational, religious, philanthropic, and professional activities. The rights stipulated for the nationals and corporations of one country to participate in, control, and manage domestic corporations of the other are also extensive, as are the rights for such corporations, participated in by nationals and corporations of the other country, to carry on their corporate activities.

Nationals and corporations of the United States are to be accorded national treatment in Italy with respect to the acquisition and holding of real property. As I have already said, this is a provision of unusual liberality and is a singular evidence of good will on the part of Italy, since national treatment is accorded without prejudicing the right of the States of the United States to freely regulate landholding. The treaty permits Italy, of course, to refuse to accord national treatment to the citizens and corporations of states which deny national treatment to nationals and corporations of Italy.

PROTECTION OF PRIVATE INVESTMENTS

The protection of foreign private investments in the face of the very obvious trend in many parts of the world toward nationalization of industry, extension of public control over certain industries, and the participation of the state in

industrial enterprises is a matter that is receiving more and more attention, not only by the Government departments concerned but by businessmen interested in foreign investment. The present treaty with Italy contains provisions designed to increase the protection usually afforded by a treaty of this type. There is, of course, the usual provision for the payment of just and effective compensation for property taken into public ownership or control. Provision is also made, as in the treaty with China, for the transfer of the compensation paid to an expropriated person into the currency of the country of which he is a national. In this treaty there have been included for the first time, as previously mentioned, some rules designed to provide additional protection for private investments. In Article V, it is provided more specifically that in all matters relating to the taking of privately owned property into public ownership or control, the nationals and corporations of one country within the territories of the other shall receive treatment no less favorable than that accorded by such country to its own nationals and corporations or those of any third country. This clause is, of course, designed to prevent the alien from being singled out for unfavorable treatment in case of a nationalization program.

Senator Lodge: Does that mean that the alien is put on the same basis as the citizen, or on the same basis as other aliens?

Mr. Thorp: Both. He gets whichever is better.

Mr. Brown: Sometimes, Senator, the citizen gets treated worse than the foreigner.

Senator Lodge: You are not in favor of that, are you?

Mr. Brown: No.

Mr. Thorp: If they do that for some other country, there is no reason why we should not get it.

Senator Lodge: That is not most-favored-nation treatment, is it?

Mr. Thorp: It is both. It is which ever is better.

Senator Lodge: Give me an illustration of how that would work.

Mr. Thorp: Suppose, let us say, that in a given situation Italy nationalized an industry and they agreed to settle for 50 cents on the dollar so far as Italians were concerned.

Senator Lodge: With the stockholders?

Mr. Thorp: With the stockholders — 50 cents on the dollar with Italian stockholders, but felt that because, we will say, there were some very important citizens of a third country involved in this, and they did not want to get into trouble, they would pay them off at 100 cents on the dollar. In that case we would insist that we be given the full 100 cents on the dollar, because that had been done with a third country.

Oftentimes it works the other way around — that the nationals of a given country will be treated more favorably than the aliens because, shall we say, their political strength may be a little greater with the country, and in this case, if it were more favorable treatment for the nationals, we would get the more favorable treatment.

This is irrelevant in the United States, because in the United States there is no differential treatment at all. If we nationalize property, the owner is entitled to court protection and a determination, if necessary, by going to the courts, of what he will be paid in connection with the expropriation, quite regardless of his nationality.

Senator Lodge: So this is a one-way proposition, is it? It works insofar as Italy is concerned.

Mr. Thorp: It happens that we already have a procedure here which would identify national treatment with the treatment of the alien, and what this does is to bring Italy, shall we say, up to that same standard.

Senator Lodge: In this country, if the Government takes something it condemns it, as I understand it, and pays damages to the private person from whom the thing has been taken. Does that not hold true in Italy?

Mr. Thorp: Yes; this does not change what happens today in Italy. Italy has the same basic principle with respect to nationalization and condemnation that we have. But we have discovered that there is some tendency throughout the world for differential treatment to develop, and it seemed just as well to establish the principle in the treaty, although, as I say, it is not a new principle that is established here. This is confirming by an international agreement an established practice in both countries.

Senator Lodge: Thank you.

Mr. Thorp: In addition to the danger of being expropriated, a serious danger faced by American private enterprise abroad is that of being subjected to unfair competition from state owned or controlled enterprises. In this treaty, an effort is made to deal with this problem by providing that, with certain exceptions, special favors granted by one country to its publicly controlled business enterprises shall be extended also to the private enterprises of the other in situations in which the public enterprises operate in fact in competition with private enterprises. Somewhat related to this provision is another which provides that no publicly owned or controlled enterprises of one country, if it engages in business activities within the territories of the other, shall claim for itself or its property immunity from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned or controlled enterprise is subject therein.

COMPARISON WITH CHINA TREATY

There are a few subjects dealt with in the treaty with China that are not covered in the treaty with Italy. There are no provisions here dealing with the reception of diplomatic representatives, the recognition of agreements and awards in commercial arbitration, the protection of literary and artistic property, and adherence to a program designed to expand international trade. These matters are dealt with in Articles I, VI, IX, and XV, respectively, of the treaty with China. The first and last of these subjects are not considered as of consequence in a treaty with Italy. As to commercial arbitration, as I have already said, the Italian negotiators felt that the provision which we had included in the China treaty was not well adapted for application under Italian law. As to copyright matters, the two Governments concluded that their relations, based upon proclamations issued under their respective laws in 1910, were satisfactory and that no treaty provision would be necessary.

A number of provisions in the treaty with Italy have been restated in language somewhat different from that in the treaty with China. The objective has been to clarify the language or to make the provision more explicit. Examples are the article relating to internal taxation — Article X in the China treaty, IX in the treaty with Italy — and the article relating to exchange controls — Articles XIX and XVII, respectively, in the Chinese and Italian treaties. There are, of course,

a number of minor differences in phraseology and even in substance between the two texts that have not been referred to above.

NEED FOR THE PROTOCOLS

In negotiating the treaty with Italy, it was necessary to give special consideration to the grave economic situation facing Italy as a result of the war and the present inability of Italy to supply, unassisted, the minimum needs of its people or the minimum requirements of economic recovery. Accordingly, there has been attached to the treaty a protocol, the purpose of which is to relax under certain conditions some of the rules of the treaty, such as those relating to quantitative restrictions on imports and exports, in order to enable Italy to protect its international-payments position and obtain the essential needs of economic recovery.

The Department of State regards this treaty as a very favorable one from the standpoint of American interests. Prompt ratification would not only have the effect of affording immediate treaty protection for American interests in Italy but would also further strengthen our cordial relations with the Government and people of Italy. The announcement of the signature of the treaty on February 2 was particularly well received by the Italian press and public. Approval of the provisions of this treaty by the Senate will provide the Department with an accepted standard which will afford necessary guidance in proceeding with the negotiation of treaties with other countries.

Senator Thomas of Utah: Thank you, Mr. Thorp.

Is Mr. Egan here? Will you please state your name and your address, and whom you represent?

STATEMENT OF RICHARD M. EGAN, GREAT LAKES CARBON CORP., NEW YORK CITY

Mr. Egan: Richard M. Egan, Great Lakes, Carbon Corp. I am foreign sales manager of Great Lakes Carbon Corp., New York City, 18 East Forty-eighth Street. I have had some experience in Italy, having been there for the greater part of 2 years and having had my family there for about a year and a half.

I thought I would take this opportunity to answer a few questions, mainly, if they were to be put to me, to give you a businessman's version of the peace treaty, just from observation. I am not an expert, and I represent a company that has done a fair amount of business with the Italian Government and the Italian people, and we are still doing business with them, and we have a great interest in the future of Italy.

So far as the peace treaty is concerned, we are of the opinion that it is a good treaty. There are a few things that we feel maybe could be improved, so far as the people's future is concerned; but so far as business opportunities for American business, I am convinced that it is a good treaty.

Senator Thomas of Utah: That is the treaty that brought about peace. Now tell us what you think about this commercial treaty.

Mr. Egan: The commercial treaty is very satisfactory for the American businessman. I see no obstacles. So far as the Italians are concerned, I think their opportunities under that treaty are very satisfactory. We have made a study of it, and we have seen no obstacles.

Senator Thomas of Utah: In other words, you feel that this is a constructive move on the part of our country to enter into this treaty with Italy?

Senator Thomas of Utah: Do you have any questions?

Senator Lodge: No.

Senator Thomas of Utah: Thank you very much, Mr. Egan, for coming. Mr. Blaisdell. Have you a statement, Mr. Blaisdell?

Mr. Blaisdell: I have a brief statement, Senator, which I am prepared either to present orally or to present for the record, if you wish.

Senator Thomas of Utah: I think we would like to hear it, if we may.

STATEMENT OF THOMAS C. BLAISDELL, JR., ASSISTANT TO THE SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE

Mr. Blaisdell: The treaty before you will form a comprehensive legal basis for carrying out our commercial relations between the United States and Italy. It is intended to replace a previous treaty of friendship, commerce, and navigation concluded with Italy in 1871 following the unification of that country. The 1871 treaty was terminated by mutual agreement on December 15, 1937, and subsequent efforts to work out a more modern and comprehensive treaty prior to the war proved unsuccessful. A temporary commercial agreement of "modus vivendi", was effected in December 1937 by an exchange of notes signed in Rome, but it is no longer recognized as legally operative by the present Italian Government. Italy has voluntarily continued to provide most-favored-nation treatment with regard to customs duties. However, we urgently need an agreement on many other matters if we are to have a satisfactory legal framework for commercial relations between the United States and Italy.

TRADE WITH ITALY

Our trade with Italy is substantial. It decreased considerably during the immediate prewar period because of the depression, and the self-sufficiency policies of the prewar Italian Government. Since the war our exports to Italy, at least, have reached levels, in current dollars, far in excess of those of the 1920s. United States exports to Italy, in 1946, amounted to $327,000,000 as compared with an average of only $185,000,000 in the early 1920s and $58,000,000 in 1938. Imports from Italy in that year amounted to $69,000,000 as compared with $79,000,000 in the early 1920s and $41,000,000 in 1938. In 1947, our exports to Italy had increased further to $479,000,000 while our imports from there decreased to $44,000,000. Although the large United States exports to Italy during 1946 and 1947 have been primarily made up of shipments under the aid programs, there has been a substantial flow of commodities of a type which will probably continue to be shipped from this country to Italy in the years to come, and to be handled more and more through ordinary commercial channels.

The treaty under consideration is the first comprehensive commercial treaty to be concluded by the United States with a European country since 1934 and the first treaty of its type signed by Italy after the war. Its early ratification would help stabilize our postwar commercial relations and be a further step in recognizing the efforts of the Italian Republic to establish itself firmly in what we call a democratic way of life.

The treaty represents acceptance by republican Italy of a number of democratic principles in trade and navigation. The "national" treatment accorded to corporations, for example, is the most liberal ever specified in any treaty entered into by the United States.

The treaty is based in general upon the principle of mutuality, and establishes standards to govern the relations between the two countries in many fields of activity. It includes articles relating to the status and activities of persons and corporations, protection of persons and property, landholding, freedom of information, treatment of vessels, and commercial principles such as those in the proposed charter for the International Trade Organization, as well as provisions concerning such matters as exchange control, transit, and industrial properties.

The treaty is not a trade agreement and contains no specific obligations as to import or export treatment of any individual commodities. It does recognize modern developments in import and export regulations and exchange controls, and seeks so to condition their application as to provide, in accordance with basic American policy, the utmost possible freedom for the pursuit through ordinary private channels, and on a nondiscriminatory basis, of commercial and cultural relations.

In this connection, special attention should be drawn to the second protocol, which relates to the acceptance of certain quota and exchange restrictions necessary to meet the special commodity and foreign exchange shortages of the present reconstruction period, but even these exceptions are carefully circumscribed so as to protect the legitimate interests of Americans transacting business with or in Italy.

In drafting this new treaty with Italy, numerous additions and changes were made to and from the original 1871 treaty which the two Governments had agreed in 1936 was "antiquated and inadequate to meet modern conditions". Conditions have undergone further considerable change since that date.

NEW CONDITIONS

Treaties of friendship, commerce, and navigation have traditionally included, as the committee well knows, provisions relating to entry and residence of individuals, the protection of persons and property, the tenure and disposition of real and personal property, religious activities, customs administration, transit rights, and the treatment of shipping. Provisions of this character have been included in the new treaty. In addition, numerous recent economic developments of which we must take account in our commercial relations have made it necessary to expand our traditional form of treaty. These include such things as the development of the corporation in all of its modern ramifications, the development of workmen's compensation and other social insurance laws, and the spread of certain philanthropic, educational, and cultural activities. Since the war we have been additionally confronted with major changes in the use of import and export quotas and licenses, exchange controls, and state trading with which we must deal. The new treaty takes account of all of these developments, taking care, as I have already pointed out, to minimize the impact of any restrictive practices upon the future development of free, private, international commerce.

Let me outline, briefly, a few of the major provisions of the treaty in which I think you will be interested.

With regard to customs duties and charges on imports and exports and the formalities of customs clearance, most-favored-nation treatment is mutually granted. With regard to the taxation, internal sale, and distribution or use of imported goods, national treatment is mutually granted. This means that while Italy may lay down regulations for the most effective distribution and use within its borders of imported commodities it will not discriminate against imports from the United States in favor of those from any other country.

Another set of provisions relates to the setting of import and export prohibitions or quotas. Again, most-favored-nation or nondiscriminatory treatment is stipulated. When quantitative restrictions are imposed through quotas, licenses, or other measures, the treaty requires that, as a general rule, public notice be given of the total quality or value permitted to be imported, exported. sold, distributed, or used, during a specified period. In line with this last provision, the Office of International Trade is already publishing, wherever practicable, country quotas for United States commodities in scarce supply which are under export control. This, Senator Thomas, is the provision of our office in the Department of Commerce in our trade with Italy and other countries.

It is further specified in the treaty that if either party allots to any third country a share in the total quantity or value of any article in which the other signatory has an important interest, it shall, as a general rule, allot to this other signatory a share based upon the proportion of the total supplied to it by, or exported by it to, the other during a representative period. This provision was originally incorporated in the temporary 1937 agreement, and was designed to deal with the discriminatory channeling of imports and exports practiced by Italy and Germany before the war. To meet the present-day needs of Italy, which is suffering from critical shortages of dollars, the second protocol permits in the application of this provision a temporary latitude. Under this protocol the paragraphs of the treaty providing for most-favored-nation treatment will not apply to quantitative restrictions which place temporary limits on the freedom of exchange operations in a scarce currency, or to temporary exchange restrictions required in the postwar transitional period on payments and transfers for current international transactions. The parties are also given leave to apply such quantitative restrictions as are necessary to secure, during the early postwar transitional period, the equitable distribution of goods in short supply, or to use accumulated inconvertible currencies for the purchase of imports. In the latter case, advantage can be taken of the protocol only if it is in fact necessary to restrict imports to protect monetary reserves or to yield a volume of imports otherwise impossible. All exchange restrictions, moreover, must be in accord with applicable provisions of the International Monetary Fund agreement.

Other provisions are designed to protect the competitive position of American enterprises in their dealings with state trading companies, to assure fair and equitable treatment in the award of concessions and other contracts, and to encourage the future conduct of business within both countries along competitive nonmonopolistic lines. There are further provisions, relating to many facets of commercial operation and the ownership, transfer, and use of property which specify treatment according to the most-favored-nation and/or national principles.

I do not propose to burden the committee by discussing all of these various provisions. Mr. Thorp has covered that. However, if I can add to what I have already said, I will be glad to answer questions concerning these.

INTERNATIONAL TRADE PRACTICES

Senator Thomas of Utah: A general question, first of all: You are dealing all the time with these problems and have been through the International Trade Conference and the rest of it. Do you think there is any hope of overcoming in international trade the practices which were developed by those nations before the war, channeling trade entirely to their own advantage?

Mr. Blaisdell: Senator, if I did not believe that that were possible, I would not be doing what I am doing now. I am convinced that this is the objective that we

should be driving toward all along. That might sound strange to some of my exporter friends who are on my shoulders most of the time because of the export controls which we administer in the Department of Commerce, but I assure you that it is a very sincere conviction that the kinds of regulations which we are now using to a limited extent in the United States, to a greater extent in practically all European countries and in many other countries of the world, are a function of this particular period in our economic development, when the world is seriously disrupted from the conditions that developed during the war. The development of inflationary monetary policies, which is worldwide — and we are not excluded from that — has created conditions of demand in international trade which are entirely unusual. They are of an entirely different character than the directive and inhibitory practices which were used, and for which the same instruments were used, prewar. They arise from different conditions. And the United States has taken the initiative in a great many cases and has thrown all the support of its people and its Government against the development of these practices wherever it is possible. It has played a major part in the development of the International Monetary Fund and the International Bank and the International Trade Organization because we have believed that through these devices we would eventually be able to get to a point where the restrictions that are now burdening trade can be gotten rid of and private trade can proceed with as little interference as possible.

Senator Thomas of Utah: Is there any place in the world where there is any free money today?

Mr. Blaisdell: I do not know of any place. I do not know of any country. Even the United States has limitations on the use of gold.

Senator Thomas of Utah: Yes. We have quite a bit of it hidden away, I think. We are told we have. I hope it is still there.

We have not in the world today anything equivalent to the old Austrian dollar, and then the old Mexican dollar, which had a way of keeping value and going places and doing things, especially when our Government was set up, have we? There is nothing like that anywhere, is there?

Mr. Blaisdell: I know of none. I think the last remnant of that, Senator, was the Chinese silver unit, which was never coined.

MONETARY PROBLEMS

Senator Thomas of Utah: I do not mean free trade in the political sense, but can you have free trade in the world without free money?

Mr. Blaisdell: I do not think so.

Senator Thomas of Utah: Neither do I, and I am wondering if we are starting at the wrong end in these trade arrangements. Is there anyone thinking about money in the world today? Did not the Germans teach us a lesson about control in such a way that we have not yet gotten over it?

Mr. Blaisdell: I think there is a growing recognition of the significance of monetary and financial factors in this whole problem of trade relationships.

Senator Thomas of Utah: They are beginning to see it?

Mr. Blaisdell: I think so. In fact, I think in connection with this treaty it would not be out of the way to point out that the very existence of the protocols, besides the treaty itself, is a recognition of something very fundamentally wrong in the monetary relationships that exist; that without the development of stabilized

World War I draft

The Selective Service Act of 1917, enacted soon after this country became a belligerent in World War I, made liable for military service "male citizens, or male persons not alien enemies who have declared their intention to become citizens" (sec. 2, 40 Stat. 77 and 78).

Thus all aliens who had not declared their intention to become citizens, that is, nondeclarants, were exempt. This legislation was amended in 1918 by the addition of the following proviso:

> "*Provided*, That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States" (40 Stat. 885).

Under this amendment neutral declarants also were exempt from military service provided they gave up the privilege of becoming citizens.

Following World War I a number of commercial treaties were concluded containing military-service provisions generally comparable to the following in the 1928 treaty with Norway:

> "Article VI
>
> In the event of war between either High Contracting Party and a third State, such Party may draft for compulsory military service nationals of the other having a permanent residence within its territories and who have formally, according to its laws, declared an intention to adopt its nationality by naturalization, unless such individuals depart from the territories of said belligerent Party within sixty days after a declaration of war."

World War II draft

The Selective Service Act of 1940, enacted before the United States became a belligerent in World War II, made liable for training and service "every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen" (sec. 3, 54 Stat. 885).

This was comparable to the 1917 law before its amendment.

A few days after the United States became a belligerent in World War II this 1940 act was amended so as to make subject to training and service "every male citizen of the United States, and every other male person residing in the United States . . ., *Provided* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States" (55 Stat. 845).

Thus the basis for exemption was changed, and throughout the war it remained whether the alien was a national of a neutral rather than a cobelligerent country.

to cruel and unusual punishment for American citizens. The obligation of military service is especially closely associated with the idea of national loyalty. *The American who goes abroad in the interest of American foreign* trade, of world economic development, of international cultural cooperation should not be obliged by any policy of this Government to abandon his primary loyalty to the United States. If foreign governments follow the practice of requiring an oath of allegiance from conscripts (as in the United States, under pain of severe penalties), a policy of allowing Americans to be conscripted abroad would be a policy of sanctioning the involuntary expatriation of American citizens. It is not believed that the United States should, through a policy of impressment, in effect force citizens of any country to divest themselves of their nationality.

Senator Thomas of Utah: You remember that in the First World War every Japanese in the United States answered our registration questions the same. There was in the United States Supreme Court at that time the case of Osawa, I think it was, a case on nationality, citizenship, and the rest of it. And when we registered the Japanese, the Japanese answered in such a way as to stand for their right, as their attorneys were arguing their case, before the Supreme Court. Nothing came of it excepting that. But at the same time, if there had been a situation of this kind, it might have done some damage to some Americans in any country where they have compulsory universal training at all times.

Mr. Brown: I think we were thinking primarily of the point that Mr. Thorp raised, that we did not want to be in a position where any American citizen would have been compelled to serve military training in Italy.

Senator Thomas of Utah: And I do not want to be in that position either. If, for instance, our practice becomes universal military service, I surely do not want to have a treaty that if we happen to go somewhere else military service in some other countries would be ours.

Mr. Brown: This treaty would protect us against that.

Senator Thomas of Utah: I do not know whether it will or not.

Mr. Brown: It specifically says —

Senator Thomas of Utah: It says that: I know. I am just frightened that it brings complications into the even tenor of our ways, where we have never had any problems until that one came up.

Is there anything else?

Dr. Wilcox: That is all.

Senator Thomas of Utah: Thank you all for coming. We will bring the hearings to an end.

(Whereupon the subcommittee hearings were closed.)

Document 30

CERTIFICATE OF THE MINISTRY OF THE INTERIOR CONCERNING THE AVERAGE TIME TAKEN TO EXAMINE THE APPEALS

[Italian text not reproduced]

MINISTRY OF THE INTERIOR, OFFICE OF THE MINISTER

TO WHOM IT MAY CONCERN

This is to certify that before the entry into force of the Presidential Decree No. 1199 of 1971 (which not only made it optional to submit appeals through the hierarchy, but established the principle that the absence of a reply to an appeal lodged with the public administration within 90 days of the matter giving rise to it signified rejection) the average time taken to examine appeals used to be about one year.

The time could be further reduced if the parties requiring a prompt reply used the "Diffida" (=intimation) procedure provided by section 5 of Law No. 383 of 3.3.1934 *governing this matter.*

22 June 1987. (Initialled by the Chef de Cabinet).

Document 31

EXCERPTS FROM THE DECISION OF THE BOARD OF DIRECTORS REGARDING THE MERGER OF ELSI S.P.A. WITH SELIT (1965)

[Italian text not reproduced]

(Omissis)

Raytheon-ELSI S.p.A. is the registered holder and owner of all 1,300,000 shares for Lire 1,000 each, making up SELIT share capital; the merger shall result in the annulment — without replacement — of the said shares, and will be carried out once the merger deed has been drawn up.

(8) *(Omission)* in order to avail themselves — for the merger envisaged by the present resolution, aimed at upgrading Raytheon-ELSI S.p.A.'s industrial activity in Southern Italy — of the tax relief provided for in the existing legislation for the industrialization of the South, or in regional laws, and in particular of the provisions under Article 38 of law No. 634, dated 29 July 1957, and of the provisions under law No. 2 of 20 March 1950, and of law No. 51 of 5 August 1957.

(9) To confer power of attorney upon the Chairman of the Board of Directors, Professor C. L. Calosi and the Managing Director, Eng. Aldo Profumo, also severally and *(omission)*.

(5) *Resolution on the taking out of a loan from Banco di Sicilia and relevant power of attorney:* The Chairman reports on the negotiations under way with Banco di Sicilia for the taking out of a soft mortgage loan amounting to one billion and five hundred million lire, and calls upon the Board of Directors to consider the matter, conferring the appropriate powers of attorney and rights in connection with the taking out of said mortgage.

The Board, after a lengthy debate — with the favourable opinion of the Board of Auditors — decides to severally authorize Professor Carlo L. Calosi (born in Intra on 25 September 1905), the Managing Director Eng. Aldo Profumo (born in Genoa on 15 October 1917) and Accountant Nicolò Fiandaca (born in Agrigento on 1 February 1926), acting in their capacity of legal representatives of the company, to take out from Banco di Sicilia — Division for Credits to Industries — a loan amounting to lire 1,500,000,000 (one billion five hundred million), to be paid over a five-year period, under Article 5 et seq. of regional law No. 51 dated 5 August 1957, interest rate of 4 per cent and accessories, correlated by the securities envisaged in Article 12, last but one subparagraph, of the said regional law No. 51 of 5 August 1957, as well as by the suretyship of the associated "Raytheon Company" of Lexington, Mass. (USA), for 50 per cent of the whole amount of the loan.

The Board subsequently and severally authorizes them to enter into the mortgage contract with the Division for Credits to Industries of Banco di Sicilia, in the name and on behalf of the said Company, conferring upon them for this purpose the widest powers and rights (such as the right to grant lien and mortgage on all the Company assets, for an amount to be determined by the above-mentioned Division, incurring — on behalf of the Company — all the expenses of the relative contract or relevant to it), on the basis of terms and conditions to be requested by *(omission)*.

(omissis)

Document 32

NOTES AND COMMENTS CONCERNING THE BOOKS AND THE DOCUMENTS ATTACHED TO THE PETITION IN BANKRUPTCY [1]

[Italian text not reproduced]

Raytheon ELSI S.p.A.

NOTES AND COMMENTS ON THE BOOKS AND DOCUMENTS ATTACHED TO THE BANKRUPTCY PETITION

(A) Inventory Book No. 3

Note: (1) books No. 1 and No. 2 are kept at the company plant premises in Palermo and are currently requisitioned by order of the Mayor, Mr. Giuseppe Polizzotto, who was given the task of getting them, was prevented from doing so by a certain Mr. Riccobono, who claimed that the books could not be removed without the Mayor's approval. At the request of a member of the company management, Mr. Maggio, the Mayor's substitute during his absence, refused permission to remove the books (see attached declaration).

Note: (2) the book produced contains the inventory as at 30 September 1966. The inventory as at 30 September 1967, which should have contained the balance sheet approved on 20 March 1968, had not yet been transcribed into the book, the legal period for doing so having expired on 27 June 1968.

Note: (3) the information concerning the inventory as at 30 September 1967 can be found in the balance sheet as at 30 September 1967 and related annexes.

(B) General Ledger

Note: (4) this book contains annotations from 15 June 1967 to 30 September 1967. Annotations prior to the date of 15 June 1967 are contained in other volumes of the General Ledger current kept in the requisitioned plant, and for which the remarks made in note (1) above also apply. It was not possible to make any annotations after 30 December 1967 because of the succession of circumstances that occurred to prevent this: the Christmas holidays, the earthquake, a strike with the occupation of the plant by the employees and, lastly, the much publicized requisition order.

(C) Clients Ledger

Note: (5) this book contains the annotations from 11 March 1967 until 29 December 1967 (see preceding note).

(D) Suppliers Ledger

Note: (6) this book contains the annotations from 28 October 1966 until 30 January 1968 (see preceding notes).

[firmato]

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[1] For an English translation of the petition, see Memorial of the United States, Ann. 43.

Document 33

TELEX NO. 570/2 OF 6 APRIL 1968 FROM THE MAYOR OF PALERMO TO AVVOCATO NICOLÒ MAGGIO AND DR. ARMANDO CELONE

[Italian text not reproduced]

Messrs. Dr. Armando Celone
Avv. Nicolò Maggio.

In my capacity of Government Official, having issued on 2.4.1968 an order requisitioning the plant owned by Raytheon-ELSI S.p.A., I appoint you as my representatives and entrust you with the task of ensuring the enforcement of the orders and provisions already issued or still to be issued, giving me daily reports on the management activities performed by the special appointee Ing. Aldo Profumo who, in his turn, shall be obliged to request your prior approval for the measures to take in the fulfilment of the management tasks conferred upon him.

(Signed) BEVILACQUA.

Ref. 570/2
6 April 1968.

Municipality of Palermo
Certified copy
Palermo 27 June 1987
Deputy Secretary-General
(Signed) Avv. Nicolò MAGGIO.

Document 34

TELEX NO. 568/2 OF 6 APRIL 1968 FROM THE MAYOR OF PALERMO TO INGEGNERE PROFUMO

[Italian text not reproduced]

Ing. Aldo Profumo
General Manager
of Raytheon-ELSI S.p.A.
Palermo.

Pursuant to the requisition order of 2 April 1968, of the Raytheon-ELSI S.p.A. plant, I entrust you with the management of the said plant in order to avoid any damage to the equipment and machinery due to the abandoning of any activity, including maintenance.

Furthermore, I order that an inventory of the plant assets be drawn up, with the assistance of Dr. Giuseppe Marsala, Notary Public, and on the basis of the rebuttal of the legal attorneys representing Raytheon-ELSI S.p.A., who are to be notified of the date of the beginning of the operations of which you are in charge.

I inform you that I have appointed Dr. Armando Celone and Avv. Nicolò Maggio as my proxies, and I have entrusted them with the task of ensuring the compliance with the provisions I have issued or which are still to be issued.

As my proxy, therefore, you will request the prior approval of the persons cited above for the action to take in the fulfilment of the management tasks you have been entrusted with.

(Signed) BEVILACQUA.

Ref. 568/2
6 April 1968.

Municipality of Palermo
Certified copy
Palermo 27 June 1987
Deputy Secretary-General
(Signed) Avv. Nicolò MAGGIO.

Document 35

LETTER FROM THE MAYOR OF PALERMO ENTRUSTING INGEGNERE LAURIN WITH THE MANAGEMENT OF THE PLANT, 16 APRIL 1968

[Italian text not reproduced]

Palermo, 16 April 1968.

Dear Mr. Silvio Laurin,

In view of the continuing absence of Mr. Profumo to whom the management of the factory had been entrusted following attachment, I hereby appoint you as his temporary replacement with the same powers, functions and limitations.

You have been chosen because of the need to ensure total compliance with the orders I have issued, and the need for the management activities to be co-ordinated and the interests of Government and the rights of third parties are properly protected.

Your duties are particularly appropriately connected with your functions and responsibilities as Security Officer, and this is a warranty against any interference with military security requirements.

In the performance of your duties, you shall report to my deputies and personally to me on any matter relating to the activity and running of the factory and you shall assist Notary Public Marsala to begin the inventory operations today.

(Signature illegible.)

Municipality of Palermo: This is to certify that this is an authentic copy of the original. Palermo, 27 June 1987.

Document 36[1]

MAGISTRATES COURT OF PALERMO, INSOLVENCY SECTION, TECHNICAL-ACCOUNTANCY ADVICE ON "RAYTHEON-ELSI" S.P.A., FROM THE FINANCIAL YEAR 1964/65 TO 31 MARCH 1968 (TECHNICAL ADVISOR: DR. GIUSEPPE MERCADANTE)

[Italian text not reproduced]

RAYTHEON ELSI S.P.A. — PALERMO

Technical Report on the Management of the Pre-Insolvency Period 1965-1968

1. History — Organization Chart — Directors — Accounting Records

In 1954 Elettronica Sicula S.p.A. was incorporated with a share capital of Lit. 1,000,000 with the objective of manufacturing cathode tubes, X-ray tubes and electronic supplies for the new market that would be created with the introduction of television in Italy.

Subsequently, in 1959, Selit S.p.A. was incorporated and took over the manufacture of cathode tubes only, while the administrative services remained under the management of "Elettronica Sicula" (ELSI).

Limited evidence will be given in this report as to the initial development that Elettronica Sicula had in the manufacture of cathode and X-ray tubes. It is, however, certain that over a period of ten years, at the end of which our investigation starts, the Company did not effectively penetrate the market. Thus it is possible that the decision taken by the management in March 1968 matured some time previously.

Although Selit, incorporated in 1959, belonged to "La Centrale" and to "Thomas Electronic" companies well known both in Italy and abroad, Elettronica Sicula was not given adequate support by them.

On 4 October 1962, Elettronica Sicula S.p.A. changed its name to Raytheon ELSI S.p.A. since the North American group Raytheon of Lexington (USA) became the major shareholder. At this time Raytheon ELSI decided to purchase all the shares in Selit thereby becoming its agent.

During 1965 (20 September) Raytheon ELSI incorporated Selit cancelling all its shares. This transaction, the most recent, was undertaken as follows:

(1) The resolution for the merger of Selit into Raytheon ELSI was taken at the meeting held on 31 March 1965 to approve the financial statements of both companies at 30 September 1964. This merger was legally executed by Notary Di Giovanni in Palermo on 20 September 1965 on the basis of the balance sheets of the two companies at 30 September 1964.

[1] By a letter dated 7 March 1988, the Agent of Italy submitted a revised translation of Document 36 which was substituted for the former translation by decision of the President of the Chamber. However, the unrevised version was referred to in some instances during the Oral Arguments (see III, Argument of Professor Libonati). *[Note by the Registry.]*

(2) With the merger the entire share capital of Selit was cancelled and Raytheon ELSI added to its equity all the assets and liabilities of Selit with a share-capital of zero, since the profit of Lit. 16,129,377 shown by Selit at 30 September 1964 was taken in reduction of goodwill in accordance with a decision of the shareholders' meeting.
(3) In the balance sheet of Raytheon ELSI at 30 September 1964 the item "payables" included an amount due to Selit of Lit. 1,503,584,209, whilst Selit showed an amount of Lit. 1,540,728,150, the difference of Lit. 37,143,941 being receivable from the other agent (Generale Elettronica).
(4) The investigations carried out on the financial statements of Raytheon ELSI and Selit at 30 September 1964, regarding the transactions between the two companies from inception until the date of the merger, resulted in a decrease in receivables of Lit. 938,753,000.

Before examining the management for the three-year period prior to the declaration of insolvency by Raytheon ELSI S.p.A., it should be remembered that at the same time two other companies, both still in existence, operated in the same field of radiologic products, Fitra S.p.A. (share capital Lit. 60 million) and Columbus S.p.A. (share capital Lit. 60 million), the former in Central Italy and the latter in North Italy. The recent manner of management of these companies is not known, though it appears that they are heading for liquidation, but consideration must be given to the fact that their results greatly affected Raytheon ELSI since the latter in effect absorbed their heavy losses.

In this respect, a report on the management of Fitra and Columbus has been found covering the period from incorporation through 31 December 1963, and during this investigation evidence will be given of occasions on which Raytheon ELSI absorbed heavy losses on their behalf, including the payment of taxes relative thereto.

Organization chart

The organization chart of Raytheon ELSI S.p.A. during the latter period was as follows:

Two managing directors under whom were the following Divisions:

(a) *Production*

— TMX which manufactured microwave tubes,
— TRC which manufactured cathode tubes,
— SCD which manufactured electronic supplies (semiconductors).

(b) *Administration*

— financial,
— general and industrial accounting,
— ACU and personnel services.

(c) *Commercial*

One commercial and three sales managers.

Those responsible for the various sections during the latter period were Messrs:

The managing directors with equal powers and single signatures:

— Ing. Aldo Profumo,
— Mr. Yustin Guidi,

were responsible for the technical and commercial management of the whole company.

The administrative managers were:

- Mr. Mazzotti — administration manager,
- Rag. Fiandaca — financial manager,
- Mr. Nett — chief accountant.

The head of the commercial division was Ing. Secondo Rovelli, and under him were the following sales managers:

- TMX — Mr. Mandel,
- TRC — Ing. Burzilleri,
- SCD — Mr. Charman.

Accounting and legal books

Apparently the Company, during the latter period, maintained its accounting records correctly using mechanized accounting procedures for the "general accounts" and "accounts payable journal", whilst the cost accounting records and "accounts receivable journal" were kept by an IBM centre that prepared the perpetual inventory records.

With regard to the "general accounts", the journal was not kept in accordance with legal requirements in that the entries were not progressively numbered, in the sense that each transaction shown in the "prima nota" was recorded without making any reference thereto and without using a progressive system of numbering. This is a very serious and incorrect procedure since the pages were numbered but not signed by a notary public and it would have been possible to insert any transaction in a blank space without the possibility of this subsequent insertion being discovered. It was further noted that at the date of insolvency the "general accounting" and supplementary ledgers were updated to 30 December 1967.

There is no major note with regard to the keeping of the legal books (shareholders' registers, Board of Directors' and Statutory auditors' minute books, etc.).

2. *Analysis of Production*

The investigation of the production sector resulted in very few matters that could justify the losses incurred by Raytheon ELSI through the year ended 30 September 1967.

A more practical knowledge of this technical sector would have permitted a more detailed investigation of the single factors involved in the manufacture of the following products:

- cathode tubes,
- electronic supplies (semiconductors),
- X-ray tubes,
- other microwave products.

The major portion of production (65 per cent) concerned cathode and X-ray tubes whilst semiconductors accounted for only a minor part of the production sector.

An analysis of production in the three year-period immediately prior to the date of insolvency has given inconsistent results with regard to the incidence of direct labour costs on quantities sold.

This negative factor is found again in the different manners of preparing the financial statements, some of which only showed a non-detailed profit and loss

account, whilst in others it was possible to analyze the various production expenses.

This diversity was suggested by management and accepted by the statutory auditors, and we believe it was carried out in a cursory manner, thus it would not be possible to analyze costs that were higher than would normally be expected.

Only for the period 1/10/1966 to 30/9/1967 was a budget found that could be compared with the actual results for the period. A comparison between these financial statements and the budget (prepared in English) has lead us to believe that the loss could be considered "worse than expected".

We will now consider the analysis of production for the penultimate financial year 1965/66 on the basis of the results of the official financial statements which showed a loss of Lit. 2,187,486,904.

It should be remembered that this loss represented more than half the share capital of Lit. 4 billion, without taking into account the accumulated losses of prior years at 30 September 1966 Lit. 262,573,096, thus giving a total accumulated loss at such date of Lit. 2,500,000,000.

At this point it must be pointed out that these financial statements are the first after the merger Raytheon ELSI-Selit in September 1965; thus the 1965 loss of Selit which should be Lit. 362,573,096, less Lit. 47,529,111 representing the losses of Raytheon, becomes more notable in the subsequent financial year.

What is the reason then for such a huge loss after only one year of management of the combined companies?

There is reason to believe that:

(1) The losses of Selit that operated as a purchaser from Raytheon ELSI until 1964 were included with its assets for an amount greatly superior to the difference between its share capital and the loss for the year Lit. 985,017,000 (Lit. 1,300,000,000 less Lit. 314,983,000).

(2) Owing to the similarity of production of the two companies, that in years 1964 through 1966 had approximately the same sales volumes, there could not have been increases in costs (even though they did increase enormously over the period of three years) which would have caused the company to go from a profit position, even if slight, of Lit. 16,129,377 in 1964 to a loss one of Lit. 2,137,000,000 in 1966.

The following are the details of the above in Lire/million.

	1964	*1965*	*1966*
Sales Selit	4 232	–	–
Sales Raytheon	2 529	8 519	8 242
Total sales	6 761	8 519	8 242
Profit (Loss)	16	(47)	(2 137)
(in millions of Lit.)	14	(314)	–

In order to consider such losses as related to the industrial management, even though at first glance this is not apparent, it should be remembered that the single factors of production have been so distorted from one year to the next that the loss should be increased fifty-fold in prior year (1965: Lit. 47,529,111 net loss). Thus owing to the constancy of the gross margin foreseen as such in the budget and considering a small decrease in the inventory valuation, the incidence of direct costs should be approximately the same (58-60 per cent) as can be seen in the budgets for the years ended 30 September 1966 and 30 September 1967. Since such parameters in similar conditions (equal volume of

sales, same market conditions, etc.) are not possible, there is no doubt that falsified elements have affected the results of the entire management and such hypothesis is further strengthened when it is considered that in certain years the industrial expenses are shown in the profit and loss whilst in others they are not.

The figures below demonstrate more precisely the unrealiableness of the results, with regard to the true situation and to the volume of sales as well as the movements in inventory.

(A) Ratios between Sales and Direct and General Costs

Sales	*1963/64*	*1964/65*	*1965/66*	*1966/67*
Selit	4 232	–	–	–
Raytheon ELSI	2 529	8 519	8 242	7 143
Total	6 761	8 519	8 242	7 143
	(100%)	(100%)	(100%)	(100%)
Costs				
Labour	2 134	2 869	2 614	2 616
Sales expenses	289	238	527	432
Interest payable	676	917	879	926
Depreciation	507	695	560	573
Sundry and consumables	782	975	761	859
Various — Royalties	23	119	79	109
Total	4 411	5 813	5 420	5 515
	(65%)	(68%)	(66%)	(77%)
Inventory	2 350	2 706	1 822	1 628
Difference	(2 507)	(3 020)	(4 193)	(4 323)
Loss	(157)	(314)	(2 371)	(2 695)

(B) Analysis of Movements in Inventories

Opening inventory	2 871	5 210	5 550	6 029
Opening inventory	1 962	–	–	–
Purchases	882	3 984	5 067	4 230
Purchases	3 171	111	118	–
Charges to inventory	8 886	9 305	10 735	10 259
Final inventory	2 806	5 550	6 029	5 564
Final inventory	2 404	–	–	–
Revaluation	76	57	46	–
Study	665	678	467	372
Study	429	–	–	–
Withdrawal	6 379	6 285	6 542	5 926
Usage	2 507	3 020	4 193	4 323

It is evident from the above summary how the final inventory in the two years 1965/66 and 1966/67 has been modified in order to align the preceding year with the present with an increase of approximately Lit. 1 billion.

The extraordinary income and losses and other expenses have been removed from the summary showing the relationship between sales and direct and general costs, including inventory costs.

3. *Investigation of Direct and General Costs*

(a) *Labour*

We must consider first of all, that in spite of the adoption of an efficient cost accounting system and a profit and loss account at year end which shows detailed labour costs, it is felt that the analysis of the direct labour costs and of general costs with regard to the final three-year period, has been possible from information contained in the general accounting records. See Attachment 1 which summarizes all the labour costs for the last three years.

Taking into account that salaries and wages are shown as a single item in the profit and loss account, it is possible to state that labour costs (employees, workers and management) is equal to 33.67 per cent in 1965/66, to 31.71 per cent in 1966 and to 36.62 per cent in 1967, of sales.

The following expenses should be added to these.

(b) *Travelling expenses* in the various years:

1965 Lit. 89,358,000
1966 Lit. 127,040,000
1967 Lit. 94,896,000

Approximate costs not properly supported by appropriate documentation.

(c) *Donations* which would not have been included as such in the accounts, considering their nature:

1966 Lit. 4,950,000
1967 Lit. 9,470,000

Since these expenses are neither directly nor indirectly attributable to production, they must be considered as licentiousness on the part of the directors, as it is of no importance that they account for only a very small percentage of the huge volume of costs of the Company.

(d) *Hotel expenses* appear to be excessive, considering the limited number of persons to which they should refer (consultants, directors of Raytheon USA). Since they referred to long periods of time, they should have been included in the fees of such persons, thus reducing the burden for the Company.

The expenses were as follows:

1965 Lit. 7,650,000
1966 Lit. 7,121,000
1967 Lit. 6,424,000

Finally we must mention the substantial amount of *sundry expenses* found each year, Lit. 37,733,000 in 1965; these expenses cannot be considered as such and in any case they appear excessive and incorrectly charged.

The chart of accounts relating to cost of labour is detailed enough to classify them correctly.

(e) *Analysis of sundry costs*

This group includes all those costs and expenses, either direct or general, which do not regard either production or sales.

If we leave aside those costs which, even though not properly justified, are of modest amount, the following is our analysis of these costs which appearing frequently are of a significant amount. Amongst the various costs which left us in some doubt are the large amounts relating to *costs for assistance to Raytheon* as follows:

1965 Lit. 61,932,000
1966 Lit. 96,998,000
1967 Lit. 104,328,000,

which were added to *royalties* paid in:

1965 Lit. 119,405,791
1966 Lit. 79,481,279
1967 Lit. 75,284,877.

Details of the account "Technical Consultancy Services" (extract from the book "payments to third parties"):

(1) *Consultancy services rendered at September 1967*

— Mr. Helmut Post	Lit. 9,000,000	
— Mr. Conoscenti	Lit. 320,000	
— Dr. Giuseppe della Ragione	Lit. 5,000,000	
— Mr. Helmut Post	Lit. 375,000	
— Mr. James Conoscenti	Lit. 320,000	(monthly)
— Ing. Kunig Harbert	Lit. 11,682,000	(21 July 1967)
— Dr. Giuseppe della Regione	Lit. 5,687,708	(23 June 1967)
— Mr. Walter Jaeger	Lit. 2,713,744	(17 April 1967)
— Mr. Walter Jaeger	Lit. 8,726,631	(9 March 1967)
— Mr. Walter Jaeger	Lit. 3,400,000	(31 Oct. 1966-9 Feb. 1967)
— Mr. Walter Jaeger	Lit. 1,772,291	(18 Oct. 1966).

(2) *Consultancy services rendered at 30 September 1966*

— Mr. Ralph D'Amato	Lit. 5,500,000
— Mr. Walter Jaeger	Lit. 19,279,785
— Mr. James Conoscenti	Lit. 3,840,000
— Mr. Ralph D'Amato	Lit. 1,000,000.

(3) *Consultancy services rendered at 30 September 1965*

— Ing. Walter Jaeger	Lit. 23,677,749	
— Ing. Walter Jaeger	Lit. 10,405,742	(9 Sep. 1965)
— Ing. Walter Jaeger	Lit. 1,700,000	(30 Sep.-28 Oct. 1965)

(4) *Consultancy services rendered and fees paid in the pre-insolvency period*

29 Jan. 1968	— Dr. Giuseppe della Ragione	Lit. 4,000,000
5 Feb. 1968	— Ing. Helmut Post	Lit. 375,000
6 Feb. 1968	— Mr. James Conoscenti	Lit. 343,000
29 Feb. 1968	— Dr. Giuseppe della Ragione	Lit. 4,500,000
29 Feb. 1968	— Dr. Giuseppe della Ragione (reimb.)	Lit. 873,317

6 March 1968 — Notary Di Giovanni Lit. 7,600,000 (increase in share capital)

6 March 1968 — Mr. James Conoscenti Lit. . . .

There is reason to believe that the holding company periodically paid significant amounts which greatly affected the results each year.

Leaving aside the royalties, which alone would not have been able to justify the payment of the other categories of costs, namely, *technical consultancy* fees amounting to

1965 Lit. 15,101,000
1966 Lit. 42,212,000
1967 Lit. 61,948,000

we must conclude that, in addition to the production system already in existence for which the company *had since 1954 formed a technical patrimony, the* Company had to add a mark-up, so that even if it is true that the poor quality of the products meant that production had to be repeated (goods returned, returns from clients, defective goods left at customs or at the client), the justification of such costs should not have permitted such occurrences.

In fact, adding all the above expenses (group assistance, royalties and technical consultancies) we obtain an overall annual amount of

1965 Lit. 196,438,000
1966 Lit. 218,891,000
1967 Lit. 241,560,000

without taking into account either the costs incurred directly within the company which, as it is known, employed a technical management team whose salaries are shown under "Salaries and wages" or the huge costs incurred for "Research and development" which will be dealt with later.

Continuing the analysis of the sundry costs in the financial statements from 1965 to 1967, there are various payments which are not justifiable. At this point we must mention the "*various expenses*" (see attachment).

Since the general management existed only in name and the components thereof were the two managing directors, there is some perplexity as to a caption found in the records for the years 1966 and 1967 and in the 1968 cash book.

An extract of the above is as follows:

29 Dec. 1966 private expenses general management	Lit.	250,000
31 March 1967 bank transfer R. D'Amato (consultant)	Lit.	2,538,429
22 May 1967 private expenses general management	Lit.	4,000,000
3 July 1967 private expenses general management	Lit.	2,200,000
28 July 1967 private expenses general management	Lit.	2,136,000
31 Aug. 1967 private expenses general management	Lit.	900,000
8 Sep. 1967 *private expenses general management*	Lit.	400,000
28 Aug. 1967 private expenses general management	Lit.	300,000

and again in the year 1967/68 which terminated at the end of March 1968 with *the declaration of insolvency:*

13 Oct. 1967 private expenses general management	Lit.	2,114,000
3 Nov. 1967 private expenses general management	Lit.	5,500,000
11 Dec. 1967 private expenses general management	Lit.	9,500,000
20 Dec. 1967 private expenses general management	Lit.	306,000
21 Jan. 1968 private expenses general management	Lit.	2,106,000
22 Jan. 1968 private expenses general management	Lit.	4,000,000

31 Jan. 1968 private expenses general management	Lit. 3,275,057
29 Feb. 1968 sundry for credit notes	Lit. 5,349,469
Total	Lit. 46,787,955

During the last part of the financial year (January-March 1968) there was a payment, for travelling expenses, to Wagon Lits Cook for Lit. 1,684,455 on 22 February 1968 and Lit. 1,329,989 on 29 February 1968, though it should be considered that the directors, staff and consultants had sufficient funds for such expenses and in such context the payment of Lit. 1,691,181 on 4 January 1968 to Ing. Barberis, who was in charge of the Paris representative office, should be noted. Another erroneous transaction during 1967 in the "general management expenses fund" is the discounting of a bill of Lit. 15,000,000 to a certain Mr. Domenico Guaiana, to whom payments were made (17 January 1967, Lit. 1,000,000 and 26 April 1967, Lit. 10,000,000) against a bill of exchange.

Mr. Guaiana's account was overdrawn for an advance on his expense account of Lit. 770,000 (see attachment).

Also with regard to the afore-mentioned noted "donations" attention should be given to the payment made on termination of the contract to Dr. Chielini on 16 January 1968.

Since Dr. Chielini was an employee of the first level, as can be presumed from his salary, and was in the company's employment since the incorporation of ELSI (1954) and considering that his monthly salary was Lit. 241,135 including for the calculation of his termination benefit the quota of the 13th-month salary, vacation, etc., and calculating one month for each year of service (15 years), his termination benefit should have been Lit. 4,200,000 against the Lit. 7,099,268 actually paid as documented in the cash book, that is, approximately Lit. 3,000,000 in excess.

(f) *Sundry costs and expenses* which should have been insignificant amounts but were, in certain years, of relevance.

Leaving aside any justifiable comment on the amounts of *interest payable* (Lit. 774,940,000 in 1965, Lit. 726,947,000 in 1966 and Lit. 926,553,000 in 1967), which leads to the assumption that at an annual rate of 10 per cent approximately Lit. 12 billion of external capital was used throughout the year, though the use of this was obviously not maximized, the result was that the financial position continued to deteriorate especially when also taking into account the medium-term loans (IRFIS, Banco di Sicilia Sez. Credito Industriale, EFI Banca, etc.) the interest on which is not included in the above amounts. At this point we must point out that this deficiency in the working capital (not remunerable on the basis of the volume of sales effected) contributed to increase the loss of the various years by a good 45 per cent.

(g) *Bad debts written off*

These costs in the financial statements for the year 1965/66 amounted to Lit. 216,254,000 as against the previous year 1964/65 (Lit. 31,926,000) and the following year 1966/67 (Lit. 38,590,000).

An investigation of the related accounts, accounts receivable, Group companies and accounts payable showed that this amount included an amount of Lit. 121,585,582 uncollectable from Fitra S.p.A. — an associated Company — managed by a certain Mr. Carlo Emanuele Ferrero — Sole Director.

Apart from the fact that this company is connected with Raytheon ELSI S.p.A., the amount of the loss was such that it was impossible not to notice it.

Further this loss resulting from an uncollectable receivable could not be written off since the reserve for doubtful debts, at 30 September 1966, had a balance of only Lit. 42,041,145.

Further with regard to the sundry provisions, discounts allowed were only shown for the following years:

1965 Lit. 34,767,000
1966 Lit. 43,277,000

with nothing shown for 1967; in fact it appears rather odd that in the whole year no discounts were allowed to customers. Instead in 1967, and only in that year, do we find *packing costs* of Lit. 30,985,000 included in selling expenses.

Finally, to complete our analysis of this group of general and direct costs, we must consider that the costs relative to accruals for prior years to the leaving indemnity fund and the rounding up of the amounts paid to personnel leaving the company's employment, were not adequately supported.

With regard to accruals for prior years made to the leaving indemnity fund, it is surprising that this was only recalculated in 1966 (Lit. 31,026,000) and in 1967 (Lit. 17,035,000); in fact in the last year, 1967, there was a provision for accruals made to the leaving indemnity fund, amongst personnel costs, for Lit. 112,512,000.

The most irregular occurrence, however, was the rounding of amounts paid to employees leaving the company, equal to Lit. 9,444,000 in 1965, Lit. 15,262,000 in 1966 and Lit. 26,159,000 in 1967.

(h) *Conclusions on our analysis of the direct and general costs*

Having concluded our analysis of direct and general costs and having carried out limited investigations on the various items included therein, it must be considered that the Company's accounts were often tampered with so that costs and/or expenses were recorded in incorrect accounts, thus resulting in a situation difficult to control, principally due to the diversity of the many costs involved, as well as the impossibility to apply set parameters to those of the same kind.

It must also be stated, however, that the classification of the costs in the "budget" made it possible to put similar costs into one or more accounts.

In this regard it was impossible to check the direct production costs, vis-à-vis those estimated in the budget with the published financial statements; it was only possible to compare them with the budgets which, for that portion which had been put into practice, showed results far worse than those shown in the financial statements.

In this connection, for the year 1965/66, whilst the budget forecast a loss of Lit. 356,100,000 equal to 4 per cent of the sales, the published financial statements showed a loss of Lit. 2,137,486,964 (see attachment).

It must be considered in this respect that the large difference (Lit. 2,137,486,964 less 356,100,000) is due to lower valuation of assets or higher estimated liabilities.

This happened again in the year ended 30 September 1967 when the difference between the budgeted loss of Lit. 1,745,400,000 and the actual loss shown in the financial statements of Lit. 2,683,460,000 was approximately Lit. 1 billion.

4. *Analysis of Sales*

At this point we do not consider that our investigations on the volume of sales for the three years 1965 to 1967 can be of any great assistance.

On a sample basis we checked the amount of purchase tax (IGE) paid over on sales in Italy as well as the deduction for foreign sales.

With regard to sales we must take into account the fact that, since to a large extent the sales were destined to clients who returned the goods or did not pay for them, this could lead to a fictitious overstatement of such sales, which remain in the end frozen in the account "accounts receivable".

We reached this conclusion by analyzing the account "accounts receivable — foreign" at 31 March 1968 which includes customers who would not have received the goods or those who would not have paid for goods regularly invoiced.

Amongst these is Lit. 246,296,774 due from Neye Alfred Enateckmer of Quickborn (West Germany); the goods (conductors) were despatched and subsequently returned, remaining in customs.

It must be remembered that in the meantime the banks had granted overdraft facilities on the basis of such exports which the company used, writing off the debt against other amounts until the end of 1967 when the overdraft (mainly with the Banca Nazionale del Lavoro) amounted to approximately Lit. 662 million (see details below).

In this manner the unsuccessful sales continued and the receivership has now instituted procedures for recovery of the related receivables.

With reference to our analysis of the sales and to certain categories of receivables, we noted that large credit facilities had been granted, as shown below:

T. Bosch Ferrau — Barcelona (Spain)	Lit. 135,335,635
Kuba —	Lit. 303,732,458
Thomson of Houston	Lit. 13,281,408

etc., and it should be remembered that the company had requested the auditing firm "Fidital" of Milan to check the amounts due from debtors.

5. Analysis of Sundry Debtors

In this respect, leaving aside the figure of Lit. 73,461,268 relative to advances made to staff, it is important to note, among "*Miscellaneous receivables*" and "*Other receivables*", the following:

(1) Advances to management and consultants for expenses.
(2) Receivable for the reimbursement of IGE on the exportation of goods in the last period, to be received from the finance police of Palermo for an amount of Lit. 71,878,691.
(3) Other receivables which will be detailed below.

Amongst "*Other receivables*" (the account is so entitled), the principal accounts, since they also refer to other transactions, are:

(1) The account Ing. Colombo,
(2) The account Carlo Emanuele Ferrero,

related to the financial statements at 30 September 1966.

The account *Ing. Colombo* (managing director of Columbus S.p.A.) at 30 September 1966 showed a debit balance of Lit. 82,193,039 of which Lit. 65,084,396 related to the year ended 30 September 1965. The credits to this account related to the reimbursement of advances and receipts for payment of invoices on his behalf.

During the year 1966/67 the account balance increased until it reached at 30 September 1967 a total of Lit. 190,712,698 and was written off at such time "using the taxed reserve" for the same amount.

Included in "Accounts receivable" and "Accounts payable" is a compensating entry, that is:

Accounts receivable — Debit Lit. 25,854,705
Accounts payable — Credit Lit. 45,547,181.

In addition, at 30 September 1967 the account "Columbus special account" was closed and was not shown in the financial statements at such date. This account had not moved since the year 1965/66 and was written off "utilizing the taxed reserve" in an amount of Lit. 136,500,000.

The account *C. E. Ferrero* showed a balance at 30 September 1965 of Lit. 31,926,701 and increased during the year 1965/66 as a result of withdrawals for bills, with a sole credit for commissions equal to Lit. 19,384,300, giving a balance of Lit. 134,922,116, and was finally closed (at 31 January 1967) using the same ledger card that should have ceased to exist on 30 September 1966.

Mr. Carlo Emanuele Ferrero who, as is known, was the managing director of Fitra S.p.A., also had a similar account, closed at 30 September 1966, showing a balance of Lit. 136,500,000 of which Lit. 121,586,582 was uncollectable (see above) and the remainder, Lit. 14,914,418 was written off at 30 September 1967 "utilizing the taxed reserve".

The identical amounts of the two special accounts of Fitra and Columbus, Lit. 136,500,000, should be noted. These two accounts increased the loss of Raytheon ELSI by Lit. 327,212,698 Ing. Colombo, Lit. 271,422,116 Mr. Ferrero, for a total amount of Lit. 598,634,814.

6. *Analysis of Inventory*

One of the most significant items to examine is the *Inventory* which included thousands of articles and was updated by the IBM computer bureau and could be considered when determining the valuation as a certain hiding place for losses.

We have good reason to believe this in fact, when studying the financial statements from 1965/67 together with the final situation of insolvency at 31 March 1968 in order to compare them with the results effectively calculated by the sworn appraisors nominated by the receivership, and when discarding finally what can or could be salvaged.

The inventories at year end for each of the above years gave the following amounts:

Financial statements at 30 September 1965 — Final inventory	Lit. 5,679,087,465
Financial statements at 30 September 1966 — Final inventory	Lit. 6,202,101,004
Financial statements at 30 September 1967 — Final inventory	Lit. 6,692,156,656
At insolvency date — Final inventory	Lit. 5,519,600,000.

When considering the purchase in the various fiscal years and the sales, the results for the last two years, 30 September 1966 and 30 September 1967, remain constant whilst a large difference of approximately Lit. 1,500,000,000 can be seen in the financial statements at 30 September 1965, a difference which can be described as an overvaluation of inventory.

In fact, if we reclassify the values (rounded to the nearest million) for movements in inventory for the years from 1965 to 1967, we obtain:

Year 1964/65

— Opening balance	Lit. 5,210,008
— Purchases	Lit. 3,984,695
Total	Lit. 9,194,704

Less: sales in the year	Lit. 8,519,480
Closing balance	Lit. 5,679,087
Gross profit	Lit. 5,003,863
Year 1965/66	
— Opening balance	Lit. 5,679,087
— Purchases	Lit. 5,067,682
Total	Lit. 10,746,769
Less: sales in the year	Lit. 8,242,452
Closing balance	Lit. 6,202,156
Gross profit	Lit. 3,697,838
Year 1966/67	
— Opening balance	Lit. 6,202,156
— Purchases	Lit. 4,230,699
Total value	Lit. 10,432,800
Less: sales for the year	Lit. 7,143,407
Closing balance	Lit. 6,692,156
Gross profit	Lit. 3,402,763

As can be seen from the above, the gross profit, which in the light of an even level of production and raw materials, should have remained constant, in the year 1964/65 (year of the merger Raytheon ELSI/Selit) increased by approximately Lit. 1,500,000,000, from the normal value of Lit. 3,500,000,000 to Lit. 5,000,000,000 as an effect of the over-valuation of inventory effected on that occasion.

As further proof of this, we must also consider the abnormal difference in valuation at the date of insolvency resulting from the appraisal carried out by Prof. Ing. Di Benedetto, who valued the inventory shown in the financial statements at Lit. 5,519,600,000, for an amount of Lit. 2,300,000,000.

Obviously, Professor Di Benedetto's valuation had a lower value as it was valued for liquidation purposes and consequently it cannot be considered as an estimate of the normal production.

In order to convalidate this deduction which cannot in actual fact be proved since there are no elements available (physical stock, detailed analysis of movements, etc.), it can be held that, apart from increases or decreases of a compensating nature each year, inventory was overstated in the financial statements by an amount between Lit. 1,500,000,000 and Lit. 2,000,000,000.

In this respect it is not useful to examine the amounts due to suppliers at the end of each period considered above, since the amount appears insignificant, especially in the last two years, nor would it be useful to consider the amount of bank loans granted against imports, obviously taken to be overseas debts for raw materials; at 30 September 1967 these totalled Lit. 2,447,782,787.

7. Analysis of Work in Progress for Studies, Research and Development

At each year-end the internal costs incurred to construct new plant, manufacture own products and for studies, were capitalized, obviously without computing the value of the projects finalized during the year (finished goods) which, instead of increasing the value of "patents, studies, research and development", or the account "plant, machinery and equipment", has confused the value of purchases.

An analysis of the specific accounts for the three years in question shows an annual cost of approximately Lit. 800,000,000 as follows:

Capitalizations during 1965	Lit. 678,409,000
Capitalizations during 1966	Lit. 467,000,000
Capitalizations during 1967	Lit. 372,000,000.

While in the assets, apart from work-in-progress valued at the end of each year in:

1965 — Work in progress for studies, research and development	Lit. 978,364,000
1966 — Work in progress for studies, research and *development*	Lit. 781,053,000
1967 — Work in progress for studies, research and development	Lit. 441,201,000

there were the following increases in plant, studies, research and development:

During 1965 only for work in progress;
During 1966 the increase related to:

(a) plant and machinery	Lit. 710,000,000
(b) studies, research and development (decrease)	Lit. (230,000,000)
thus the total increase was	Lit. 480,000,000
for which we deduct the work in progress that increased during the year for	Lit. (197,000,000)
we obtain a loss of	Lit. (283,000,000)
During 1967 there was a decrease in the value of plant equal to	Lit. (351,000,000)
and in studies and research costs of	Lit. (126,000,000)
giving a total decrease of	Lit. (477,000,000)
to which we must add work-in-progress that increased during the year	Lit. (330,000,000)
giving a loss of	Lit. (807,000,000)

In conclusion, we have tried to demonstrate that in this sector, even though the company only obtained experience, there was an overall loss in the financial statements between 1965 and 1967 of Lit. *1,090,000,000 (Lit. 283,000,000+ Lit.* 807,000,000) which gave rise to the loss of all the assets in this sector, equal to Lit. 2,430,000,000 since they were not realizable.

At this point it must be remembered that the company carried out updating preparation, studies and other work, etc., with an annual cost of approximately Lit. 800,000,000; even though such costs were capitalized annually and amortized in subsequent years, since they did not bear any fruit, they must be considered as a heavy burden on the results of the period.

We still believe it legitimate to question why the company spent so much on studies, research and development (not counting amongst others the high costs for technical consultants) while paying royalties to its holding company which alone should have permitted a well-organized production adopting the production lines laid down by the same. From our investigation we have noted that the Company, after a number of years of production, had still not defined its production lines.

We noted that the main loss resulted in the SCD sector (electronic equipment), revealing it to be a complete failure on which huge amounts had been spent.

Certainly, if the management had had a greater technical rectitude, such large costs in this sector would not have been allowed, apart from the consultancy fees, which, even if not totally incurred for this sector, have resulted excessive when compared with the fact that the overall aim of the company has not been achieved after so many years of activity.

8. Bank Current Accounts and Overdrafts

The origin of the bank overdraft at the insolvency date for an amount of Lit. 12,971,000,000 can be divided into three categories:

(1) overdraft for normal daily use;
(2) amounts advanced from the banks on imported goods (payments to suppliers) and for goods exported (advances to the company against presentation of invoices with customs' stamp);
(3) long and medium-term loans on the company's plant and inventory.

At insolvency date, since the balance on long and medium-term loans amounted to Lit. 3,841,600,000, the difference of Lit. 9,129,400,000 was made up by bank overdrafts and Lit. 1,200,000,000 of bills of exchange payable to banks as they referred to accommodation bills discounted with the banks.

The analysis of the three years shows an increase in the years ended 30 September 1965 (Lit. 1,093,500,000) and 30 September 1966 (Lit. 1,142,000,000) whilst there was a slight decrease for the year ended 30 September 1967 (Lit. 314,000,000) and for the part of the year till insolvency was declared (Lit. 350,000,000).

When examining the overdrafts, we must consider the bank guarantee given by the holding company for an amount up to Lit. 5,090,000,000, excluding the mortgages and other privileges already guaranteeing the loans and overdrafts.

There are grounds for believing that the parent company, which provided assistance to its subsidiary upon remuneration had ample time to realize that the subsidiary's indebtedness was swelling progressively and growing out of all proportion to the volume of production, and we are surprised that the parent company did not see fit to bring the subsidiary within more realistic limits, for which it gave a guarantee of over five billion lire.

9. Final Notes of the Technical Advisor

The investigation was difficult in that explanations from persons who had closely followed the company were not forthcoming, except for certain explanations from Rag. Nicolò Fiandaca, administrative director responsible for the financial sector. On the other hand, the amount of administrative and accounting entries, the complex activity of the company from a technical point of view and owing to the internal and external financial transactions (between group companies, financing by the holding company, etc.), as well as the difficulties of finding filed documents, meant that the investigation could not be carried out in a short period of time; consequently the investigation was limited to a general examination of a number of items for the last three accounting periods (1964/65-31/3/68), concentrating on certain items that I considered to be of major importance.

In this investigation, as well as in the actual tests, I was ably assisted by Prof. Dr. Giuseppe Zarcone, who used his knowledge of the application of modern accounting techniques, as well as of the American accounting systems generally adopted by the company.

Palermo, 20 November 1969.

Dott. Giuseppe MERCADANTE.

Document 37

SICILIAN REGIONAL LAW NO. 12 OF 13 MAY 1968, "SPECIAL BENEFITS FOR EMPLOYEES OF ELSI OF PALERMO AND SATS OF MESSINA"

[Italian text not reproduced]

(DOC. NO. 4) LAW NO. 12 OF 13 MAY 1968; SPECIAL BENEFITS FOR EMPLOYEES OF EL.SI OF PALERMO AND SATS OF MESSINA

SICILIAN REGION. THE REGIONAL ASSEMBLY HAVING APPROVED, THE PRESIDENT OF THE REGION HEREBY PROMULGATES

the following law

Article 1

The regional councillor for labour and co-operation is hereby authorized to make payment, for the months of March, April and May 1968, to the dismissed employees of Raytheon-EL.SI of Palermo of a special monthly indemnity equal to the actual monthly pay received until the month of February 1968.

The employees dismissed after the month of March shall receive the indemnity as from 1 March 1968.

Article 2

The regional councillor for labour and co-operation is hereby authorized to make payment, starting from 1 April 1968, to the dismissed employees of SATS of Messina of a special monthly indemnity equal to the actual monthly pay received. This indemnity shall be paid until such time as management resumes control and in any case not after 31 May 1968.

Article 3

The indemnity provided for in Articles 1 and 2 above shall be commensurate with the amount of pay actually received on the basis of 26 working days per month.

Article 4

In the implementation of the present law the provisions of regional law No. 334 of 2 August 1954 shall apply.

Article 5

Approval is hereby granted for expenditure of 300 million lire for the purposes laid down in Article 1 above and of 70 million lire for those laid down in Article 2.

The above-mentioned amounts shall be paid into the Sicilian fund for the welfare and employment of jobless workers established in accordance with Regional Presidential Decree No. 25 of 18 April 1951.

Article 6

The expenditure incurred under the present law shall be covered using funds appropriated to section 20911 of the Budget for the financial year 1968.

The present act shall be published in the *Official Gazette* of the Sicilian Region. It is mandatory to respect and enforce it as a law of the Region.

Palermo, 13 May 1968.

(Signed) CAROLLO.
Macaluso.

Document 38

SICILIAN REGIONAL LAW NO. 23 OF 6 AUGUST 1968, "FURTHER SPECIAL BENEFITS FOR EMPLOYEES OF ELSI OF PALERMO"

[Italian text not reproduced]

LAW NO. 23 OF 6 AUGUST 1968 (*OFFICIAL BULLETIN*, NO. 36 OF AUGUST 10)
FURTHER SPECIAL BENEFITS FOR THE EMPLOYEES OF EL.SI OF PALERMO (*OFFICIAL GAZETTE*, NO. 224 OF 3 SEPTEMBER).

The Regional Assembly having approved:

The President of the Region hereby promulgates the following law:

Article 1. Approval is hereby granted for a further expenditure of 350,000,000 lire relative to the period from 1 June to 15 September 1968, for the purposes laid down in Article 1 of law No. 12 (3) of 13 May 1968.

The monthly allowance provided for in Article 1 of the above-mentioned law is also paid to those employees who attended the retraining courses managed by EL.SI on behalf of the Ministry of Labour, as well as to those employees who were put on reserve by Raytheon EL.SI in March 1968 and subsequently dismissed on 30 April 1968.

The sums effectively received by the employees concerned in March 1968 are deducted from the aforesaid indemnity.

Those workers who were employed in another capacity are not entitled to receive such indemnity.

Article 2. The amount under Article 1 shall be paid into the Sicilian fund for the welfare and employment of jobless workers, established in accordance with Regional Presidential Decree No. 25 of 18 April 1951.

Article 3. The expenditure of 350,000,000 lire, incurred under Article 1 of the present law, shall be covered using a quota of the funds appropriated to section 10802 of the budget of the Sicilian Region for the current financial year.

The quota of the appropriation authorized under Article 5, first subparagraph of Law No. 24 of 24 October 1966, concerning the financial year 1968 and utilized in compliance with the foregoing subparagraph, is carried over to the financial year 1983.

The President of the Region is hereby authorized to modify the budget — if necessary — by virtue of his own decree.

Article 4. ESPI is hereby authorized to participate in a company aiming at taking over the property constituting Raytheon EL.SI corporate assets, in order to ensure their utilization for the production purposes inherent to the activity already carried out by the said Raytheon EL.SI.

Article 5. The present act shall be published in the *Official Gazette* of the Sicilian Region and shall come into force on the same day of its publication.

Document 39

SICILIAN REGIONAL LAW NO. 31 OF 23 NOVEMBER 1968, "INTEGRATIVE PROVISIONS TO REGIONAL LAW NO. 23 (2) OF 8 AUGUST 1968 CONCERNING FURTHER SPECIAL BENEFITS FOR EMPLOYEES OF ELSI OF PALERMO"

[Italian text not reproduced]

LAW NO. 31 OF 23 NOVEMBER 1968 (*OFFICIAL BULLETIN*, NO. 53 OF 23 NOVEMBER). PROVISIONS SUPPLEMENTING REGIONAL LAW NO. 23 (2) OF 6 AUGUST 1968, CONCERNING FURTHER SPECIAL BENEFITS FOR EMPLOYEES OF EL.SI OF PALERMO (*OFFICIAL JOURNAL*, NO. 313 OF 10 DECEMBER).

The Regional Assembly having approved; the President of the Region hereby promulgates the following law:

Article 1. Approval is hereby granted for a further expenditure of 230 million lire for the purposes laid down in Law No. 23 of 6 August 1968.

Article 2. The words "relative to the period from 1 June to 15 September 1968" under the first subparagraph of Article 1 of law No. 23 dated 6 August 1968, are replaced by the following ones: "relative to the period from 1 June to 15 October 1968".

Article 3. The expenditure incurred under the present law shall be covered using a quota of the funds appropriated to section 20911 of the budget of the Sicilian Region for the financial year 1968.

In connection with the foregoing subparagraph, Annex No. 4 to the Budget estimate for the financial year 1968 is modified as follows:

Capital expenditures

Section No. 20911. Necessary funds in order to meet expenses, etc.

Object of the provision

Entry to be modified:

Participation of the Sicilian Region in the endowment fund of the Regional Institute for the Financing of Industries in Sicily (IRFIS). From 800 million lire to 570 million lire, entry to be added:

Provisions supplementing regional law No. 23 of 6 August 1968, concerning further special benefits for the employees of EL.SI of Palermo.

230 million lire.

Article 4. The President of the Region is hereby authorized to modify the budget — if necessary — by virtue of his own decrees.

Article 5. The present act shall be published in the *Official Gazette* of the Sicilian Region, and shall come into force on the same day of its publication.

Document 40

REPORT OF THE BANKRUPTCY RECEIVER, AVVOCATO SIRACUSA, 6 MARCH 1970

[Italian text not reproduced]

TO JUDGE VINCENZO BADALAMENTI, "GIUDICE DELEGATO" FOR THE RAYTHEON EL.SI S.P.A. BANKRUPTCY CASE BEFORE THE PALERMO COURT.

I, Attorney Giuseppe Siracusa, trustee in the matter of the afore-mentioned bankruptcy proceedings, further to my earlier report of 28 October 1968 deposited on 31 October 1968 hereby advise you as follows:

The expert witness appointed by you, Dr. Giuseppe Mercadante, submitted his report, duly sworn, on 29 November. In it he stated that the company's statutory accounting records had not been kept in the customary manner, in that the transactions had not been entered in serial form. Under this *modus procedendi*, each transaction entered in the journal was recorded without cross-reference or serial number. According to the expert witness, this was incorrect and serious because, even though the pages in the day book were serial-numbered (albeit without being initialled by the Notary Public who had stamped them for authentication), any transaction could have been fitted into any blank space without showing that it had been unlawfully entered at a later time.

The expert witness also confirmed what I had earlier stated in my first report deposited on 31.10.1968, namely, that the company's accounting records and general accounts had been entered up to 31 December 1967.

The expert witness also referred to the analyses he had made of the company's output and pointed out that this examination had not revealed any sound grounds justifying Raytheon EL.SI. S.p.A.'s losses up to the financial year which ended at 30 September 1967. His analysis of production over the last three-year period, which he conducted in order to identify the causes and the reasons for the company's serious indebtedness, produced widely inconsistent results, particularly with regard to the direct and labour costs as a percentage of the quantities of goods sold. This being so, and in view of the difficulty of carrying out his examination, the expert witness concluded that forged entries had been made in the accounting records. He felt that this was more likely to be the case since the company had practised cost accounting for some years, but not for others.

Bearing this in mind, the expert witness made an analytical examination of the direct costs and overheads, in which he noted a number of inconsistencies and irregularities.

I am submitting his technical report to you so that you can appraise these points, which are dealt with quite thoroughly and explicitly.

As you know, the Raytheon Company was entitled to royalties for the use of its technical processes and patents. The expert witness noted that the Raytheon Company had not only collected these royalties but that it had also received substantial supplementary revenue from what it referred to as "assistance", without any further qualification. These revenues totalled Lire 60,932,000 in 1965, Lire 96,998,000 in 1966, and Lire 104,328,000 in 1967. Raytheon EL.SI also paid out considerable sums for services received from third-party technical consultants: Lire 15,101,000 in 1965, Lire 42,212,000 in 1966, and Lire 66,818,000 in 1967.

For such large fees one might reasonably have expected its products to be virtually perfect from a technical point of view. Yet they continued to be defective, and the customers continued to return them as faulty. The expert witness was unable to find any explanation for this, but his main difficulty was justifying these costs, considering the poor quality of the goods produced.

I therefore feel that good grounds exist for instituting proceedings against the company directors in respect of these expenses, since they were wholly unjustified as far as the results on production were concerned. At all events, I consider that legal action can certainly be taken against the Raytheon Company to recover the money paid to it for assistance, in addition to the revenue from royalties to which it was certainly entitled.

Justification for this opinion stems from the fact that, according to the expert witness, the company carried out updating, preparation and research work totalling an average of Lire 800,000,000 per year, which it capitalized annually to be gradually amortized in future financial years.

However, the consultant noted that since these expenditures did not produce revenue, they should be considered solely as substantial operating losses. This view is supported by the expert witness's contention that it would be quite absurd for a company to incur such huge expenses on research and experimentation, in addition to other huge expenses on technical consultancy, and still produce faulty products. Its products should have been nearly perfect and of high technical quality even if one only considers the assistance accruing from the payment of the royalties. But the expert witness was also puzzled when he analyzed the sales, loans and inventories, as he stated in his report to which I refer you.

The results of the inspection carried out by the expert witness/auditor, assisted by Professor Giuseppe Zarcone, lead me to conclude that the financial difficulties and other company problems were due to a shortage of capital, for which the company took out large loans on which it had to pay considerable service charges, as well as to poor management. The principle cause, however, was the poor organization and mistaken policies of the commercial department, with the result that sales were not properly thought out or financially viable, but were made willy-nilly simply to ensure a high turnover.

However, I must add that nearly all the loans recorded in the financial statements do in fact exist, and that with very few exceptions, all of them can be paid.

For a more thorough examination of all the accounts and the administrative situation of the company, I refer you to Dr. Mercadante's annexed technical report of 20.11.1969.

I am assigning the foregoing to you so that appropriate action can be taken.

Palermo, 6 March 1970.

(Signed) Giuseppe SIRACUSA,
Trustee in Bankruptcy.

Document 41

DECISION NO. 5143 OF THE COURT OF CASSATION, I SECTION, 7 OCTOBER 1982

[Italian text not reproduced]

CIVIL SUPREME COURT OF APPEAL, I DIVISION, 7 OCTOBER 1982, NO. 5143 — SANDULLI ACTING AS CHAIRMAN — SANTOSUOSSO ACTING AS DRAFTSMAN — GRIMALDI ACTING AS PROSECUTING ATTORNEY (IN ACCORDANCE WITH THE RULINGS OF THE COURT) — CENTRAL SAVINGS BANK FOR THE SICILIAN PROVINCES (ATTORNEYS FORNARIO AND MANISCALCO BASILE) VERSUS THE MACHLETT LABORATORIES INC. (ATTORNEY CICCOTTI), RAYTHEON COMPANY (ATTORNEYS BISCONTI AND FAZZOLARI) AND THE BANKRUPTCY ESTATE RAYTHEON ELSI S.P.A.

Confirmation of the Appeal filed in Palermo on 29 October 1980
(omission)

COURSE OF THE TRIAL

With decision 7 May 1968, the Court of Palermo declared the bankruptcy of Raytheon ELSI S.p.A. (Elettronica Siciliana). The Vittorio Emanuele Central Savings Bank for the Sicilian Provinces, creditor of the bankrupt company for an amount of approximately L. 645 million, not having paid after the sharing out of the assets, sued the US Raytheon Company and, considering that the defendant owned 99.15 per cent of the holdings, as well as all the holdings of the company the Machlett Laboratories, which owned 0.85 per cent of the remaining shares of the afore-mentioned bankrupt company, requested the Court to declare its unlimited liability as sole partner, under Article 2362 of the Civil Code.

On the initiative of the defendant, a preliminary jurisdiction regulation was inserted, which ended with the decision — on the part of the Supreme Court — to dismiss the appeal. After resuming the case, and having ended all other legal proceedings, the petition was dismissed by the Court of Palermo with decision 7 July 1978; this decision was confirmed also as far as the appeal was concerned.

The Court of Appeal of Palermo, with decision 13 June-29 October 1980, after disagreeing with the principle (Supreme Court of Appeal, 23 March 1971, No. 848) whereby the unlimited liability laid down in Article 2362 could be referring solely to the hypothesis that the only shareholder is a normal individual, ruled that the liability undertaken by a legal person with all his estate, is neither juridically nor economically different from the unlimited liability undertaken by a normal individual.

The Court, though, rejected the thesis of the applicability of the aforesaid rule to the case in which in a limited company there is a plurality of shareholders represented by companies, although owned by a single individual, pointing out that this thesis hinges on the principle, difficult to surmount, of the juridical autonomy of the single companies of the group in the carrying out of their business.

The case envisaged by Article 2362 of the Civil Code, which may not be applied by analogy, applies only when there is a single shareholder, though through a fictitious use of nominees.

From the critical assessment of the various elements pointed out by the appellant bank the Court of Appeal reached the conclusion that the Machlett Laborato-

ries could not be considered merely as a fictitious partner. This was also sufficient in order to rule out the hypothesis that Machlett had merely acted as mandatory for the purchase of the shares. Once established that Machlett was — although in a minimum way — interested in a shareholding in the Italian company, Raytheon Company's wish not to become sole shareholder of the aforesaid Italian company in order to avoid the consequences envisaged in Article 2362, could not be considered fraudulent.

The Court of Palermo also ruled that the behaviour attributed to Raytheon ELSI's directors, being outside the juridical sphere of the US company, might generate its contractual or extra-contractual liability towards the Savings Bank.

Finally, as regards the applicability of US law under Article 12 of the preliminary provisions, the Court ruled that the matter at issue implied a controversy over the juridical subjectivity of US companies. In any case, the Court concluded that,

> "had the US law been applied concerning the partner's liability for the Company's debts — which the Court did not have the possibility to get acquainted with — the result would not have been any different from the one reached by applying Italian law".

For the annulment of this decision, the Savings Bank, being the losing party, files an appeal, accompanied by six motives and illustrated by a memorial. Machlett and Raytheon Company oppose it; the latter has also filed a counter-appeal.

MOTIVES OF THE DECISION

The censures of the six motives for the appeal were subdivided in two groups of issues by the counsel of the appellant. The first one concerns the applicability of Article 2362, Civil Code, while the second one regards fault liability.

In the first group Raytheon's liability is sustained under the afore-mentioned Article 2362 on the basis of a number of motives, which can be summed up as follows:

(a) Coincidence between the concrete case and the case envisaged by law, at least from a substantial point of view, since the "ratio" and the letter of Article 2362 aim at avoiding the limitation of the liability of the partner who has become the sole "owner" of the limited company, although through another subject (first, second and seventh motive of the hearing of the minutes);

(b) the formal separation between the two subjects no longer holds, once it is proved that one of them has acted as mandatory of the other and has been used as a fictitious nominee; that which clearly emerges from the US law (which the Court should have examined and applied) which does not envisage the presence of two subjects in the case of controlled companies (third, fifth and sixth motive);

(c) in the case of common intention on the part of a number of subjects to purchase holdings in order to concentrate them in the hands of a single subject, Article 2362 applies, at least by analogy (fourth motive).

This Court deems that the problems under sub (a) and (c) are unfounded in law, whereas the motive sub (b) cannot be granted, on the grounds of the judge's findings.

This Supreme Court, modifying its previous approach (decision No. 848 of 1971), recognized that the rule contained in Article 2362 of the Civil Code is applicable, not only in the hypothesis of concentrating the shares in the hands of

a single partner, but also when this concentration is achieved in a single legal person. (Supreme Court of Appeal, No. 6594 of 1981.)

Now for the first time this Court is faced with the question as to whether the case envisaged in the aforesaid rule applies when a legal person has complete control over the limited company, and owns up to 100 per cent of the companies holding the shares of the former.

To this effect, it is sustained that also in this case the "ratio" of the rule materializes, that is to say — avoiding any measure aimed at limiting the liability of the single "dominus" who owns the company completely.

Nor is this conclusion contradicted by the letter of the law, which does not refer to the formal "entitlement" of the shares, but concerns their substantial "ownership".

This phenomena is expressly envisaged by the legislator in various other cases of intermediation of nominees (Arts. 1471 and 2360 of the Civil Code, Art. 5 of Law No. 216 dated 7 June 1974); in such cases there is an "indirect" ownership, namely, through other subjects, who are formally proprietors. This hypothesis, being valid also when the holdings of a limited company are completely owned by a single legal person, the plurality called for by the law is only apparent, and therefore the principle of unlimited liability laid down in Article 2362 of the Civil Code becomes applicable.

This thesis is very subtly outlined. Indeed, in a number of cases, apart from those indicated by the appellant, there is substantial ownership of the assets, vis-à-vis their formal entitlement. However, it seems to this Court that the problem must be solved along guidelines which are completely opposite to the ones put forward by the bank appellant, in the same way as some fundamental principles of the existing system on commercial law.

Indeed, the sector of limited companies in our legislation is characterized by:

(a) the formal legal personality, who does not allow the various subjects operating in the commercial field to be mixed up, even though they associate or create links between themselves, or are in a position of respective economic dependence;

(b) the principal of autonomy of the estates, which can be referred to the various subjects, even though a single company or group has complete control over the others;

(c) the principle of limitation of liability of the company to its own assets and to the respective shares in the company's capital of individual partners.

The widespread interconnection of the phenomenon of the grouping or of the control relation among companies also hinges on these criteria, where the dependence and accessories among them, as stated on a number of other occasions, does not produce either their identification or the absorption into the juridical sphere of the rights and obligations of the other companies, but limits its effects solely to the field of activity and to the aims to be reached.

The existing law takes into consideration these phenomena, regulating some consequences but without modifying the aforementioned principles on the issue of personality and liability.

Article 2362 of the Civil Code, since it separates, in the case of a single shareholder, the debt situation (Schuld) — which is always borne by the company — and its liability (Hafthung) — which applies to the estate of the single partner — partially waives the aforesaid principles, but retains the juridical autonomy of the various subjects, nor does it contain any elements to consider the absorption in a single shareholder of different partners who have a relationship of economic dependence.

Such regulation waiving the principle of liability envisaged in Articles 2325 and 2427 of the Civil Code, is taken into consideration only for the hypothesis when there is no more plurality of members, not under merely the economic profile, but especially under *the juridical one.*

In other terms, this regulation does not depend on the case of "complete control" of one of the shareholders as regards assets and management, but on the hypothesis when there is a single shareholder, either formally or for the assessment of a merely fictitious presence of the other shareholders.

Indeed, this Court has — on a number of other occasions — (decis. 2602/70; 571/73) declared that the unlimited liability of the partner under Article 2362 of the Civil Code can only be recognized when there is no longer plurality of partner, *through the demonstration of the fictitious or fraudulent nature of the names of* the shareholders. Such plurality does not exist, apart from the case of fictitious intermediation of partners nominees, also in the case of purchase of shares through mere mandatories of the only partner.

At this point, three specific complaints of the appellant must be taken into account:

(a) that the various elements proving the fictitious intermediation of the Machlett Company have been assessed by the Court of Appeal only analytically and not globally;

(b) that the evidence that said Company had acted as mandatory has not even been admitted;

(c) that, according to US law, there is no distinction among companies which are associated up to 100 per cent.

The first complaint is unfounded, since the global and conclusive assessment — which runs counter to the appellant's thesis — emerged from the whole thorough analysis carried out by the competent Court regarding the various elements submitted.

The second complaint must be dismissed as well, since the Court of Appeal has logically concluded that — *once Machlett's personal interest in purchasing* a part, even though very small, of the shares of the Italian company was demonstrated, it was useless to prove a counter-evidence on the basis of this conclusion.

As regards the applicability of the US law, it must be pointed out in the first place that the question raised in the framework of the preliminary jurisdiction regulation as an alternative between the applicability of Article 17 or of Article 25 of the preliminary provisions of the Civil Code, was settled in this latter sense, with a decision of settlement of this Court No. 952 of 1972.

As *regards the unicity of juridical subjectivity* in the US law for the hypothesis of formally plurimous shareholdings, the Court of Palermo, while pointing out — on the one hand — that it had not had the possibility of getting acquainted with this foreign law concerning the individual States, decided to dismiss the aforementioned thesis on the basis of the information directly acquired by the judge.

As regards the first group of issues raised by the Savings Bank appellant, the unlimited liability envisaged in Article 2362 of the Civil Code materializes only when all the company's shares are in the hands of a single partner, and not when *one of the partners has a domineering* position as regards management and the effects of said management on the Company's assets, and not even when the holdings of a second (or of other) companies are completely owned by the domineering partner.

The exceptional unlimited liability of the shareholder of a limited company, since it waives the general principle of this matter, may not be applied by analogy.

But the same legislative concrete case materializes both when some shares are purchased by subjects who had acted as simple mandatories and not as partners, and when the plurality of the partners, fictitiously preordained in order to waive the rule of Article 2362, is proved to be only apparent, since these people are basically mere nominees, with no interest or power as regards the life and the activity of the company, therefore cannot be considered as partners.

According to the last thesis supported by the Savings Bank, Raytheon Company's employees, in their capacity as directors of the Italian company Raytheon ELSI, should have been judged guilty for violation of the general principle of correctness and of the principle of the duty of care, with the ensuing liability of the aforesaid US company under Article 2049 of the Civil Code.

This motive must be dismissed as well, since the competent Court has pointed out in this regard that the behaviour of the directors of the Italian company Raytheon ELSI could not be referred to the US company, since there was no evidence that the above-mentioned directors were authorized to commit Raytheon Company.

This statement also implies a concrete assessment, to which no exception may be taken here.

Therefore, the appeal must be totally dismissed, with the consequent granting of the examination of the appeal filed by Raytheon Company.

The Savings Bank — the losing party — must be sentenced to the payment of costs to Raytheon Company, whereas costs must be offset in connection with the Machlett, taking into account the small entity of the respective counsels.

The Supreme Court of Appeal, I Civil Division, joins the appeals Nos. 6481/81 and 7873/81 filed against the first decision; it dismisses the first one and grants the second. It sentences the Savings Bank Vittorio Emanuele, main appellant, to pay the costs, amounting to L. 2,042,000 (of which 2 million lire are for fees), to Raytheon Company. It offsets the costs in respect to the Machlett Laboratories Company.

Rome, 18 June 1982.

The Draftsman,
(Signed) Fernando SANTOSUOSSO.

The President,
(Signed) Ruggiero SANDULLI.

The Division Director,
(Signed) Antonio CHIANESE.

Filed with the Clerk of the Court's office

7 October 1982.

The Clerk,
CHIANESE.

Filed in Rome on 12 October 1982.

No. 27783
(Illegible)

Document 42

DECISION NO. 6712 OF THE COURT OF CASSATION, I SECTION, 9 DECEMBER 1982

[Italian text and English translation not reproduced]

Document 43

DECISION NO. 2879 OF THE COURT OF CASSATION, 9 MAY 1985, *GIURISPRUDENZA COMMERCIALE* (1986), II, PAGES 537-564

[Italian text and English translation not reproduced]

Document 44

AFFIDAVIT OF INGEGNERE BUSACCA, DATED 30 OCTOBER 1987

[Italian text not reproduced]

Maria Antonietta Morici
Notary Public
via Umberto Giordano n. 55
Palermo (Tel. 571059)

1. I am Ing. Guido Busacca, born at Messina on 27.4.37, and resident at No. 35 via Notarbartolo, Palermo.

I graduated in Industrial Engineering — Electrotechnical Subsection — on 13.11.59.

I joined Raytheon-ELSI in via Villagrazia, Palermo, on 1.8.60, and at the time of my dismissal on 29.3.68, I was head of the microwave tube design department.

2. As at 29.3.68 Raytheon-ELSI had five production lines:

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

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

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

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

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

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

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

3. On the whole, the plant was to be considered uneconomic:

The plant engineering and available technologies were generally obsolete.

The machinery was intensively exploited, old and hard to manage. The labour force was comparatively unskilled. A negligible impulse had been given to independent research and there was no available plan to renew the production lines (even by means of licencing).

4. The dismissal letters arrived in March 1968. We were all dismissed except for a small number of persons required for jobs involving the administrative, commercial and technical aspects of a company ceasing its productive activities. Work had actually ceased some time earlier with the strikes and occupation of the plant.

5. Eltel (set up by SIT-SIEMENS, now called ITALTEL, in 1972) took over ELSI. Start-up operations were very difficult. The semi-conductor and X-ray tube lines were not even reopened and the plant was mainly scrapped.

The cathode-ray tube line had to be reactivated in order to give jobs to the labour force while awaiting restructuring.

At the time this activity was resumed a licence was purchased from RCA to ensure that the processes were less risky. Also this line was dismantled a couple of years later.

The microwave tube line did not come within the SIT-SIEMENS range of (telephone) products and was started up again only experimentally, linked with the line surge arresters. A research group was set up and considerable investments made, as a result of which products improved. Other licences were purchased. Practically all the products were renewed. The line was sold off to SELENIA Industrie Elettroniche Associate S.p.A. in 1985 because of its greater affinity with the field of activity of the latter; on the same occasion also the telephone surge arrester line was closed down.

The lines set up in the former ELSI plant to replace those closed down had no relation to the latter as regards either technology or equipment, for example: telephone cable radio broadcasting, energy stations.

(Signed) Guido BUSACCA.

Palermo, 30.10.87.

AUTHENTICATION OF SIGNATURE

I, Dott. Maria Antonietta Morici, Notary Public in Palermo, with office at No. 55 via Umberto Giordano, registered on the List of Notaries of Palermo, hereby certify that, after being duly warned of the penal consequences of false or incomplete declarations under law No. 15 of 4 January 1968, Ing. Guido Busacca, born in Messina on 27 April 1937 and resident at No. 35 via Notarbartolo, Palermo, of whose identity I, Notary Public, am certain, made and put his signature to the above declarations.

Palermo, thirtieth of October nineteen eighty-seven.

(Signed) Maria Antonietta MORICI.

DOCUMENTS ATTACHED TO THE COUNTER-MEMORIAL OF ITALY

Unnumbered Documents, Volume I

NOTE VERBALE OF THE EMBASSY OF THE UNITED STATES OF AMERICA, ROME, 7 FEBRUARY 1974

No. 51.

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Italian Republic and has the honor to submit herewith the documented claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated.

The documental claim, consisting of five bound volumes in English, includes the sworn statement of claim of Raytheon Company and Machlett Laboratories, Incorporated, two legal memorandums, and 138 annexes in two volumes.

The claim is for $7,225,968, plus interest, from 30 June 1971, and is based upon illegal actions and interferences by Italian authorities contrary to treaty provisions, Italian law, and international law which precluded an orderly liquidation under the laws of Italy of ELSI, S.p.A., a wholly-owned Italian subsidiary of Raytheon Company and Machlett Laboratories located in Palermo, Sicily.

It is established from the evidence that Raytheon Company and Machlett Laboratories, Incorporated, are now and have been continuously nationals of the United States since the date the claim arose on 1 April 1968. The evidence also establishes that ELSI S.p.A., was incorporated under the laws of Italy and was owned at such time 99.16 per cent by Raytheon Company and 0.84 per cent by Machlett Laboratories, Incorporated.

The evidence also establishes that when it became apparent that the extensive efforts of the above-mentioned companies to make ELSI a viable element in the Italian economy would not succeed, ELSI's Board of Directors decided on 16 March 1968 to cease full-scale production, dismiss on 29 March 1968 all but 120 employees and to liquidate in an orderly fashion. As a result of this determination, the Mayor of Palermo, on 1 April 1968, acting in his capacity as an official of the national government, requisitioned the ELSI plant and all equipment for six months. The Mayor's action was appealed by ELSI to the Prefect of Palermo.

The evidence also establishes that ELSI officers and directors, with financial obligations falling due and no assets from which they could be satisfied, were, under Italian law, forced to place ELSI into bankruptcy on 26 April 1968. Under the bankruptcy laws of Italy, ELSI lost complete control of its assets, the most desirable of which were sold to ELTEL, a corporation controlled through IRI, by the Government of Italy. Notwithstanding the illegal requisition and the filing of a voluntary petition in bankruptcy, the Prefect of Palermo failed to act promptly on ELSI's appeal on the illegal requisition. It was not until 20 November 1969, a full year and seven months after the appeal was filed, that the Prefect held that the requisition action of the Mayor was illegal. It was a hollow victory as ELSI was not legally in a position to reassert its control over its property and

proceed with its intended orderly liquidation. Based upon the Prefect's decision, the curator in bankruptcy instituted a civil suit against the Mayor and the Interior Ministry of the Italian Republic for damages resulting from the illegal requisitioning. As a result, the Mayor appealed the decision of the Prefect to the President of the Italian Republic who, on 22 April 1972, confirmed the Prefect's finding that the Mayor's action was illegal.

It is clear from the legal opinions submitted with the claim that the appeal taken to the Prefect of Palermo was the only legal remedy available to Raytheon Company and Machlett Laboratories, Incorporated, to obtain redress. It is also clear from the documented claim that amounts realized and to be realized by the curator in the bankruptcy proceedings will not be sufficient to satisfy fully the preferred creditors, to say nothing of the general creditors and the stockholders.

As compared to the skilled personnel ELSI assembled for the orderly liquidation, the curator, even under the best of circumstances, was handicapped in realizing the full value of the property. The curator was further handicapped by the Government's control and eventual purchase of the assets through ELTEL at a reduced price. Moreover, Raytheon Company and Machlett Laboratories, Incorporated, were deprived of their stockholders' rights of liquidating ELSI and of working out favourable settlements with its creditors.

The amount of compensation claimed is based upon the difference between the monetary position in which Raytheon Company and Machlett Laboratories, Incorporated, would have been had they been allowed to proceed with an orderly liquidation of ELSI, as compared to the monetary position they now face.

In addition to the compensation claimed, it is also requested that the Government of Italy arrange to dismiss or settle Italian bank suits against Raytheon Company and Machlett Laboratories, Incorporated, presently pending before the Italian courts, for obligations incurred by ELSI, and which obligations would have been settled during an orderly liquidation but for the illegal actions and interferences of Italian authorities. Accordingly, should Raytheon Company and Machlett Laboratories, Incorporated, be forced to pay judgments of Italian courts, the amount claimed will be increased by the amount of such judgments.

The Embassy of the United States of America is prepared to enter into negotiations with the Ministry of Foreign Affairs of the Government of Italy with a view to concluding an expeditious and equitable settlement of the claim at a mutually convenient time.

The Embassy of the United States of America takes this occasion to renew to the Ministry of Foreign Affairs its expression of highest consideration.

Embassy of the United States of America
Rome, 7 February 1974.

THE CLAIM OF RAYTHEON COMPANY AND THE MACHLETT LABORATORIES, INCORPORATED, AGAINST THE GOVERNMENT OF ITALY IN CONNECTION WITH RAYTHEON-ELSI S.P.A.

The Government of the United States of America hereby makes claim against the Republic of Italy in the amount of $7,225,968 (Lire 4,516.23 million at the exchange rate of 0.0016) for damages suffered by the American corporate nationals, Raytheon Company and The Machlett Laboratories, Incorporated (herein-

after respectively called "Raytheon" and "Machlett"), as a result of acts and omissions of the Republic of Italy in connection with Raytheon-ELSI S.p.A., their Italian subsidiary (hereinafter in this claim, together with predecessor corporations, called "ELSI").

From the inception of their respective associations with ELSI, which began with the ownership of only a few shares of stock, Raytheon and Machlett on a continuing basis made enormous efforts to increase ELSI's technical and business competence. Essential relationships with Italian firms were sought to unlock Italian markets. However, during its operative existence (1953-1968), ELSI was plagued with problems which prevented it from realizing its potential. During 1967, Raytheon and Machlett made a massive effort to revitalize ELSI by advancing large amounts of new capital, seeking new Italian products, partners and markets, increasing managerial skill and reducing costs. When it became clear in the spring of 1968 that Raytheon's and Machlett's efforts to make ELSI a viable self-sufficient element of the Italian economy were not to meet with success, the claimaints were left with no other solution but the liquidation of ELSI in an orderly and efficient manner. At the point of the decision to liquidate ELSI, the Government of Italy seized ELSI's assets without taking any corresponding responsibility for its liabilities, causing ELSI's bankruptcy, the destruction of a large share of its asset value and substantial losses to Raytheon and Machlett.

The actions of the Government of Italy violated Italian law and the standard of conduct prescribed by customary and conventional international law.

The Statement of Facts on which this claim is based are set forth in this Part I. The legal precedents supporting the position of Raytheon and Machlett regarding the violation of Italian and International law are set forth in Part II. The supporting documents are displayed in the Appendix.

Part I. Statement of the Facts

[Not reproduced]

MEMORANDUM OF LAW IN SUPPORT OF THE CLAIM OF RAYTHEON COMPANY AND THE MACHLETT LABORATORIES, INCORPORATED, AGAINST THE GOVERNMENT OF ITALY IN CONNECTION WITH RAYTHEON-ELSI S.P.A.

Introduction

In the statement of its claim against the Government of Italy, the Government of the United States has shown that two of its corporate nationals, Raytheon Company and The Machlett Laboratories, Inc., made substantial contributions of "know how" and investment of funds in an Italian corporation, last known as ELSI, S.p.A. Over a 13-year period, Raytheon and Machlett, in addition to their technical contributions, invested over 12,600 million lire in equity and guaranteed loans in the Italian enterprise, without receiving any dividends on their investment.

ELSI's inability to establish itself as a self-sufficient enterprise in the Mezzogiorno stemmed largely from the failure to gain full access to Italian markets. In order to reach such markets, efforts were made to associate with appropriate Italian partners. Assistance was sought from public and private sources. ELSI made efforts to obtain privileges, subsidies, franchises, marketing advantages, and governmental investment enjoyed by other Italian corporations. Although the critical nature of its needs in this regard was graphically portrayed to the governmental officials, ELSI's efforts were largely in vain. Accordingly, in view of its unprofitable operations and inability to achieve measures which would correct its marketing and financial situation, ELSI's American stockholders were left with no alternative to the liquidation of their Italian corporation.

Even at this point, instead of the Government which could have taken constructive action to find a lasting solution to ELSI's problems and thus to preserve the employment base in the Mezzogiorno, instead undertook *a series of actions* to prevent liquidation.

Belatedly, when it was clear that ELSI had no course open to it other than selling its business and property to the highest bidders, in the best interests of its creditors, the Government of Italy faced the political, social and economic consequences of the liquidation of ELSI, a major enterprise and employer in Sicily. Beset with the results of its own inaction, the Government of Italy then illegally seized ELSI's assets without taking any responsibility for its liabilities, thereby *forcing* ELSI into bankruptcy and the sale of its assets to a governmental corporation. The management and control of ELSI was taken away from the claimants, and, as a consequence, they suffered great losses.

Among the steps taken by the Government of Italy were:

(a) The Mayor of Palermo, *acting as an official of the national government*, seized ELSI's assets. Such interference at this point wrested the control and management of ELSI from the claimants, plunged ELSI into bankruptcy and deprived them of their interests in ELSI's management and property, *permanently*. No *compensation* has ever been paid or even offered the claimants for the taking of their property and management interests in ELSI.

(b) The Prefect to whom ELSI promptly appealed, failed to rule on ELSI's appeal for over one and one-half years following the taking by the Mayor of Palermo.

(c) The President of Sicily announced the Government's opposition to the sale of ELSI assets and threatened Raytheon and ELSI with prolonged and extensive international litigation.

(d) The Italian Government publicly announced that a Government-owned corporation, IRI-STET, would "take over" ELSI, thereby preventing other competing buyers from attempting to purchase the assets.

(e) The Italian Government allowed the ELSI workers to occupy the ELSI plant illegally further cutting off any sale possibilities.

(f) Banks owned by the Government through IRI, as predicted by President Carollo, initiated lawsuits now totalling Lire 4,400 million against Raytheon and Machlett for unguaranteed loans which the banks had made to ELSI.

In the following pages, the Government of the United States will show that the actions of the Government of Italy were in clear violation of applicable treaty provisions and of customary international law. The Government of the United States will further show legal justification for the amount of $7,225,968 or 4,516.23 million lire at the conversion rate of 0.0016 for the damages suffered by the claimants as a result of the acts and omissions of the Government of Italy.

I. The Community of Interests of the Governments of Italy and the United States in the Equitable Resolution of this Claim

At the outset, it is essential to recognize that the Governments of Italy and the United States enjoy a similar understanding of the necessity, through international law, to protect international investments. Although demonstrated in a number of ways over the years, the most concise manifestation of this understanding is found in their bilateral Treaty of Friendship, Commerce and Navigation and a Supplemental Treaty, which respectively entered into force on 26 July 1949; and 2 March 1961 (hereinafter sometimes called the "FNC Treaty")[1].

Among the provisions of the FNC Treaty are the following which are directly applicable to this claim:

1. Recognition that protection encourages foreign investment to the mutual benefit of both countries[2].

2. Authorization for citizens of either State to "organize, control and manage corporations" in the territory of the other "for engaging in commercial, manufacturing processing and scientific activities"[3].

3. A prohibition against the taking of property of the corporation of one signatory may not be taken within the territories of the other without due process of law and without the prompt payment of just and effective compensation[4].

4. Interests held directly or indirectly by corporations of either signatory in property within the territories of the other are afforded the protection of Article V, paragraph 2, of the FNC Treaty, the pertinent substantive portion of which is set forth in the preceding paragraph 3[5].

5. A prohibition against either signatory taking arbitrary or discriminatory measures within its territories in:

(a) preventing the corporations of the other signatory to control and manage enterprises which such corporations have been permitted to establish or acquire in its territories, or,

(b) impairing such corporations' legally acquired rights and interests in such enterprises or in the investments they have made, whether from the investment of funds through loans, the acquisition of shares of stock or otherwise, or from the furnishing of materials, equipment, services, processes, patents, techniques or otherwise[6].

6. Provision for the rights of the corporations of one signatory to acquire and freely *dispose* of real and personal property in the territories of the other[7].

7. The requirement that each signatory afford the property of corporations of the other "the most constant protection and security" and right to "enjoy in this respect the full protection and security required by international law"[8].

8. A prohibition against unlawful entry or molesting of the dwellings, warehouses, factories, shops, and other places of business, and all premises thereto

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[1] Treaty of Friendship, Commerce and Navigation. 79 *UNTS* 171; 64 Stat. 2255. Agreement Supplementing the Treaty of Friendship, Commerce and Navigation. 404 *UNTS* 326; 12 *UST* 131.

[2] Preamble to the 1961 Supplement to the FNC Treaty.

[3] FNC Treaty, Art. III, para. 2.

[4] *Ibid.*, Art. V, para. 2.

[5] FNC Treaty Protocol, para. 1.

[6] FNC Treaty Supplement, Art. I.

[7] FNC Treaty, Art. VII, para. 1.

[8] *Ibid.*, Art. V, para. 1.

appertaining, of corporations of either signatory, located in the territories of the other[1].

9. Assurance that the rights and privileges of an economic nature granted by one signatory to its publicly owned or controlled enterprises will be extended to the privately owned enterprises of the other where both such enterprises are in competition with each other. Supplying goods or services for government use is excluded, but supplying goods and services for the use of government-controlled corporations is not[2].

10. A requirement that existing and future legislation providing special advantages to firms engaging in the industrialization of Southern Italy is specifically to apply to US investments made in Italy[3].

This claim should be considered in the spirit of the FNC Treaty which reflects the attitudes of both Governments toward international investment, and the desirability of protecting and encouraging it. Not only does the FNC Treaty prescribe the spirit in which this claim should be considered; it, moreover, as shown by the foregoing list, provides many detailed rules on which the claim is based. It also enunciates the Governments' adherence to affording international investment the "full protection and security of international law"[4].

II. The Supremacy of International Law

The rights and duties between States and foreign nationals are established by international law which, in the context of this claim, is superior to domestic law.

The Italian Constitution of 1948, like the constitutions of many States, provides in Article 10:

> "The Italian juridical system conforms to the generally recognized principles of international law.
> The juridical status of the foreigner is regulated by law in conformity with international rules and treaties . . .[5]"

The Harvard Draft on the Law of Responsibility of States sets forth this universally recognized rule as follows:

> "Art. 2. The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its National Courts, or in its agreements with aliens, to the contrary notwithstanding[6]."

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[1] FNC Treaty, Art. VI.

[2] *Ibid.*, Protocol, para. 2.

[3] FNC Treaty Supplement, Art. V.

[4] Although the sources of international law are variously defined, Article 38 of the Statute of the International Court of Justice provides a good key.

> Article 38. 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> *(a)* international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> *(b)* international custom, as evidence of a general practice accepted as law;
> *(c)* the general principles of law recognized by civilized nations;
> *(d)* subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

[5] Peaslee II, 280, a translation.

[6] See comment, 23 *AJIL* (1929), Spec. Suppl., 142-145, for citations.

In its draft on the Law of Treaties, the Harvard Research, with a wealth of citations, unequivocally applies the rule to Treaties as follows:

> "Art. 23. Unless otherwise provided in the treaty itself, a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omissions in its municipal law, or because of any special features of its governmental organization or its constitutional system[1]."

Citations of authority for this generally recognized rule are limited in this brief because of their abundance rather than their paucity. The rule is set forth in numerous decisions of international courts[2]. It has been accepted without challenge in the respective practices of the Governments of Italy and the United States. It needs no further elaboration.

III. Acts and Omissions of the Government of Italy in Contravention of Customary and Conventional International Law

A. The Taking of ELSI's Property

As shown in detail in the statement of claim, the illegal requisition of ELSI's property occurred at a crucial time in ELSI's existence. The requisition and the failure of the Italian judicial system to act promptly on ELSI's appeal of the illegal requisition plummeted the company into bankruptcy. It permanently deprived the claimants of their right to manage the corporation and of their interests in the ELSI property. As described in the claim, governmental officials thwarted the sale of the desirable portions of the ELSI property to anyone else, and fostered its sale to a government-owned and controlled corporation. The result in the final analysis is akin to confiscation.

The illegal nature of the taking is, moreover, established by its violation of applicable treaty provisions, general rules of customary international law, and of domestic Italian law.

1. Preventing the Effective Control and Management of ELSI

Raytheon and Machlett were assured the right to pursue directly or through an Italian subsidiary, without interference or discrimination, the manufacturing and scientific activities in which ELSI was engaged. Such rights were provided by Article I, paragraph 2; Article II, paragraph 3; and Article III of the FNC Treaty.

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[1] 29 *AJIL* (1935), Supp., 1029-1044.

[2] The Permanent Court of International Justice, on numerous occasions, maintained that since the rights and obligations of a State in its international relations are determined by international law, it is international law, not municipal law which provides the standards to determine the legality of its conduct. For example, it held in the case concerning *Certain German Interests in Polish Upper Silesia* (Merits), *P.C.I.J., Ser. A, No. 7* (1926), that use of Polish law in expropriating certain German properties in Poland was a violation of Poland's treaty obligations towards Germany. The Court stated, "Any [Polish] measure affecting the property, rights and interests of German subjects covered by Head III of the Convention . . . which oversteps the limits set by the generally accepted principles of international law, is, therefore, incompatible with the régime established under the convention".

See also *Free Zones* case between France and Switzerland, where the Court said "that France cannot rely on her own legislation to limit the scope of her international obligations". *P.C.I.J., Ser. A, No. 24* (1930), 12 and *Ser. A/B, No. 46* (1932), 167.

Article I of the FNC Treaty Supplement, moreover, granted the right to effectively manage and control ELSI. The full text of this significant Article provides:

> "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 requisition of the ELSI property and the subsequent events, which were foreseeably and proximately caused by the seizure, clearly violated the claimant's right to effective management and control of ELSI. In fact, they prevented *any* management or control by the claimants whatever. The seizure of ELSI's assets at the fragile moment of 1 April 1968, forced ELSI's bankruptcy and assured the eventual sale of its valuable assets to a corporation owned and controlled by the Government of Italy. ELSI's control and management were permanently wrested from the US national claimants. A clear breach of this treaty provision resulted.

2. Impairment of Legally Acquired Rights and Interests

Under sub part *(b)* of the treaty provision quoted in the preceding paragraph, the Government of Italy bound itself not to impair the claimants' legally acquired *rights and interests* in enterprises which they have been permitted to establish or acquire or in investments which they have made. The requisition of ELSI's property at the crucial point in its financial history of 1 April 1968, impaired the enterprise ELSI and the claimants' investment in it to the point of extinction. Again, a clear-cut, far-reaching and irreparable breach of this treaty provision resulted.

3. The Protection of Rights and Interests

Before leaving the provisions of Article I of the FNC Treaty Supplement, attention should be focused upon the fact that the provision clearly establishes the right to protection of property in which they have indirect interests. Also eliminated is the possibility of narrowly defining "interests" so as to eliminate some of the claimants' real damage. Although there are excellent grounds for this claim, based upon customary international law which are set forth below in this brief, Article I of the FNC Supplement eliminates the question of whether the claimants may bring a claim based upon their shareholder and other interests in ELSI. Funds advanced, whether by loan, capitalization or recapitalization "or otherwise" are recognized as protectable under the Treaty.

The provision also recognizes that rights, interests or investment in enterprises may be created by advancing items other than money. Investment may be made in the form of "materials, equipment, services, processes, patents, techniques or otherwise". Again, the Treaty recognizes the many ways in business practice that investment rights or interests in a foreign enterprise are created, and the two

Governments wisely and equitably provide protection for all types of rights, interests, and investments, including the interests of a parent corporation which has invested in its subsidiary by providing it materials, equipment and services for which it has not been paid.

4. Taking Without Due Process of Law and Without Prompt Payment of Just and Effective Compensation

Among the rights of members of the community of nations is the right to protection by international law of the persons and property of their nationals within the territories of other States.

The taking of ELSI's property without payment of prompt, adequate and effective compensation was in violation of Treaty provisions, customary international law, and the domestic law of Italy.

Private property may not be taken from a foreigner without the prompt payment of just, adequate and effective compensation[1].

(a) Taking

The requisition of ELSI's property constituted a "taking" even without the subsequent consequences which deprived the claimants of their property rights and interests permanently. A "taking" may be either temporary or permanent. Accordingly, although the requisition decree purported to seize the property for a six-month period, subject to extension if deemed necessary, it constituted a "taking" *ab initio*, as the term "taking" is interpreted and understood in international law.

Article 10 of the 1961 Harvard Draft Convention on Responsibility of States for Injuries to Aliens defines a "taking" as:

> "3. *(a)* A 'taking of property' includes not only an outright taking of property but also any such *unreasonable interference with the use, enjoyment, or disposal of property* as to justify the inference that the owner thereof *will not be able to use, enjoy, or dispose of the property within a reasonable period of time* after the inception of such interference.
>
> *(b)* A 'taking of the use of the property' includes not only an outright taking of use but also any *unreasonable interference with the use or enjoyment of property for a limited period of time*[2]." (Emphasis added.)

The Mayor's act of requisitioning ELSI's property and the Prefect's subsequent delay in ruling on ELSI's appeal amounted to a "taking" of ELSI's property. Under principles enunciated in the above provision of the Harvard draft, it is clear that interference with ELSI's property insured that ELSI would not be able to use or dispose of its property within a reasonable time. Considering the circumstances surrounding ELSI at the time, the requisition insured that ELSI would never be able to liquidate in an orderly fashion and in effect forced ELSI into bankruptcy. This conduct certainly satisfies the test of "conduct attributable

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[1] Battaglini, "Nazionalizzazione", *Novissimo Digesto Italiano* XI, p. 150; De Nova, "L'Esproprio in Diritto Internazionale", *Il Politico*, 1951, p. 261; Quadri, *La Sudditanza nel Diritto Internazionale*, Padova, 1936, p. 225; Vitta, "Espropriazione e Nazionalizzazione nel Diritto Internazionale", *Rivista di Diritto Internazionale*, 1953, p. 120.

[2] Art. 10, para. 3, draft Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12, Apr. 15, 1961. Reporters, Sohn and Baxter, Harvard Law School, p. 101; 55 *Am. J. Int'l L.* (1961), 553.

to a State that is intended to, and does, effectively deprive an alien of substantially all the benefit of his interest in property"[1].

As clearly demonstrated in the Statement of Claim, the Government of Italy was well aware of ELSI's financial straits. It was precisely for this reason (to prevent the consequent orderly liquidation) that the Government requisitioned ELSI's property. Thus, the intent to take the property from ELSI permanently and the effect of such an actual taking are both present in this case. Had the Government of Italy requisitioned the assets of a company which was not in the process of liquidation, had the Prefect promptly overturned the decree, and had the company suffered no substantial interference with its activities, or damage as a result, a requisition might not constitute a "taking" of property. In ELSI's situation, the facts clearly show that the requisition did amount to a "taking of property". Even the loss of title did predictably ensue when a major portion of ELSI's assets were sold by the Curator in bankruptcy to an Italian Government corporation. The fact that the requisition was theoretically only for a temporary period did not change the effect on ELSI — the immediate and permanent deprivation of its use of its property and subsequent loss of legal title.

Thus, having established that the requisition by the Government of Italy substantially exceeded the minimum requirements of the international law to constitute a "taking" of ELSI's property, we turn to the question of whether just compensation was either offered or paid.

The Government of Italy did neither.

(b) The Prohibition against taking Property Rights and Interests Without Due Process or Without Payment of Prompt, Adequate and Effective Compensation

The first sentence of paragraph 2 of Article V of the FNC Treaty provides:

> "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 prompt payment of just and effective compensation."

Paragraph 1 of the Protocol to the Treaty makes clear that the above provision applies to Raytheon's and Machlett's stockholder and other interests in ELSI and the ELSI property. It provides:

> "1. The provisions of paragraph 2 of Article V, providing for the payment of compensation, shall extend to interests held directly or indirectly by nationals, corporations and associations of either High Contracting Party in property which is taken within the territories of the other High Contracting Party."

Again, the two Governments, in order to encourage foreign investment and the benefits which flow therefrom, have eliminated the technical distinction between rights and interests in property. The Treaty safeguards both the rights and interests in property held directly or indirectly. Raytheon and Machlett invested in ELSI over 12,000 million lire in the manner contemplated by this Treaty, and accordingly their property rights and interests held indirectly through ELSI were afforded protection from the taking of such rights and interests without due process of law and without the prompt payment of just and effective compensa-

[1] Art. 10, para. 3, draft Convention on the International Responsibility of States for *Injuries to Aliens, Draft* No. 12, Apr. 15, 1961. *Reporters*, Sohn and Baxter, Harvard Law School, p. 101; 55 *Am. J. Int'l L.* (1961), 553.

tion. The taking of such rights and interests of the claimants without due process of law and without prompt payment of just and effective compensation constitutes a clear treaty violation by the Government of Italy.

Moreover, the constitutions of almost all countries of the free world prohibit the taking of private property without payment of compensation. The Constitution of Italy is no exception. Article 42 of the Italian Constitution provides:

> "Property is public or private. Economic assets belong to the State, to institutions or to private persons.
>
> Private property is recognized and guaranteed by law, which specifies the modes of acquisition and enjoyment thereof, as well as its limits, in order to assure its social function and render it accessible to all.
>
> In cases provided by law, *and on the basis of compensation*, private property may be expropriated for reasons of public interest." (Emphasis added.)

The US law is like that of Italy in this respect. The fifth amendment of the US Constitution affords protection to private property and just compensation when it is taken for public use. The applicable portion of this amendment provides:

> "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The requisition of the ELSI property was illegal under Italian law. It was also held to be so by a favourable ruling on the appeal of ELSI [1].

Italian courts have taken a similar position with respect to the effect in Italy of a foreign nationalization where full compensation is not guaranteed. For example, a 1956 decision of the Court of Appeal of Bologna reached this result in the case of *Svit Nsrodin Padnik and Bata A.S.* v. *Societa B.S.F. Stiftung and others*. The Court nullified the extra-territorial validity in Italy of an expropriation by the Czechoslovak Government where payment and valuation would be solely at the discretion of the expropriating administrative authority in Czechoslovakia. The case held that under such circumstances proper standards were not established which would protect an owner from political and other discrimination and would thus reduce the expropriation to an act of "real and pure confiscation". The court took the effective measure of holding that nationalization under conditions of this type would not "produce" a transfer of ownership of property situated in Italy [2].

The taking of the ELSI property was without due process in further violation of the Treaty provisions of Italy and the United States. The taking runs counter to court decisions handed down by the Courts of Italy. It contravenes the provision of the Italian Constitution set forth above. It even has been declared illegal by the Prefect in the appeal taken by ELSI.

The taking also is contrary to the generally accepted principles of customary international law. In the *Cerruti* case [3], the Government of Italy espoused the claim of its national against the Government of Colombia. The latter had taken properties of a Colombian company in which an Italian national held substantial interests. The Government of Italy vigorously pursued compensation for the value of Cerruti's interests for many years. Eventually, the matter was arbitrated

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[1] See Exhibits III-7 and III-8 for the text of the appeal of ELSI and the decision of the Prefect one and one-half years later.

[2] Reported in 5 *American Journal of Comparative Law* 641, 642 (1956).

[3] De Visscher, "Protection diplomatique des actionnaires des sociétés", *Revue de droit international et de législation comparée*, 1934, pp. 630-631; IV *AJIL* 1003 et seq.

by the President of the United States, and Italy was given an award for the value of such interests plus protection of its national against the monetary consequences of suits against him in process at the time of award which arose in connection with the taking of his property interests in Colombia.

Accordingly, without prompt payment of just and effective compensation in the taking of the ELSI property, the Government of Italy breached a principle of international law, to which it has consistently subscribed.

A large number of western countries, by treaty, have assured the protection of private property. As demonstrated above by the FNC Treaty, Italy and the United States number among the States which have given such assurances. In so doing, they lend stability to the rules regulating investment, and in this way enhance their economic development in their own interest. These treaties encourage the "investor" to allow his funds, technology and managerial skills to flow to areas where they are most needed in order to energize less developed areas. Often the missing ingredient to the fulfilment of a depressed area is required from abroad. Sometimes this ingredient is capital, sometimes techology, and sometimes managerial skill. These treaties encourage the mix of local natural resources and manpower with the foreign ingredient required in order to achieve mutually beneficial results.

Another such treaty provision is found in the protocol to the European Convention for the Protection of Human Rights. This protocol was signed by a representative of Italy on 20 March 1952 in Paris and ratified by the Government of Italy on 26 October 1955. It provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest, and subject to the conditions provided for by law and by the general principles of international law."

The following is an illuminating official comment explaining the meaning of this provision:

> "This text permits the expropriation of private property 'subject to the conditions provided for by law', which will, in the great majority of cases, include the payment of compensation. In addition, a further guarantee is added by the reference to 'the general principles of international law'. This provision was intended to guarantee compensation to foreigners for the expropriation of their property, even if compensation is not paid to nationals; it would therefore make it impossible for a State which nationalizes foreign property without adequate compensation to justify its actions on the ground that the foreign owners of the property were treated on a footing of equality with its own citizens[1]."

Clearly, compensation is to be paid to the foreigner, even though nationals might not receive compensation or might not be paid as much as foreigners. It is also clear from use of the term "legal person" in the text of the protocol that it affords protection to corporations.

In this regard Italy's position is the same as that of the United States; Italy has also taken additional steps to assure that foreign investors and property owners will receive equitable treatment in the territory of Italy, which is what the claimants seek in presentation of this claim.

Accordingly, the Government of Italy is responsible for making payment in respect of its taking of the ELSI assets in contravention of customary and

[1] Robertson, *The Council of Europe*, p. 158.

conventional international law and in contravention of the law of most nations, including its own.

B. Occupation of ELSI's Plant

As set forth in the Statement of the Claim, hundreds of ELSI workers forcefully occupied the ELSI plant.

The holding of the plant by the workers is illegal under Italian law. Articles 508, 633 and 634 of the Italian Criminal Code clearly cover almost all foreseeable fact situations in which private property is affected or perturbed by the violent action of others.

Holding of the ELSI plant by the workers was illegal under some or all the above-mentioned Articles of the Italian Criminal Code. Translations of which are as follows:

> "508[1]. (Arbitrary invasion or occupation of agricultural or industrial factories. Sabotage.)
>
> Whoever invades or occupies someone else's agricultural or industrial factory . . ., with the only purpose of preventing or perturbing the normal cause of work, is punished by imprisonment of up to three years and by a fine of not less than Lire one-thousand (now Lire eight-thousand)."
>
> "633[2]. (Invasion of lands or buildings.) Whoever arbitrarily invades someone else's lands or buildings, either public or private, for the purpose of occupying them or to otherwise draw profit from them, is punished, upon demand of the private offended person, by imprisonment of up to two years or by a fine from Lire one-thousand to ten-thousand (now from Lire eight-thousand to eighty-thousand).
>
> The above punishments are inflicted jointly and the action is started by the Office of the District Attorney without demand if the crime is committed by more than five persons, one of whom is armed, *or by more than ten persons, even without weapons.*" (Emphasis added.)
>
> "634[2]. (Violent perturbation of the possession of immovables.) Outside the cases indicated in the preceding Article, whoever by violence to persons or by threat perturbs someone else's peaceful possession of immovables, is punished by imprisonment of up to two years and by a fine from Lire one-thousand to three-thousand (now Lire eight-thousand to twenty-four thousand).
>
> The violation is considered as having been committed by violence or threat when it is committed by more than ten persons."

Under the laws of any civil law country, including the Italian law, when the authorities have knowledge that a crime is being committed such authorities must intervene immediately to stop the criminal action and to prosecute the offenders. Articles 1 and 2 of the Italian Code of Criminal Procedure provide:

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[1] Section 508 of the Italian Criminal Code (approved by Royal Decree No. 1398 of 19 October 1930), which falls under the following headings:

"Book 2. The Crimes in Particular, Title 8, Crimes Against the Public Economy, Industry and Trade, Chapter 1, Crimes Against the Public Economy."

[2] Which falls under the following headings:

"Title 13. The Crimes Against the Property, Chapter 1, Crimes Against the Property Committed by Using Violence Against Things or Persons."

"1 [1]. (Officiality of the penal action.) The penal action is public and, when the private demand for punishment ('querela'), the request by the Minister of Justice ('richiesta') or the private petition ('istanza') are not necessary, (the action) is started by the Office of the District Attorney in consequence of a report ('rapporto') (made by the Police or by other Public Officials), medical ('referto'), private information ('dununcia') or of any other information of the crime.

2. (Duty to report in general.) The Officials and the other members of the Judiciary Police must make a report of any crime of which they have in any way knowledge except for those crimes for which punishment can be inflicted only upon private demand ('querela') of the offended person.

The other public officials and those persons who are appointed to carry out a public service, who, in exercising their functions or service or as a consequence of their functions or service, have knowledge of a crime, are obliged to make a report on it provided it is not a crime for which punishment can be inflicted (only) upon demand of the offended private person.

The report must be filed, without delay, to the office of the District Attorney or to the 'Pretore'.

The report summarizes the fact and all circumstances which may be of interest for the criminal proceedings; gives information concerning all the evidence collected and, when possible, contains the personal data regarding the person who is indicated as being the author of the crime, the person offended by the crime and the witness of any element suitable for the identification of same."

Despite their obligations under the law, Italian officials, instead of taking the measures required by Italian law and removing the workers, seized the plant by the Mayor's illegal requisition order. The ELSI officers were denied access to the books and records of the Corporation. Prospective buyers could not view the plant, its equipment and inventory. The acts and omission of the governmental Officials foreclosed the possibility of any sale of the ELSI assets and of an orderly liquidation.

The FNC Treaty also affords protection to the claimants in this connection. In pertinent part, it provides:

"The dwellings, warehouses, factories, shops, and other places of business, and all premises thereto appertaining, of the nationals, corporations and associations of either High Contracting Party, located in the territories of the other High Contracting Party, shall not be subject to unlawful entry or molestation [2]."

C. Failure of Prefect Promptly to Quash the Requisition

In the circumstances, the failure of the Prefect immediately to act upon the ELSI appeal was contrary to Italian and international law. In order to avoid the damage done to the claimants by virtue of the requisition of the ELSI assets by the Government of Italy, the Prefect should have taken immediate action on the appeal. This appeal was not acted upon within a few hours, days, weeks or even months. Over a year and a half elapsed before a decision was rendered. In the

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[1] Section 1 of the Italian Code of Penal Procedure — approved by Royal Decree No. 1399 of 19 October 1930, which falls under the following headings: "Book 1, General Provisions, Title 1, The Actions, The Penal Action."

[2] FNC Treaty, Art. III, para. 2; Art. V, para. 3.

interim, ELSI had been destroyed, forced into bankruptcy, and its property values decimated. This is a perfect example of the maxim:

"Justice delayed is justice denied."

International jurisprudence is replete with cases which recognize the validity of this axiom[1].

As a prelude to the foregoing, the claimants were threatened with such a delay and with the irreparable consequences. The Hon. Carollo recognized that irreparable damage would befall the claimants if the requisition was not lifted. He stated orally and in writing that he deemed it his "duty, in the situation as it has developed, to provide *Raytheon Company* with some fundamental elements of judgment so that the *irreparable* can be avoided"[2]. With reference to the appeal which should have been decided without delay in view of the critical nature of ELSI's position, the Hon. Carollo stated in his written memorandum to the President of ELSI:

> "(2) The Banks which have outstanding credits for approximately 16 billion lire, cannot and will not accept any settlement even at the cost of dragging the Company into litigation on an international level. I mean to refer to Raytheon and not to ELSI because the distinction between ELSI and Raytheon is not found to be admissible since any and all financing was granted to ELSI based on the moral guarantee of Raytheon, whose executives have always negotiated said financing.
>
> (3) Anyway, it is known in Italy that one can enforce the claims directly against Raytheon because it has interest and revenues in our country also outside ELSI.
>
> It is obvious that every attempt will be made *(even at the cost of long litigation)* to obtain from Raytheon what is owed by ELSI.
>
> (4) In the event that the plant shall be kept closed, waiting for Italian buyers who will never materialize, *the requisition shall be maintained at least until the courts will have resolved the case. Months shall go by*[3]." (Emphasis supplied.)

These threats of delay in connection with the illegal requisition, the fact they were carried out by the failure of the Prefect to rule for over one and one-half years, the forced bankruptcy of ELSI and the dragging of the claimants into international litigation by the government-owned and controlled banks violates customary international law and the provisions of Article V, paragraph 1, of the FNC Treaty, which provides:

> "The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law."

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[1] For a wealth of citations, see Freeman, *Denial of Justice*, Chapter X — Unreasonable Delay in Administering Justice; the Hague Codification Conference of 1930; "Article 9. International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact . . . (2) that, in a manner incompatible with said obligations, the foreigner has encountered in the [judicial] proceedings unjustifiable obstacles *or delays* implying a refusal to do justice." The Harvard Draft Research on Responsibility of States in the pertinent part of Article 9 provides: "Denial of Justice exists when there is an unwarranted delay . . ."

[2] Exhibit III-12.

[3] *Id.*

The fact that all similar other requisitions of property under the 1865 Italian statute had been promptly quashed by Italian authorities violates Article V, paragraph 3, of the FNC Treaty, which affords the claimants protection from such discriminatory conduct as follows:

"3. The nationals, corporations and associations of either High Contracting Party shall within the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 and 2 of this Article, upon compliance with the applicable laws and regulations, *no less than the protection and security which is or may hereafter be accorded to the nationals, corporations and associations of such other High Contracting Party* and no less than that which is or may hereafter be accorded to the nationals, corporations and associations of any third country. *Moreover, in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control, enterprises in which nationals, corporations and associations of either High Contracting Party have a substantial interest shall be accorded,* within the territories of the other High Contracting Party, treatment no less favorable than that which *is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of such other High Contracting Party have a substantial interest,* and no less favorable than that which is or may hereafter be accorded to similar enterprises in which nationals, corporations and associations of any third country have a substantial interest." (Emphasis supplied.)

Accordingly, protection is afforded to Raytheon and Machlett, by both customary and conventional international law. It is clear with respect to the latter that this protection extends to Machlett and Raytheon who, as shareholders, had a "substantial interest" in ELSI, their wholly owned Italian subsidiary, as contemplated by the Treaty provision quoted immediately above.

Failure of the Prefect promptly to quash the illegal requisition violated the above-mentioned Treaty provisions as well as customary international law. It damaged the claimants for which the Government of Italy should compensate the Government of the United States.

D. Failure to Achieve Access to Markets and Advantages of Mezzogiorno Laws

During its existence, ELSI sought but did not receive, market parity with publicly owned and controlled electronics enterprises in connection with the supplying of goods and services for use by Italian government-controlled corporations. Failing to achieve such parity, it then sought to associate itself with government-controlled corporations in order to obtain a share of such markets. ELSI also sought, without success, the advantages accorded by Italian law to firms in Southern Italy. Access to such markets and the benefits of such laws are assured by the FNC Treaty.

E. Interference with ELSI's Right to Freely Dispose of Real and Personal Property

Article VII of the FNC assures the claimants the rights to freely dispose of their real and personal property within the territory of Italy. The acts and omissions of the Government of Italy prevented them from disposing of their interests in ELSI's real and personal property. In fact, the entire object of the requisition and subsequent actions of the governmental officials was to interfere

with the disposal of the ELSI assets in accordance with the planned orderly liquidation. The interference is set forth in detail in the statement of the claim. The President of Sicily made clear the intent that such interference would persist, blocking sale of the assets to anyone in order to assure that they would not be removed from Palermo.

Here, again, is a clear Treaty violation for which the Government of Italy is liable.

IV. Responsibility of the Government of Italy for the Acts and Omissions of Its Officials

Acts and omissions of officials within the actual or apparent scope of their official capacities are attributable to their government. The acts and omissions of the President of the Sicilian Region, the Mayor of Palermo, the Prefect of Palermo and others which were described in Part I of this claim, are directly attributable to the Government of Italy. As a result, the Government of Italy is directly responsible for such acts and omissions, and the damage which resulted from them.

The rule regarding attribution of acts and omissions of government officials to the government is generally accepted as customary international law. There can be no doubt "that a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the government, so far as the acts are done in their official capacity"[1].

> "The organs of the State acting within their competence may commit internationally unlawful acts thereby resulting in the responsibility of the State . . . The only check which is necessary in this connection is the one concerning the possibility that the organ acted outside its competence. When it has been ascertained that an action falls within the competence of the organ, responsibility for such an action is imputed to the State[2]."

Inter alia, the acts and omissions of the judiciary[3], of administrative officials[4] and of officials of municipal and subordinate units[5] are imputed to the State.

The American Law Institute has stated the rules as to attribution as follows:

> "Section 169. *General Rule as to Attribution*
>
> Conduct of any organ or other agency of a state, or of any official, employee, or other individual agent of the state or of such agency, that causes injury to an alien, is attributable to the state within the meaning of section 164 (1) if it is within the actual or apparent authority, or within the scope of the functions, of such agency or individual agent.
>
> *Comment:*
>
> (a) *State agency, in general.* The term 'agency' as used in this Section includes the head of state and any legislative, executive, administrative or judicial organ, or other authority of the state.

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[1] Salvador Commercial Company (El Triunfo), XV *Reports of International Arbitral Awards* 477 (1902).

[2] Monaco, *Manuale di Diritto Internazionale Pubblico*, Turin, 1970, p. 556.

[3] *Id.*, pp. 558-560.

[4] *Id.*, pp. 557-558.

[5] *Id.*, pp. 560-562; see also Monaco, *Manuale di Diritto Internazionale Publico*, Turin, 1960, pp. 560-562.

(b) *Commercial enterprise.* The term 'agency' as used in this Section includes any commercial enterprise owned by a state unless, under the law of the state, such enterprise is a separate legal entity to which the state does not accord sovereign immunity of a foreign state in the courts of other states . . .

(c) *Individual agent.* The term 'individual agent' as used in this section includes any official employee, member of the armed forces, or other individual employed by or authorized to act on behalf of the state or any agency of the state . . .

Section 170. *Conduct of Local Authorities*

If conduct of an agency or agent of a political unit that is included in a state causes injury to an alien, such conduct is attributable to the state to the same extent as conduct of an agency or agent of the state, subject to the special rule stated in Section 193 (3) as to a contract of a political subdivision of a state.

Comments:

(a) *Federal state.* Conduct of local authorities is attributable to the central government of a state without regard to the nature of the state's constitution. Although component units of a federal state have certain attributes of sovereignty for domestic purposes, and may, as in the case of the United States be known as 'state', they are not treated as separate states under international law . . .[1]"

To the same effect is the resolution adopted by the Third Committee of the Hague Codification Conference in 1930, which provides

"Article 8 (1). International responsibility is incurred by a State if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State."

It is clear from the ample authority, of which the above passages are only examples, that the acts and omissions of the President of Sicily, the Mayor and the Prefect of Palermo are imputed to the Government of Italy both by the general rule and the rule covering acts of officials of subdivisions of the State.

Moreover, the Regional President, the Mayor of Palermo, and the Prefect are not just local officials, but are officials of the National Government as well. When the President of the Sicilian Region threatened the catastrophe which befell ELSI's American shareholders, his own words make it clear that he was speaking not only for the Region, but for the Central Government. When the Mayor of Palermo issued the requisition decree, he was then acting in his capacity as a National Officer. Likewise, when the Prefect delayed in ruling on the legality of the requisition, he was also acting as an agent of the National Government.

When ELSI's employees unlawfully occupied ELSI's plant, no government official whatsoever moved to expel them and enforce the existing laws and treaty obligations prohibiting such occupation. This omission to act on the part of those chargeable under Italian law with enforcing this law also is directly attributable to the Government of Italy.

Although it is clear that they were acting as Central Government officials, whether the Regional President, the Mayor and Prefect were acting in their local or national capacities is actually of no consequence. In all cases, the acts or the

[1] Restatement, Second, Foreign Relations Law of the United States (1965).

failure to act of these officials are attributable to the Government of Italy. These officials were unquestionably acting, or failing to perform acts within "their official capacity"[1], their "actual or apparent authority"[2], and "the limits of their authority"[3].

V. Standing of the Government of the United States

The Government of the United States has standing to present this claim on behalf of the American corporations, Raytheon Company and the Machlett Laboratories, Incorporated.

A. Corporate Nationals of the United States

From the date of injury to the present date, Raytheon and Machlett continuously have been corporate nationals of the United States under any test recognized by international law.

1. Siège Social

Raytheon and Machlett are United States corporations under the *siège social* test of nationality. It holds that a corporation is a national of the state where the centre of its activities is found. The centres of Raytheon's and Machlett's activities are in Lexington, Massachusetts, and Stamford, Connecticut, respectively. At these sites they hold their board meetings, have corporate offices and their principal places of business, and direct their manufacturing and sales activities. There are no other locations, particularly locations outside the United States, which could be considered as the *siège social* of these two companies.

2. Genuine Link

Raytheon and Machlett are both strongly and genuinely linked to the United States by virtue of their stock ownership. All of the stock of Machlett is owned by Raytheon and a large majority of Raytheon's stock is and has been owned from the date of the injury on which this claim is based to the present date by United States citizens as is shown in the accompanying Statement of Claim. Accordingly, they are United States corporations under the "genuine link" test[4].

3. Situs of Incorporation

As shown in the Statement of Claim, both Raytheon and Machlett were incorporated under the laws of the territory of the United States, Delaware and Connecticut, respectively. They are, and have been at all times from their incorporation to the present date, corporations in good standing under the laws of such states. The FNC Treaty provides in Article II, paragraph 2:

> "Corporations and associations created or organized under the applicable laws and regulations within the territories of either High Contracting Party and shall be deemed to be corporations and associations of such High Contracting Party and shall have their judicial status recognized within the

[1] Salvador Commercial Company, XV *Reports of International Arbitral Awards* 477 (1902).

[2] Restatement, Second, Foreign Relations Law of the United States (1965).

[3] Article 8 (1). Resolution of the Third Committee of the Hague Codification Conference of 1930.

[4] *Nottebohm* case *(Liechtenstein* v. *Guatemala)* 6 April 1955, *I.C.J. Reports 1955.*

territories of the other High Contracting Party whether or not they have a permanent establishment, branch or agency therein."

In view of Raytheon's and Machlett's unassailable genuine links to the United States, the provisions of Article XXIV, paragraph 5, of the FNC Treaty[1] are not applicable. Third country nationals do not have any direct or indirect controlling interest in either of the claimants. Accordingly, Raytheon and Machlett are United States corporations under the situs of incorporation test.

4. Conclusion

Under any test recognized by international law, the nationality of Raytheon and Machlett is irrefutably American.

B. Standing to Represent Shareholders

The Government of the United States, under rules of international law, is entitled to espouse the claim of its nationals, Raytheon and Machlett, as stockholders of the Italian corporation, ELSI. The rule of international law, on which such entitlement is based, is expressed in the decisions of international tribunals, in treaties, in the practice of the Governments of Italy, the United States, and many other countries, and in the writings of international legal scholars.

1. Resumé of Pertinent Facts

The following is a brief resumé of the facts which buttress the standing of the United States to represent the ELSI shareholders:

(i) Raytheon and Machlett are American national corporations under any theory recognized by international law.

(ii) Together they own one hundred percent of the ELSI stock.

(iii) ELSI was an Italian corporation and Italy is the respondent State in this claim.

(iv) Diplomatic representation of the ELSI stockholders by any State other than the United States is not possible.

(v) ELSI is defunct. In view of the diminished asset value (caused by the acts and omissions on which this claim is based), the Curator in bankruptcy represents the creditors of ELSI, not ELSI, and not ELSI's shareholders.

(vi) In view of ELSI's defunct status, the shareholders emerge as the real parties in interest with respect to (i) their interests in ELSI, (ii) their stockholders' rights (as distinct from their interests) which were taken from them by the acts and omissions of the Italian Government, and (iii) the protection afforded to United States nationals through customary international law and treaty provisions.

2. The Practice of the Governments of Italy and the United States

Again, the Governments of Italy and the United States enjoy a similar approach to the espousal of stockholder claims. Their positions are based upon the realities. Both Governments recognize that damage to a corporation whose shares are largely held by foreigners gives rise to real damage to the shareholder and

[1] "Each High Contracting Party reserves the right to deny any of the rights and privileges accorded by this Treaty to any corporation or association created or organized under the laws and regulations of the other High Contracting Party in the ownership or direction of which nationals of any third country or countries have directly or indirectly a controlling interest."

consequent interest in the stockholder's government to protect his economic rights and interests.

A State has a right to bring a claim on behalf of its citizens shareholders of a foreign corporation when the corporation is incorporated in the respondent State[1].

(a) The Practice of the Government of Italy

In accordance with the above principle, the Government of Italy sought damages on behalf of its citizens resulting from damages *(a)* to a Colombian legal entity[2] and to a Peruvian legal entity[3] of which Italian citizens were shareholders. In the *Canevaro* case, Scialoja, representing the Government of Italy, in answering Peru's claim that the action by the Government of Italy was not directed to protect the personal interests of the Canevaro brothers but their indirect interests, stated the following:

> ". . . Même si l'on admettait que la Société José Canevaro é Hijos, comme ayant son siège à Lima, était dans sa constitution sociale soumise à la loi péruvienne, cela ne diminuerait jamais le droit que l'État italien a de protéger comme ses propres sujets les sociétaires italiens de la maison, même dans les droits qui leur viendraient en passant par la personne sociale[4]."

(1) The *Cerruti* Case

The *Cerruti* case eventually involved both the United States and Italy. It arose over losses of an Italian national through confiscation in 1885 by the Government of Colombia of the property of the Colombian Sociedad en Comandita in which Cerruti had an interest. The Company was, according to Colombian law, a legal entity in the form of "a commercial association which, by the very constitution, was invested with Colombian nationality and cannot be considered as a foreign firm"[5]. So strongly did Italy adhere to the right to espouse stockholder claims that it vigorously and tenaciously pressed its claim over a period of 25 years, in spite of the persistent objections that Italy had no standing to bring the claim in view of the company's Colombian nationality. The dispute was first submitted to the Government of Spain, which held for Italy[6]. Later, the President of the United States was appointed arbiter, and in 1897 he made an award in favor of Italy in which he stated,

> "The claims of said Signor Ernesto Cerruti for injury sustained by him

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[1] Santamaria, "La Tutela dei Soci nel Diritto Internazionale", *Rivista delle Società*, 1965, pp. 1110 and 1130.

[2] *Cerruti* case.

[3] *Canevaro* case, *American Journal of International Law*, 1916, pp. 709 et seq. and 746 et seq.

[4] ". . . Even if one admits that the Society José Conevaro é Hijos, having its office at Lima, was under its by-laws subject to Peruvian law, that does not diminish the legal right which the State of Italy has to protect the Italian shareholders of the company as its Italian citizens, even under the laws to which they may become subject through the activities of the corporation." Contre-Mémoire présenté par le Gouvernement Italien, Rome, Imprimerie du Ministère des Affaires Etrangères, 1912, pp. 22 et seq.

[5] Bureau, Paris 1899, *The Italo-Colombian Dispute*, pp. 63-64.

[6] IV *AJIL* 1003.

for reasons of losses and damages to his interests in the firm of E. Cerruti and Company are proper claims for international adjudication[1]."

Italy continued to press for many years after the award for complete monetary restitution for Cerruti, including protection for him from litigation which resulted from seizure of the property of the Colombian firm.

(2) Other Italian Cases

The Government of Italy firmly reaffirmed its position in the *Canevaro* case before the Permanent Court of International Justice, stating that it had a right to protect "Italian nationals who are members of a foreign juridical person"[2]. It was, in addition, asserted that "The Italian State had a right to protect the Italian members of the firm, even with regard to rights which are merely derivative from the juridical person", and that "even if the rights of the firm, a juridical person, are distinct from those of the shareholders, it exercises such rights in reality in the interests of the latter"[3].

(b) United States Practice

(1) The *Delagoa Bay Railroad* Case

In this case, the Government of Portugal took, without paying due compensation, the railroad property of a Portuguese corporation, and cancelled its concession to operate it. The shares of the Portuguese corporation were owned by an English company whose shares in turn were owned by one MacMurdo, an American national. England (on behalf of the corporation) and the United States (on behalf of its national shareholder) intervened diplomatically. Portugal agreed to arbitration with three jurists selected by the President of the Swiss Confederation. On 29 March 1900 the Tribunal held for the claimant Governments[4].

This case has been recognized by governments and international legal students as a precedent for the rule that a government is entitled to espouse a claim on behalf of its stockholders *in a foreign corporation.*

(2) The *El Triunfo* Case

The El Triunfo Company (under a concession contract obtained in 1894 from the Government of El Salvador) developed and operated the port of El Triunfo. The bare majority of 501 of its 1,000 shares of stock were owned by an American company, and 35 shares were owned by other American nationals. In 1898, several Salvadorian directors usurped the powers of the company's American president and directors, and filed a petition in bankruptcy. The local courts refused to grant the plea of the American investors to reinstate the lawfully elected officers of the company and to quash the bankruptcy proceeding. The "taking" resulted from the bankruptcy and the other actions of the respondent Government. In reply to the demand of the United States for arbitration, El Salvador claimed that the case involved one of their corporations and should be

[1] II Moore, *International Arbitrations*, pp. 2117, 2121; see also De Visscher, "Protection diplomatique des actionnaires des sociétés", *Revue de droit international et de législation comparée*, 1934, pp. 630-631.

[2] Breck, *La sentence arbitrale dans l'affaire la Canevaro*, p. 40.

[3] De Visscher, "Protection diplomatique des actionnaires des sociétés", *Revue de droit international et de législation comparée*, 1934, p. 632.

[4] Volume VI Moore, *Digest of International Law*, p. 649.

settled entirely in their courts. The United States prevailed, using the *Delagoa Bay Railroad* case as a precedent in its position that States have rights under international law to espouse claims of their national stockholders in foreign corporations. The arbitrators found in favor of the United States with respect to espousal of stockholder claims[1].

Specifically, the award states:

> "We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in the El Triunfo Company, a domestic corporation of Salvador, *for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railroad Arbitration*[2]." (Emphasis added.)

(3) The *Ruden and Company* Case

Ruden, an American national, was a partner in a Peruvian firm, which, under the law of Peru, was a legal entity. The Mixed Claims Commission, established by treaty between the United States and Peru on 4 December 1868 found that Ruden's claim should be allowed for his interest in the firm resulting from damage to the firm's property.

Lapradelle and Politis, in their *Recueil des Arbitrages Internationaux*, Volume II, page 592, Paris, 1932, make the following comment on the *Ruden* case, stating that the question was:

> "Whether one should consider in a complete abstract manner the nationality of the association, or whether one should consider in a concrete way the nationality of the members of the association. In the first case, Ruden, an American member of a Peruvian company, should not be able to claim anything or obtain anything from Peru. However, in allowing Ruden's claim as an American member in a Peruvian association, *the arbiter thus rejects the abstract concept of the personality of the association to look behind it to the real persons of the association*." (Translation; emphasis added.)

De Visscher, reaching the same conclusion, states as follows:

> "The Commission recognized the Peruvian nationality of the association; nevertheless, it accorded an indemnity to an American national, Ruden, based on his personal interest in the association. *The only explanation of the decision is that the arbitrators above and beyond the personality of the association looked to the personality and nationality of its members*." (Translation; emphasis added.)[3]

(4) The *Shufeldt* Case

Shufeldt, an American national, had an interest in a Guatemalan partnership association which suffered losses due to unlawful acts of Guatemala. Under the arbitration which ensued, Guatemala claimed that under its law the association "has corporate existence", and that the United States "has not *locus standi* in order to present any claims of whatever nature"[4]. The award upheld the position

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[1] VI Moore, *Digest of International Law*, pp. 649, 650; *US Foreign Relations 1902*, pp. 859-873.

[2] *US Foreign Relations 1902*, p. 873.

[3] Charles de Visscher, "Protection diplomatique des actionnaires des sociétés", *Revue de droit international et de législation comparée*, 1934, p. 628.

[4] US Department of State *Arbitration Series*, No. 3, pp. 630, 431-435, 821-831.

of the United States, and entirely rejected the defenses raised by Guatemala. In this connection, the award stated:

> "... it makes no difference ... whether any partnership was in existence, as it is not the rights of the partnership that are in question *but the personal interest of Shufeldt in the partnership*". (Emphasis added.)
>
> "... The Guatemalan Government was trying to do what it could not do in the eyes of international law. *International law will not be bound by municipal law or by any thing but natural, justice, and will look behind the legal person to the real interest involved.*" (Emphasis added.)[1]

(5) Consistency of the United States Position to Date

The United States has consistently adhered to the rule that a State has standing to represent its nationals who have a substantial shareholder interest in a foreign corporation. Published evidence of such adherence as recent as 1965 is found in the US Department of State Memorandum of Law submitted in connection with its claims on behalf of the US-Mexican Imperial Development Company. In pertinent part, this memorandum states:

> "... the Government of the United States has the right under principles of international law to intervene or espouse a claim on behalf of nationals of the United States who own a substantial interest in a corporation organized under the laws of ... [a foreign country][2]".

3. Practice of Other States

Many other States have relied upon the rule that they have the standing to represent stockholders.

Successful representation of diplomatic claims by governments whose citizens own substantial stockholder interest in corporations which suffered damage at the hands of another government has many precedents. Foreign relations documents are replete with examples.

(a) Mexican Eagle Oil Company

The British Government expressed its right to present such a claim in a note sent to the Mexican Government in 1938 in connection with damage done to the Mexican Eagle Oil Company.

> "His Majesty's Government are not invervening on behalf of the Mexican Eagle Company, but on behalf of the very large majority of shareholders who are of British nationality.
>
> They are perfectly well aware of the Mexican nationality of the Mexican Eagle Company itself in the sense that it is incorporated under Mexican law, and in no way seek to deny this.
>
> But, the fact remains that the majority of shareholders who are the ultimate sufferers from the action of the Mexican Government are British, and the undertaking in question is essentially a British interest.
>
> For this reason alone, His Majesty's Government have the right, which cannot be affected by anything in the Mexican Constitution, to protest against action which they regard as unjustified ...[3]"

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[1] *Id.*, p. 875.
[2] Whiteman, *Digest of International Law*, Vol. 8, pp. 1272-1273.
[3] *Id.*, p. 1273.

The British note pointed out in this connection that:

> "If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad[1]."

The Government of Mexico agreed with the British Government to make payment for the expropriated property of the oil company[2].

(b) The *Ziat Ben Kiran* Case

One of the claims submitted by Great Britain under its agreement with Spain for damage incurred in the Spanish Zone of Morocco was on behalf of a British member of a partnership which was a legal entity under Spanish law. Arbiter Huber, Judge of the Permanent Court of International Justice, held that Spanish objections based upon the Spanish nationality of the firm were inadmissible. In *spite of the fact that under many jurisdictions partnerships have a legal personality* apart from their members, he held that:

> "The jurisprudence of international tribunals recognizes the possibility of distinguishing, for the purposes of international arbitration, between the component parts of an association on the one side and the association itself on the other. International law, which in this matter is governed mainly by considerations of equity, has not so far established any formal test for admitting or refusing diplomatic protection of national interests bound up with interest vested in another nationality. It is necessary to examine whether the person on whose behalf the claim is brought forward is directly affected by the damage . . .[3]"

De Visscher, Judge of the Permanent Court of International Justic and of the International Court of Justice, in his article on *Diplomatic Protection of Shareholders in Corporations*, makes the following observation as to this decision:

> "The award rendered by Max Huber, former President of the Permanent Court of International Justice with regard to the British reclamation in the Spanish Zone of Morocco . . . underlines very well the difference between the viewpoints of internal law, dominated by the conception of the unity of the juridical person and *the viewpoints of international law which are determined by the considerations of justice and equity and which command the protection of the stockholders.*" (Emphasis added.)[4]

(c) The *Case of the Forests of Central Rhodopia*

Greece espoused the claim against Bulgaria on behalf of several of its nationals who were shareholders in a Bulgarian corporation. The question before the

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[1] Whiteman, *op cit.*, at 1274-1279.

[2] *Id.*, at 1272-1273.

[3] *Réclamations britanniques dans la zone espagnole du Maroc*, Hague, 1925, p. 185; *United Nations Reports of International Arbitral Awards*, Vol. II, pp. 729-730; *Annual Digest of Public International Law Cases*, 1923-1924, p. 190.

[4] De Visscher, "Protection diplomatique des actionnaires des sociétés", in *Revue de droit international et de législation comparée*, 1934, p. 632.

arbitrator was whether Greece could espouse the claim in spite of the fact that the corporation was in existence and that non-Greek nationals were also shareholders of the company. This question is not present in the case of ELSI whose shareholders all are American nationals. Nevertheless, the arbitrator found for the Greek Government, stating:

> "According to the minutes of the meeting of the Company . . . there were eight interested parties, namely, besides the five persons whose rights the Greek Government invokes in this case, the two Bulgarians . . . and the Turk . . . Admitting that it has not been proved that any of them withdrew from the company . . . the Arbitrator can only presume that there were at that time the eight persons interested in the company . . . It may be presumed . . . that their shares were equal. It follows that *the three claimants whose interests the Greek Government is competent to represent in the present case hold in the company a financial interest corresponding to 260/640 of its assets*[1]." (Emphasis added.)

In this decision, the arbitrator clearly looked behind the corporate veil to the real parties in interest. In this regard, the decision is in line with the precedents.

4. Agreements of States Recognizing Stockholder Claims

It is common practice for States to recognize the validity of paying compensation for the interests of stockholders even when the agreement is drawn up subsequent to the taking of the corporate property. Often such agreements are entered into effecting settlements with stockholders when their corporation is nationalized[2].

It is significant that these agreements are all entered into subsequent to the time the damage arose, and accordingly are expository of the practice of States in their recognition of customary international law.

The Treaty of Versailles of 1919 provides for payment to shareholders by providing in Article 297 *(e)* of the Annex relating to Germany:

> "The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914."

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[1] *American Journal of International Law*, 1934, Vol. 28, pp. 774, 801.

[2] Compensation Agreements providing for settlement with *Stockholders* of nationalized corporations.

Agreement of 17 March 1960, Romania and Denmark.
Agreement of 10 November 1960, Romania and Great Britain.
Agreement of 1 February 1955, Hungary and Belgium/Luxembourg.
Agreement of 12 June 1950, Hungary and France.
Agreement of 19 July 1950, Hungary and Switzerland.
Agreement of 27 June 1956, Hungary and Great Britain.
Agreement of 19 March 1948, Poland and France.
Agreement of 14 November 1963, Poland and Belgium/Luxembourg.
Agreement of 11 November 1954, Poland and Great Britain.
Agreement of 12 May 1949, Poland and Denmark.
Agreement of 25 June 1949, Poland and Switzerland.
Agreement of 26 May 1959, Bulgaria and Denmark.
Agreement of 22 September 1955, Bulgaria and Great Britain.
Agreement of 28 September 1949, Czechoslovakia and Great Britain.
Agreement of 13 July 1959, Yugoslavia and Denmark.
Agreement of 14 April 1951, Yugoslavia and France.
Agreement of 23 December 1948, Yugoslavia and Great Britain.

Similarly, the Italian Treaty of Peace of 1947 provides in Part VII, Section I, Article 78:

> "United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9 *(a)* of this Article, but which have suffered a loss by reason of injury or damage to property in Italy, shall receive compensation in accordance with sub-paragraph *(a)* above."

5. Opinions of International Legal Scholars

International legal scholars and publicists have for many years recognized the reality and the equity of the right of a State under international law to protect stockholder interests of its nationals in foreign corporations.

A profound study of whether stockholders in the position of the claimants may be protected diplomatically by their governments is made by Charles de Visscher in his article, *"De la protection diplomatique des actionnaires d'une société contre l'Etat sous la legislation duquel cette société s'est constituée*, in *Revue de droit international et de législation comparée*, 1934, pp. 624 et seq.

The position of Judge de Visscher is clear and concise. After an exhaustive examination of diplomatic practice, arbitral jurisprudence, the treaty provisions and the prevailing doctrine he states:

> "My conclusions will be short. Imperious considerations of justice, for a long time already recognized by diplomatic practice and the arbitral jurisprudence confirmed by an exact analysis of the true role of the juridical personality and of the nationality of corporations under international law lead to the recognition of the right of diplomatic protection for a State in favour of its nationals who own a majority (or a substantial part) of the stocks of a foreign corporation, when the measures taken of which the corporation is a victim, emanate from the very State under the laws of which the corporation is constituted . . ."

The Swedish scholar Halvar Sundberg expresses the same opinion in his work on international law "*Folkrätt*", 2nd edition, 1951. As to nationality, he states, *inter alia*:

> "Different principles may be applied in deciding the nationality of juridical persons . . . The development especially in the field of just compensation for damages incurred, has been away from any formal criteria towards giving more and more consideration to the realities behind the corporate veil. Thus already in the Alsop Claim . . . the Chilean defense was overruled that the claims of the corporation (incorporated in Chile) could not be the subject of an international arbitration . . . *Thus is it the nationality of the persons who own the controlling interests in the corporation which in the last instance decide to what country the corporation belongs* . . . As the stockholders are the persons who in the very last instance decide, it is consequently the nationality of the stockholders that decide the nationality even of the corporation." (Emphasis added.) (Pp. 151-152.)

Particularly with regard to the ELSI fact situation, the logic of the analysis of Professor Bagge set forth below is inescapable.

> "The shareholders, it would seem, are in a different position [than Bondholders]. As component parts of the Corporation they have an actual share in its assets even though during the existence of the Corporation their

possibility of enforcing rights based on this share independently of the corporation is limited by municipal law applicable for the corporation. If the value of their share in the actual surplus assets of the corporation has been diminished by damage inflicted on its property, the damage thereby caused to the shareholder seems to be so intimately and directly connected with the damage inflicted on the property of the corporation that it should reasonably be considered to constitute sufficient basis for intervention . . . The conclusion ought then to be that if the shareholder has suffered damage by the act committed by the foreign State and this act constitutes a breach of international law, there is, according to the international rule mentioned above, sufficient ground for an intervention by the *State* whose *subject* the shareholder is[1]."

German and Swiss international law publicists have expressed the same views. See, for instance, *von Bar* in *Eine Internationale Rechtsstreitigkeit, Iherings Jahrbücher* (1903), Vol. 45, pp. 161 et seq., pp. 192-195.

Another German publicist *Mosler* has recently also expressed the view that the property interests in the corporation are decisive with respect to the question of diplomatic protection:

> "*If they belong to natural persons who are aliens, then their State may intervene on their behalf*, regardless of the law under which the corporation as such has been constituted[2]."

These views are fully shared by recent Swiss publicists. (See, in this connection, *Bindschedler, Verstaatlichungs-Massnahmen und Entschädigungspflicht nach Völkerrecht*, pp. 50-52. Zurich, 1950.)

Similarly the well-known Swiss jurist, *Paul Guggenheim* in his *Lehrbuch des Völkerrechts* so asserts (Vol. II, 1948 ed., pp. 291-292).

John Basset Moore, in an opinion written in 1920, expressed his views as follows:

> "The fundamental right of the beneficial owners is recognized and protected in international law as well as in municipal law.
>
> This fact has been *strikingly exemplified in recent years in international cases in which it was sought to interpose the corporate entity as a bar to intervention* by a government for the protection of beneficial interests of its citizens which were sacrificed or injured by unjust administrative or judicial acts.
>
> It is superfluous to remark that no one denies that there is such a thing as a corporation, or that, whether it be called a 'legal entity', a 'legal personality' or what not, it is regarded as possessing, by virtue of its attachment to some place, in a certain sense 'nationality' . . . *But it by no means follows that the partners or shareholders have lost either their beneficial ownership of the property or the right to be protected in such ownership*[3]." (Emphasis added.)

As to the legal consequences of these views Borchard asserts:

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[1] Bagge, "Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and Rights of Shareholders", XXXIV *AJIL* 162 et seq.

[2] Mosler, *Wirtschaftskonzessionen bei Aenderungen der Staatshoheit*, p. 44, Stuttgart, 1948.

[3] Moore, *Collected Papers*, Vol. V, p. 268.

"Practice consequently permits itself to consider the stockholders as the real interested parties and to determine the right to reparation of damages suffered by a corporation according to the nationality of the stockholders who indirectly are the persons injured by the act[1]." (Translation.)

Charles Cheney Hyde clearly expresses himself to the same effect in his *International Law* (2nd ed.). With regard to the right of a government to intervene on behalf of national interests in a foreign partnership, even if this foreign partnership, according to the law of the land, constitutes a juridical entity, he states:

> "The fact that an American citizen enters into a partnership with foreigners whose business is established in a foreign State . . . does not affect his right or that of the United States acting on his behalf to regard his individual interest in the firm as essentially American property, entitled to the same protection as any other such property similarly located. The opinions of arbitrators appear to sanction this view. Even when the partnership according to the law of the country where it is established is regarded as a juridical entity possessing functions similar to those of a corporation, the United States does not hesitate to espouse the cause of individual members who may be American citizens when circumstances necessitating interposition arise[2]."

After an analysis of several of the relevant Arbitrations and Claims Conventions, Hyde reaches the following conclusions:

> "The terms of the foregoing as well as numerous other claims conventions testify to the existence of a practice acknowledging the propriety of interposition for cause in behalf of nationals interested through ownership of stock or the securities of a corporation created under the laws of a foreign State. The reasonableness of such action is attributable to the closeness of the relationship between a State and its nationals whose pecuniary interests in the foreign corporation are adversely affected by conduct of which complaint is made . . ."

6. *ELSI, a Defunct Corporation*

The standing of the United States to bring this international claim is further buttressed by the fact that ELSI is defunct. It was, and if it can be said to exist at all, is yet entirely helpless to assist itself by reasons of its financial condition, the requisition of its assets and its bankruptcy. In March of 1968, the situation was so serious that Raytheon and Machlett had moved to direct its orderly liquidation. The requisition of its assets forced ELSI's bankruptcy, thus completely and permanently deprived ELSI from taking any measures on its own behalf. As a consequence, its property and all of its affairs were in the hands of the Mayor of Palermo and the Curator in bankruptcy.

International legal precedents have long recognized the logic of espousal by the State whose stockholder nationals emerge as the real parties in interest when the corporation has ceased to function. Professor Wortley, in pointing up the significance of the *Delagoa Bay Railroad* case in this connection, states:

> "The Rudens Case, decided by the United States-Peruvian Claims Court of 1868, is the *fons et origi* of the distinction between a firm and its members, though Dr. Mervyn Jones has indicated that the first important arbitral

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[1] *Annuaire de l'Institut de droit international*, 1931, Vol. I, p. 308.
[2] Vol. II, pp. 901-902.

decision recognizing the right of shareholders to have representations made on their behalf was the Delagoa Bay Railway Company Case, decided in 1899. In that case, it was alleged that as the Company was 'practically defunct', a claim on behalf of shareholders could be made. This method appears to be normal diplomatic procedure now[1]."

Similarly, a British note to Romania with regard to the seizure of the Astra Romana Company stated:

> "The British majority of beneficial shareholders and His Majesty's Government therefore regard Astra Romana as *being in a state of forcible dissolution*, and those shareholders have therefore informed the foreign staff serving with Astra Romana of this situation, and we are advising them to repatriate themselves. His Majesty's Government reserve all right to intervene on behalf of the majority beneficial shareholders, *who must henceforward be regarded as being endowed with the powers and rights formerly endowed by Astra Romana*[2]." (Emphasis added.)

By requisitioning ELSI's assets without taking any responsibility for its liabilities, the Government of Italy forced ELSI into bankruptcy. ELSI had been informed by governmental officials that the imposition of the requisition would continue indefinitely[3]. (The requisition remained for 1½ years before being held illegal.) In order for ELSI to remain solvent at this critical juncture, it had to have complete freedom to deal with its assets in its best interests and in the best interests of its creditors. ELSI had substantial obligations which had fallen due. Demand for payment had been made. Under such circumstances, with no way to take care of its liabilities and past due obligations, with its assets tied up indefinitely by the Government's illegal requisition, ELSI faced a long indefinite period in which it would not be able to meet its obligations. For this same indefinite period (or permanently), ELSI's assets and business would be handled by others. Many of the assets would immediately decline in value if not handled expertly. Accordingly, ELSI not only was unable to meet delinquent obligations in the immediate future, but there was a substantial question, under the circumstances, whether it would ever regain control over assets which would have enough value to satisfy its obligations. The Italian law (as does the law of most countries) leaves no alternative to bankruptcy in such a situation. Failing to file a voluntary petition in bankruptcy under such circumstances is a criminal offense in Italy[4].

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[1] Wortley, *Expropriation in Public International Law* 144 (1959).
[2] *Times*, 12 March 1948.
[3] Exhibit III-12.
[4] Law on Bankruptcy — Royal Decree No. 267 of 16 March 1942.

TITLE 6

CRIMINAL PROVISIONS

CHAPTER 1

CRIMES COMMITTED BY THE BANKRUPT PERSON

"Art. 217. 'Bancarotta semplice'. The entrepreneur who, outside the case provided for by the preceding articles; . . .

(4) Has aggravated his own insolvency by not filing voluntary petition for his bankruptcy or by other grave fault,

Is punished by imprisonment from six months to two years in the event is declared bankrupt.

In support of the proposition that the shareholders may step in where the corporation is incapacitated, Hackworth, in discussing the *Romano American* case (1925) states:

> "It (the UK) further contends that where the action of the government against whom the claim is made, in law or in fact put an end to the Company's existence or, by confiscation of its property, has compelled it to suspend operations . . . is in fact . . . an application of the general rule; for it is not until the company has ceased to have an active existence or has gone into liquidation that the interest of the shareholders ceases to be merely the right to share in the Company's profits and becomes a right to share in its actual surplus assets[1]."

In view of the helplessness of ELSI during March of 1968, Raytheon and Machlett moved in their own interests as well as those of ELSI and its creditors to assist ELSI in an orderly liquidation. While in this precarious and fragile position, they were hit with the requisition of the ELSI assets and ELSI was forced into bankruptcy. The bankruptcy incapacitated ELSI and it was no longer able to act on its own behalf. The actions of the Government of Italy in the circumstances directly affected Raytheon and Machlett giving rise to the espousal of their claim by the Government of the United States.

7. *Direct Infringement of Stockholder Rights*

Virtually all authorities agree that a diplomatic claim may be based upon infringement by the respondent State of a shareholder's direct rights.

The laws of nearly all States — certainly those of the United States and of Italy, repose in the stockholders all of the fundamental decisions to be made with respect to a corporation. These include the selection of its Board of Directors, and thus its executive officers (Delaware Corp. Law, §§ 211, 142, Italian Civ. Code § 2364); and the duration or dissolution of the corporation (Delaware Corp. Law, §§ 122, 275, Italian Code § 2488).

Not only are its activities during its lifetime governed by the stockholder organization, but the life of the corporation itself is in the hands of the stockholders. Its life can be terminated by them at will, whether the corporation is prospering or not. Thus, the right to bring about an orderly dissolution is as formidable and as real as any right the stockholders hold. To deprive them of this right is a direct infringement of one of their most substantial rights.

While it is true that the fortunes of the stockholder rise and fall with the success or failure of the corporation, the corporation is not autonomous. It is subject at all times to the direction of the stockholders who, on a continuing basis, take

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Apart from the other collateral penalties set forth in Chapter 3, Title 2, Book 1 of the Criminal code, the conviction bears as a consequence disqualification of up to two years to carry on a commercial enterprise or to hold a managerial office in any enterprise.

CHAPTER 2

CRIMES COMMITTED BY PERSONS OTHER THAN THE BANKRUPT

Art. 224. 'Fatti di bancarotta semplice'. The penalties provided for by Article 217 apply to directors, general managers, statutory auditors and liquidators of corporations which are declared bankrupt, who:

(1) have committed any one of the offenses provided for by the aforementioned Article . . ."

[1] Hackworth, *Digest*, IV (1943), Vol. 5, p. 840.

share in the corporation's ventures not only through dividends, but also in the value of the corporate assets. Particularly when the latter would be worth more in liquidation than the value of the stock, an orderly liquidation is one of the shareholders' most cherished rights. Although the shareholders had laid elaborate plans and had taken steps to have these plans carried to fruition, the ELSI shareholders were denied this most valuable right by actions of Italian officials. Such actions, *inter alia*, included the illegal requisitioning of the ELSI assets which indeed blocked the orderly liquidation and plunged ELSI into bankruptcy, thereby causing serious deterioration of the asset values and embarrassing the stockholders in the international marketplace.

Although generally applicable to corporations in Italy and the United States, as well as the rest of the civilized world, the above principles have particular relevance to the ELSI situation. The ELSI stock was owned by only two US corporations which were international leaders in the same electronics business in which ELSI was engaged. Their ability to take decisive and successful liquidation was assured. Dissolution of a corporation whose stock ownership was widely defused might require an enormous effort to concert stockholder action. But the prospects of ELSI's success were high. The stockholders not only were united but they knew the product lines, could continue supplying valued customers *ad interim*, and could get the best prices for product lines because of their intricate knowledge of their value, and the assistance in operating them which they could furnish purchasers.

In addition, the creditors of ELSI have sued the stockholders, as opposed to ELSI itself, in an attempt to collect ELSI's debts. All of these suits (which are described in detail in Part I of this claim) have resulted from the fact that the stockholders were deprived of their direct right of an orderly liquidation in which the ELSI assets would have been sold in a manner which would have realized their actual value, making possible amicable settlements with these creditors. Irrespective of the merits of these suits, the stockholders, and not the defunct corporation or the Curator in bankruptcy, must put forth the effort and expend the funds to defend against them.

That the right of an orderly liquidation of its subsidiary ELSI was taken from Raytheon and Machlett cannot be denied. At the time of the requisition, steps had been taken to liquidate ELSI in an orderly fashion. Liquidation was to be conducted by experienced personnel of the stockholders' choosing. The taking of the property which was to be sold in the liquidation obliterated this important direct right. The obliteration of this right was an infringement of the direct stockholder rights of the claimants. The Government of the United States accordingly has standing to present a claim based upon the infringement of such rights.

8. Standing of the United States Based upon Conventional International Law — US-Italian Treaty Provisions

The FNC Treaty protects the interests of stockholders as well as their direct rights and, accordingly, affords the United States standing to present a diplomatic claim based upon such stockholder interest.

There can be no doubt about the plain meaning of the Treaty of Friendship, Commerce and Navigation between Italy and the United States in this regard. The first sentence of Article III of the Treaty assures the corporations of each country the right to organize and participate in corporations of the other country. It specifically provides for the right to purchase, own and sell shares of stock in corporations of the other country.

Article V, paragraph 2, prohibits the taking by either party of property of the nationals of the other party without due process of law and without prompt payment of just and effective compensation; and paragraph 1 of the Protocol states that this provision "shall extend to *interests held directly or indirectly*".

The last sentence of paragraph 3, Article V, granting most favored nation treatment to the nationals and corporations of each country under the jurisdiction of the other "in all matters relating to the taking of privately owned enterprises into public ownership and the placing of such enterprises under public control" grants protection to "enterprises in which the nationals, corporations and associations of either High Contracting Party have a *substantial interest*". In 1961 the two Governments supplemented their Treaty on Friendship, Commerce and Navigation for the stated purpose of "giving added encouragement to investments of one country in useful undertakings in the other country". This supplementary Agreement further states that the parties are "cognizant of the contribution which may be made towards this end by amplification of the principles of equitable treatment set forth in the Treaty . . .". In Article I of this Supplementary Agreement the parties agree not to subject nationals or corporations of either party "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) . . ."[1].

Attempts to distinguish between "rights" and "interests" are at best legalistic and are virtually meaningless when used in connection with subsidiaries. The fallacy of such attempts is recognized by the protection afforded both rights and interests (which arise from ownership of shares of stock) under the FNC Treaty.

9. Conclusion

ELSI is incorporated under the laws of Italy, and the acts and omissions which give rise to this claim are those of the Government of Italy. The unassailable logic of allowing the stockholders' State to pursue a diplomatic claim against the respondent when the latter is the State of incorporation virtually speaks for itself.

Moreover, all of the ELSI stock is held by two American companies. Only one claimant government could result from stock ownership. But for the espousal by the United States there could be no representation on the international plane in connection with the taking of the ELSI assets which in actuality were totally owned by foreign investors.

Accordingly, it is submitted that the United States has standing to represent the US Corporations, Raytheon and Machlett, and to present this claim on their behalf as a result of their ownership of the ELSI stock.

VI. Exhausion of Local Remedies

It is generally recognized that local remedies must be exhausted before a claim may be formally espoused under principles of international law. Such principle was authoritatively expressed in the Institute of International Law on 18 April 1956 as follows:

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[1] Agreement Supplementing the Treaty of Friendship, Commerce and Navigation of 2 February 1948; entered into force 2 March 1961. 12 *UST* 131, 404 *UNTS* 326. Preamble and Article I.

"When a State claims that an injury to the person or property of one of its nationals has been committed in violation of international law, any diplomatic claim or claim before a juridical body vested in the State making the claim by reason of such injury to one of its nationals is irreceivable if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be effective and sufficient so long as the normal use of these means of redress has not been exhausted[1]."

In a landmark decision referred to as the *Finnish Vessels* arbitration[2] the arbitrator enunciated the rule and then proceeded to study the facts in great detail. He finally reached the conclusion that any further effort on the part of the plaintiff would have been "*obviously futile*" and that as a result the plaintiff indeed had exhausted his local remedies.

"The prior exhaustion of local remedies cannot be required when . . . even though the formal possibility of a remedy exists, such remedy cannot be expected to lead to any practical result[3]."

The rule of the prior exhaustion of local remedies is valid only when the local remedies offer a real prospect of obtaining a reimbursement of the damages suffered[4].

In the controversy with France concerning the Moroccan phosphates, the Government of Italy maintained that due to the considerable delay in the issuance of the decision under the local remedy, the Government of Italy was not required to comply with the rule of the prior exhaustion of local remedies[5].

This exception to the rule has been variously phrased and interpreted in numerous cases. It is clear, however, that the remedy to be exhausted must be a real one capable under the circumstances of redressing the claimant's injury.

"Thus the international tribunal should look not merely at the paper remedy but also at the circumstances surrounding the remedy. If these are instrumental in making an otherwise effective remedy ineffective, and if they are more the outgrowth of the State's activity than that of the claimant, then the remedy must be regarded as ineffective for the purposes of the rule[6]."

One case which greatly preceded *Finnish Vessels* which reached the same conclusion was the *El Triunfo* case[7]. In this case a company incorporated in Salvador and owned by United States citizens was fraudulently driven into bankruptcy by the illegal acts of some of its directors. When the United States investors attempted to wrest the company from the illegal bankruptcy proceedings, the Government of Salvador by executive decree granted the concession formerly held by this company to others, citizens of Salvador.

The exhaustion of local remedies question was dealt with in the Award as follows:

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[1] 46 *Annuaire de l'Institut de droit international* 364 (1956).

[2] Finnish Vessels (Finland *v.* Great Britain), 3 *Int. Arb. Awards* 1479 (1934).

[3] Monaco, *Manuale di Diritto Internazionale Pubblico*, Turin, 1970, p. 571.

[4] Gaja, *L'Esaurimento dei Ricorsi Interni nel Diritto Internazionale*, Milan, 1967, pp. 105-115; the author gives a long list of examples when the prior exhaustion of local remedies is not required.

[5] Cour Permanente de Justice Internationale, Publications, *Série C, n° 84*, p. 443.

[6] Mummery, "The Content of the Duty to Exhaust Local Judicial Remedies", 58 *AJIL* 389.

[7] VI Moore, *Digest of International Law*, pp. 649, 650; *US Foreign Relations* 859-873.

"It is apparent in this case that an appeal to the courts for relief from the bankruptcy would have been in vain after the acts of the executive had destroyed the franchise, and that such a proceeding would have been a vain thing is the sufficient answer to the argument based upon this law of Salvador. What would have profited these dispoiled American citizens if they had successfully appealed to the courts for the setting aside of the bankruptcy proceedings, after the concession was destroyed by the closing of the port of El Triunfo and the grant of the franchise to strangers?[1]"

Accordingly, although the requirement for a claimant to exhaust his local remedies before seeking diplomatic relief is firmly established in international law, the exception which excuses such a claimant from pursuing remedies where it is futile to expect any effective relief is equally well established.

This is not to say that the litigation in Italy involving ELSI has all been concluded. The contrary is true.

(i) The ELSI bankruptcy and related proceedings have not been concluded.

(ii) The Curator has sued the Government of Italy to recover part of the damage to ELSI which resulted from the illegal requisition.

(iii) The five bank suits againt Raytheon to collect ELSI's unguaranteed debts are still pending.

In none of the outstanding proceedings is it possible for Raytheon and Machlett to recover any compensation which resulted from the acts and omissions of the Government of Italy on which this claim is based.

It is not and was never possible, for example, for Raytheon and Machlett to sue the Government of Italy or any of the officials who were acting in their official capacities for the requisition of the ELSI assets. ELSI took the only effective measure which was available. It appealed immediately from the Mayor's requisition decree. The Prefect under whose jurisdiction it fell did not rule for one and one-half years. When the Prefect did not rule favorably on that appeal immediately, the whole chain of events which led to Raytheon's and Machlett's irreparable damage was set in motion. The management and control of their enterprise was wrested from their hands and they were helpless under Italian law. They had no remedy of a stockholder suit against the Government of Italy to seek relief from their loss of their valuable direct right as stockholders to place their subsidiary into orderly liquidation. Nevertheless, the rights of the stockholders are preserved and protected by customary international law and by the provisions of the FNC Treaty.

The claimants have no local remedies to exhaust in connection with the facts on which this claim is based. The outstanding legal proceedings, with the exception of the bank suits, do not involve the claimants as parties, and, with the same exception, will have no effect on this claim.

Although the fact that the requisition was illegal under Italian law helps buttress this international claim, the claim depends on international law which establishes the standard of conduct against which the acts and omissions of the respondent must be measured.

Even if the Curator in the ELSI bankruptcy is successful in every endeavor he has undertaken to realize the value of ELSI's assets, he would still not have sufficient funds to pay the claimants any amount sought under this diplomatic claim. The preferred creditors may receive some greater amounts and that in turn might affect the amounts of the bank suits against Raytheon. Since the United States is not requesting a specified amount as a result of the bank suits pending

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[1] VI Moore, *Digest of International Law*, pp. 649, 650; *US Foreign Relations* 859-873.

their resolution, the effect of neither the bank suits nor the Curator's suit will affect the amount being claimed at the present time. The outcome of the bankruptcy for the same reason will not affect the amount of this claim since it is now clear that the damage inflicted on ELSI and the degradation of the value of the ELSI assets brought about by the acts and omissions of the Government of Italy on which this claim is based will result in no payment to the claimants by the Curator under the bankruptcy proceeding.

In this case ELSI and the claimants promptly and effectively exhausted every remedy which was available to them and, as attested by the accompanying opinions of independent Italian legal experts Avv. Giuseppe Bisconti and Professor Antonio La Pergola, there remain no effective local remedies to pursue. Pursuing further any local remedies available in Italy would be futile and accordingly not required by international law.

Accordingly, Raytheon and Machlett have exhausted every meaningful legal remedy available to them in Italy.

VII. Damages

A. Compensation

The general standard relating to the amount of damages that are recoverable as a result of a breach of an express treaty violation is to be found in the *Chorzów Factory* case. In the decision on this case, the Court made the distinction between an ordinary, lawful taking of property, which would have only the payment of cash compensation for direct losses, and a wrongful taking which violated an express treaty obligation. The latter requires restitution in kind, or if that was impossible, payment of a sum that would effectively place the complainant in the situation in which he was before the illegal act was committed.

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law[1]."

The Court notes that if this distinction were ignored ". . . it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable, in so far as their financial results are concerned"[2].

In ELSI's case, it has been shown previously that the acts of the Government of Italy did violate Italian law, customary international law and a number of specific treaty provisions. Accordingly, Raytheon and Machlett are entitled to be placed in the same position in which they were prior to these illegal acts and omissions. ELSI's subsequent bankruptcy, the sale of much of its former property, and deterioration in value of the remainder of its former assets have obviously

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[1] *Case concerning the Factory at Chorzów*, Judgment of 13 September 1928, *Series A, No. 17, PCIJ* 47.
[2] *Id.*

made this impossible. Thus, the only other available remedy is to award such money damages to Raytheon and Machlett as will accomplish the same result.

The amount of money that will achieve that purpose is $7,225,968 or 4,516.23 million lire at the conversion rate of 0.0016. This sum is broken down into various categories which are described in the sections that follow.

B. Payment of ELSI's Guaranteed Loans

As a result of the Government of Italy's illegal acts which precipitated ELSI's bankruptcy, ELSI lost the opportunity for orderly liquidation and the benefits of amicable settlements with all of its creditors. Thus, existing loans which a number of Italian banks had made to ELSI were not amicably settled. When the banks realized that ELSI could not pay these loans, they turned to Raytheon as the guarantor of some of them. Raytheon paid 5,629,481,667 lire on these guarantees. If the Government of Italy had permitted ELSI to proceed with an orderly liquidation, the proceeds from it would have enabled ELSI to have paid the banks 50 per cent (50%) of the total amounts due on lire 2,815 million on the guaranteed loans which Raytheon would not have had to pay. The portion of this cost which would have been paid from the proceeds of the orderly liquidation is one of the elements of damage to Raytheon which is a direct result of the unlawful acts of the Government of Italy. To reiterate, the amount of the claimants' damage in this connection is lire 2,815 million.

C. Suits Brought by ELSI's Unguaranteed Creditors

The illegal acts and omissions of the Government of Italy also caused Raytheon to be subject to groundless suits brought against Raytheon and Machlett by five Italian banks. The total amount claimed under these suits is lire 4,431,574,151.

The essence of these banks' claims is that Raytheon is the only shareholder in ELSI, and that it is responsible for the unsecured loans which the banks made to ELSI. Although Raytheon is not ELSI's only shareholder, and these claims are believed to be legally groundless, it is possible that the Italian courts may depart from their established precedents and hold Raytheon liable.

If the Government of Italy had not interfered with Raytheon's and Machlett's management and control of ELSI, and had not such interference prevented the orderly liquidation of ELSI, these suits would have been entirely avoided. The banks were willing to settle with ELSI for 30 to 50 per cent of the amounts claimed in the suits, and this amount would have easily been realized by them in an orderly liquidation. Once ELSI's assets were requisitioned and it was forced into bankruptcy, there was no longer any possibility of settlement, nor was there any likelihood that the actual value would be realized from the ELSI assets. Now, as a result, Raytheon is being sued for the total amount of these unsecured debts attesting, *inter alia*, to the fact that nothing can be expected as a dividend to the general creditors in the bankruptcy. It is now impossible to restore Raytheon's settlement opportunities with the banks, and Raytheon now must expend its own funds to defend itself against these groundless suits.

The total amount of lire 4,431,574,151 which these five banks may recover and amounts for Raytheon's defense of the suits are not included in the sum representing the amount of Raytheon's and Machlett's present claim against the Government of Italy. It is probable that Raytheon will succeed in defending against these groundless suits. If this is the outcome of the litigation, Raytheon will be entitled only to recover from the Government of Italy the amount it is out of pocket as

a result of its defense of these suits. To the extent, if any, of recovery by the banks, Raytheon is entitled to full indemnity.

In order to place Raytheon in the same position in which it would have been had it not been for the acts and omissions of the Government of Italy in connection with ELSI, it is essential that the Government of Italy assume the responsibility for such suits which were instigated by its government-owned and controlled banks.

This portion of the damage is also supported by precedent. In fact, one of the precedents, the *Cerruti* case, may be found in the diplomatic history of the United States, Italy and Colombia. Cerruti was an Italian national who resided in Colombia where he engaged, among other things, in a business partnership which, under Colombian law, was a legal entity. As a result of a revolution, he fell into disfavor with the governing circles in Colombia. The Colombian Government seized his assets, including the assets of the partnership. Several lengthy arbitrations ensued, and the matter was placed before Grover Cleveland, President of the United States, for a settlement. Among other awards of damages, President Cleveland held the Government of Colombia responsible for payment of the debts of the partnership. The Government of Colombia objected, stating, among other things, that the amount claimed was indefinite, and therefore beyond the scope of the arbitrator's jurisdiction. In the heated diplomatic correspondence which followed, Italy flatly disagreed with the Colombian position. Before final resolution of the matter, Colombia paid a portion of the award to the Italian Government. Private law suits were brought against Cerruti in Italy attaching or purporting to attach this portion of the award in the hands of the Italian Government. Eventually, Colombia assumed responsibility for the suits, and was successful in settling with all of Cerruti's creditors, except for one who persisted. The matter was finally settled by an arbitral commission in Rome on 6 July 1911, with the arbitrators granting to the Government of Italy virtually all that it requested, including costs Cerruti had been required to incur as a result of defending private litigation in Colombia.

The Government of the United States asks no more in this connection than the Government of Italy requested for its national in the *Cerruti* case. It is obviously inequitable to seize the assets of a legal entity without regard to its liabilities. When this inequity affects the nationals of another State, the resulting damage is obviously a proper element of a diplomatic claim. Accordingly, although no definite amount is included in this claim in respect of the bank suits, the Government of the United States requests the Government of Italy to assume financial responsibility for payment of any judgment which may result and for Raytheon's costs in defending against such suits. The Government of the United States also reserves the right to reopen this claim at such time as amounts of such damage become ascertainable.

D. Raytheon's Open Accounts with ELSI

Also, as a result of the requisition, Raytheon was not able to recover the amount of 550,000,000 lire representing 50 per cent of certain open accounts it had with ELSI. If ELSI had been permitted to liquidate in an orderly fashion, Raytheon would have recovered this amount. Any hope of collecting on these accounts was vitiated by the requisition and subsequent acts of the Government. The forced sale of ELSI's plant, at a diminished price, and the reduction of the value of the rest of its assets to a fraction of the amount a skilled electronics firm could have obtained for them, assured that there would not be enough money

to pay Raytheon anything on these accounts. Raytheon's damage in connection with this item, then, is lire 550,000,000.

E. Damage Resulting from the Legal, Accounting, Printing, and Other Expenses Incurred in Connection with This Claim

It has been long recognized in customary international law that a complainant is entitled to recover the costs in preparing his claim.

Since April 1968, Raytheon and Machlett have had large out of pocket expenses in connection with this claim. The claimants also will continue to incur further costs until the claim is settled.

Raytheon and Machlett estimate that the sum attributable to the hundreds of hours required of accountants, administrators and attorneys to prepare this claim is lire 600 million.

Considering the size and complexity of the claim and the many issues involved, the amount asked as reimbursement for costs is reasonable and should be paid by the Government of Italy.

International Arbitral Tribunals have long recognized that in circumstances like those involved in this claim, a claimant should be reimbursed for necessary costs in protecting his interests and in establishing his claim. The cases discussed below are typical.

A leading case on costs is the *Shufeldt* case *(United States* v. *Guatemala)* in which the United States Government claimed compensation in respect of loss of time of Shufeldt, injury to credit and grave anxiety of mind on account of the cancellation of the contract involved. The Arbitrator in his award stated:

> "Taking all the circumstances into consideration, that Shufeldt was suddenly thrown out of business and the time and expense incurred in endeavoring to come to a settlement with the Government of Guatemala and then in trying to get the United States Government to espouse his cause, I think it just and not excessive to allow $35,000.00 on this head." (II United Nations, *Reports of International Arbitral Awards*, 1083, 1101.)

In the case of *Robert H. May (United States* v. *Guatemala)*, the Arbitrator, in awarding damages sustained on account of the wrongful rescission of a contract for the management and repair of a railroad, stated:

> "It has taken Mr. May just over two years to obtain a settlement of his claim against the Guatemalan Government. He has had to undertake journey upon journey to bring the matter before the United States Government and to induce them to intervene in his favor; he has had to engage, at heavy rates the services of eminent lawyers; whose reputation would insure a hearing from overworked officials, and whose opinions, based upon the stern logic of facts, would have weight with the legal advisers of his Government. Many of the leading witnesses were scattered over the face of the world, and May has had to undergo the expenses of reaching them. Owing to the unremitting attention exacted by the prosecution of his claim, he has been entirely debarred from seeking remunerative work, and his credit, which, on the showing of this Government, was so excellent as to cause his pay checks to be received as cash by all his neighbors, is nearly, if not entirely suspended until the decision of the arbitrator be known.
>
> On the foregoing grounds the arbitrator decides: . . .
>
> 5. That the Government of Guatemala will pay Mr. Robert H. May the sum of $40,000 gold by way of indemnity for expenses incurred, two years'

time lost, suspension of credit, and grave anxiety of mind." (*Foreign Relations of the United States 1900*, 648, 659, 673-674.)

In the *El Triunfo Company, Limited* case (*United States* v. *Salvador*) arbitrated under an agreement of 19 December 1901, the Arbitrators awarded damages for the destruction of property and the annulment of a concession and franchise and the following costs incurred by claimant:

Expenses incurred before intervention by the United States	$ 2,671.31
Attorneys' fees	$60,000.00
Other expenses of prosecuting the claim	$18,964.77
Total:	$81,356.08

(*Foreign Relations of the United States 1902*, 859, 862.)

In the *Walter Smith* case (*United States* v. *Cuba*) arbitrated pursuant to an agreement of 2 January 1927, the Arbitrator allowed the expenses claimant incurred in "defending his rights". The Arbitrator stated:

"However, after taking into account all the testimony and documentary evidence, also the period of time during which the claimant has been deprived of the use of his property, approximately ten years, and the expense to which he has been put in defending his rights, the Arbitrator finds that, as compensation for the value of the land, of the buildings and personal effects contained therein, also the deprivation of the use of the property and in consideration of his expense in defending his rights, he should receive in complete settlement $190,000." (II United Nations, *Reports of International Arbitral Awards*, 915, 918.)

On many occasions arbitral tribunals have allowed claimants' costs without explanation. The following cases are typical: *John Baldwin*, Arbitration between the United States and Mexico, Convention of *11* April *1839* (4 Moore, *International Arbitrations*, 3235); *Patrick Cootey*, Arbitration between the United States and Mexico, Convention of 4 July 1868 (3 Moore, *International Arbitrations*, 2770); *The Louisa*, Arbitrations between the United States and Mexico under the Convention of *11* April *1839* (4 Moore, *International Arbitrations*, 4325.)

International tribunals sometimes refuse to allow costs. When they do so, there appear to be sound reasons for disallowance. For example, in the case of the *S.S. Wimbledon* (*France* v. *Germany*) which was decided by the Permanent Court of International Justice in 1923, certain expenses of the claimant were disallowed on the ground that they were not connected with the refusal of the passage of the vessel. (I Hudson, *World Court Reports* (1934), 180.)

The *Orinoco Steamship Company* case (*United States* v. *Venezuela*) is a very interesting example of this type of case. When this case was arbitrated under the Protocol of 1903, Umpire Barge disallowed a claim for counsel fees, stating in part:

"But whereas the greater part of the items of the claim had to be disallowed;

And whereas in respect to those that were allowed it is in no way proved by evidence that they were presented to and refused by the Government of the Republic of the United States of Venezuela, and whereas therefore the necessity to incur those fees and further expenses in consequence of an unlawful act of culpable negligence of the Venezuelan Government is not

proved, this item has, of course, to be disallowed." (IX United Nations, *Report of International Arbitral Awards*, 180, 204.)

However, when the same case was presented to the Permanent Court of Arbitration at The Hague, pursuant to an agreement of 13 February 1909, the court allowed counsel fees and expenses of litigation, stating:

> "Whereas the claim of $25,000 for counsel fees and expenses of litigation has been disallowed by the umpire in consequence of the rejection of the greater part of the claims of the United States of America, and as by the present award some of these claims having been admitted, it seems equitable to allow part of this sum, which the tribunal fixes *ex aequo et bono* at $7,000 . . ." (Scott, *The Hague Court Reports* (1916), 226.)

Thus, it appears that the cases in which costs are disallowed actually support the rule that costs are a proper element of damages because the tribunals invariably point out that the costs have been disallowed because of some dereliction or failure on the part of the claimant. Such elements are not present in this claim and it would therefore appear that Claimant's costs should be allowed on the basis of the overwhelming weight of authority in his favor.

F. Interest

Simple interest computed at the rate of 5 per cent per annum has been included in the claim from the date of requisition of the ELSI property to 30 June 1971. Simple interest at the same rate from 30 June 1971 to the date the claim is paid, when such date has been ascertained, must also be included. Interest has been included because it is an elementary principle of international law that interest must be paid for the delay in payment of an obligation which has arisen from the taking of property and that interest should run from the date the property was taken to the date payment is made. International tribunals have usually awarded interest at more than 5 per cent per annum but 5 per cent only is asked in this claim because that is the rate prescribed by Italian law, and international tribunals as a rule award the rate in effect at the place where the loss or damage occurred.

As pointed out in other parts of this Brief, international tribunals in allowing compensation for international wrongs follow the simple principle that the object of compensation is to place the injured party in the same position he was in before the injury. It follows that the injured party is not put in the same position unless the compensation includes interest for delay in payment.

The reason for the allowance of interest is very simply stated in Administrative Decision No. III of the Mixed Claims Commission, United States and Germany. That Commission allowed interest at 5 per cent per annum on claims for property taken while the United States was a neutral. The Treaty of Versailles was silent on interest on such claims and the Treaty of Berlin, establishing the Commission, expressed Germany's obligation in terms of "compensation" or "reparation". The Commission stated:

> "Applying the principles announced in Administrative Decision No. II at pages 7-8, the Commission holds that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place. But as compensation was not made at the time of taking,

the payment *now* or at a later day of the value which the property had at the time and place of taking would not make the claimant whole. He was *then* entitled to a sum equal to the value of his property. He is *now* entitled to a sum equal to the value which his property then had plus the value of the use of *such sum* for the entire period during which he is deprived of its use. Payment must be made *as of* the time of taking in order to meet the full measure of compensation. This measure will be met by fixing the value of the property taken as of the time and place of taking and adding thereto an amount equivalent to interest at 5 per cent per annum from the date of the taking to the date of payment. This rule the Commission will apply in all cases based on property taken during the period of neutrality." (VII United Nations, *Reports of International Arbitral Awards*, 64, 70.) (Emphasis added.)

The United States-Mexican Claims Commission established by the Convention of 8 September 1923 allowed interest at 6 per cent on awards of the Commission. In its Opinion in the *Illinois Central Railroad Company* case the Commission said:

"Unfortunately the convention of 8 September 1923, contains no specific stipulation with respect to the inclusion of interest in pecuniary awards. Allowances of interest have been made from time to time by international tribunals acting under arbitral agreements which, like the agreements of 8 September 1923, have made no mention of this subject. See for examples; treaty of 27 October 1795, between the United States and Spain, *Malloy*, Vol. 2, p. 1640; convention of 8 February 1853, between the United States and Great Britain, *ibid.*, Vol. I, p. 664; convention of 25 November 1862, between the United States and Ecuador, *ibid.*, p. 432; convention of 4 July 1868, between the United States and Mexico, *ibid.*, p. 1128. Other agreements have contained stipulations authorizing awards of interest under specified conditions and for more or less definitely prescribed periods. See for examples: treaty of 19 November 1794, between the United States and Great Britain, *Malloy*, Vol. 1, p. 590; convention of 10 September 1857, between the United States and the Republic of New Granada, *ibid.*, p. 319; convention of 5 December 1895, between the United States and Venezuela, *ibid.*, Vol. 2, p. 1858; convention of 7 August 1892, between the United States and Chile, *ibid.*, Vol. 1, p. 185; special agreement of 18 August 1910, between United States and Great Britain, *Redmond*, Vol. 3, p. 2619. *None of the opinions rendered by tribunals created under those agreements with respect to a variety of cases appears to be at variance with the principle to which we deem it proper to give effect that interest must be regarded as a proper element of compensation.* It is the purpose of the convention of 8 September 1923, to afford the respective nationals of the high contracting parties, in the language of the convention, 'just and adequate compensation for their losses or damages'. In our opinion just compensatory damages in this case would include not only the sum due, as stated in the memorial, under the aforesaid contract, but compensation for the loss of the use of that sum during a period within which the payment thereof continues to be withheld . . . In Hale's Report, page 21, it is stated that the Commission created by Article 12 of the treaty of 8 May 1871, between the United States and Great Britain 'ordinarily allowed interest at the rate of 6 per centum per annum from the date of the injury to the anticipated date of the final award'." (Emphasis added.) (IV United Nations, *Reports of International Arbitral Awards*, 134, 136.)

The Hague International Court of Arbitration in the case of *Russia* v. *Turkey* discussed interest at length. The court said, in part:

> "The tribunal is of the opinion that all interest-damages are always reparation, compensation for culpability. From this point of view all interest-damages are compensatory, whatever name they may be given. Legal interest allowed a creditor for a sum of money from the date of the demand in due form of law is the legal compensation for the delinquency of a tardy debtor exactly as interest-damages or interest allowed in case of an act of violence, of a quasi-act of violence or the nonfulfilment of an obligation are compensation *for the injury suffered by the creditor, the money value of the responsibility* of the delinquent debtor. Exaggeration of the consequences of civil-law distinctions in responsibility is the more inadmissible because in much recent legislation there appears a tendency to lessen or abolish the mitigation which the Roman law and its derivatives admitted in the matter of responsibility as to money debts. It is certain, indeed, that all culpability, whatever may be its origin, is finally valued in money and transformed into obligation to pay; it all ends, or can end, in the last analysis, in a money debt. The tribunal, therefore, cannot possibly perceive essential differences between various responsibilities. Identical in their origin — culpability — they are the same in their consequences — reparation in money.
>
> The tribunal is, therefore, of the opinion that the general principle of the responsibility of states implies a special responsibility in the matter of delay in the payment of money debt, unless the existence of a contrary international custom is proven. . . . The tribunal, for the reasons indicated above, is of the opinion, on the contrary, that there is no reason why the great analogy which exists between the different forms of responsibility should not be taken into account; this analogy appears particularly close between interest called *moratory* and interest called *compensatory*. The analogy appears to be complete between the allowance of interest from a certain date upon valuing the responsibility in money, and the allowance of interest on the principal determined by agreement and remaining unpaid by a delinquent debtor. The only difference is that, in one case, the interest is allowed by the judge, since the debt was not exigible, and in the other case, the amount of the debt was determined by agreement and the interest becomes exigible automatically in case of demand in due form of law." (*7 American Journal of International Law*, 178.)

International tribunals have consistently awarded interest from the date of the loss or injury to the date of the award. This is consistent with the principle that compensation, to "make the injured party whole", must include interest. Obviously then, interest must run from the date of injury. In the earliest arbitration in which the United States was a party (1794), the United States-British Commission awarded interest at 6 per cent per annum from the date of damage to the date of its awards (1 Moore, *International Arbitrations* (1898), 339-340, and 4 Moore, *International Arbitrations* (1898), 4318-4319). The Mixed Commission established under the Treaty of 27 October 1795 between the United States and Spain also awarded interest at the rate of 6 per cent per annum from the date of damage (III Whiteman, *Damages in International Law* (1943), 1867).

In the *Illinois Central Railroad* case *(United States* v. *Mexico)*, mentioned above, the question of the allowance of interest was discussed at length by the Commission established thereunder. In that case, a claim was presented for $1,807,531.36, including interest amounting to $335,331.36 as of 1 April 1925, together with a proper allowance of interest thereon from 1 April 1925. This

amount was claimed to be due in payment for 91 locomotive engines sold by the American company to the Government Railway Administration of the National Railways of Mexico under a written contract. In making an award, on 6 December 1926, the Commission allowed the unpaid principal sum of $1,472,200 and interest on the deferred payments under the contract up to 1 April 1925, amounting to $335,331.36, as well as interest at the rate of 6 per cent *per annum* on the sum $1,472,200 from 1 April 1925 to the date on which the last award should be rendered by the Commission. It stated:

> ". . . It is the purpose of the Convention . . . to afford the respective national . . . 'just and adequate compensation for their losses or damages'. In our opinion just compensatory damages in this case would include not only the sum due, as stated in the Memorial, under the aforesaid contract, but compensation for the loss of the use of that sum during a period within which the payment thereof continues to be withheld." (IV United Nations, *Reports of International Arbitral Awards*, 134, 136.)

In the *Orinoco Asphalt Company* case *(Germany* v. *Venezuela)* interest was allowed from the date of loss. Umpire Duffield said, in part:

> "In the absence of any testimony on which any definite appraisal of the value of the asphalt at the mines can be based, the claimant has not shown the actual amount of his damage. In the opinion of the umpire a fair, and perhaps the only, measure of damage is interest on the amount for which the product of the mines would have sold during the period of stoppage of traffic. Perhaps mathematical accuracy might require this interest to be calculated for the average time, but under all the circumstances of the case the umpire is of the opinion that it is just to allow interest for the entire period." (X United Nations, *Reports of International Arbitral Awards*, 424, 428.)

In the *Shufeldt* case *(United States* v. *Guatemala)*, mentioned previously in this Memorandum, the tribunal allowed interest on the property taken and on prospective profits. The arbitrator stated:

> "Interest is also claimed by the United States Government. Shufeldt has been deprived of the use of his property — the income on his investment — for two years. This income on property I have assessed at $25,415 per annum and I think he is entitled in justice to compensation for the loss of such use. I therefore award an amount equal to six per cent on such income for two years, that is $4,575.10." (II United Nations, *Reports of International Arbitral Awards*, 1083, 1101.)

As pointed out above, the United States-German Mixed Claims Commission in Administrative Decision No. III allowed interest from the date of loss for property taken, damaged or destroyed.

From the foregoing it is abundantly clear that Italy is obligated to pay interest on this claim from the date the property involved was requisitioned to the date the claim is paid.

In the *Beckman and Company* case (*Germany* v. *Venezuela*, 1903), Umpire Duffield in allowing interest for delay in payment said, in part:

> "It is too clear to need argument that if no rate of interest is agreed upon by the parties only the legal rate [in Venezuela] can be allowed." (X United Nations, *Reports of International Arbitral Awards*, 436, 437.)

In the *Puerto Cabello and Valencia Railway Company* case *(Great Britain* v. *Venezuela)*, Umpire Plumley in awarding interest at the "lawful rate" based his decision on the ground that the parties to the contract involved knew the lawful rate and were bound by it. Mr. Plumley said, in part:

> "But by the laws of Venezuela interest on overdue accounts may be allowed at 3 per cent when there is no agreement concerning interest in the contract. If interest is to be allowed here, it is on the ground that the claimant company has been without the use of certain sums of money of which use the respondent Government has had a corresponding benefit. Equity would require compensation for such use in order to secure a fair and perfect balance between the two parties. When the claimant company secured the concession and the guaranty it undoubtedly knew the lawful rate of interest in Venezuela when no rate was prescribed in the contract. If it were then unwilling to content itself with such lawful rate in case of default or delay of payment, it should have secured a stipulation for a more favorable rate. That it did not do this must be taken as sufficient proof that it rested content upon the lawful rate. Again, the respondent Government knew its lawful rate of interest at the time of entering upon such contract of guaranty, and in therein providing that all questions in dispute should be determined by its courts, where only the lawful rate could be considered and adjudged, it in effect secured a stipulation that both of the contracting parties were to abide by the lawful rate. . . ." (XI United Nations, *Reports of International Arbitral Awards*, 510, 526-527.)

In the *Hetty Green* case *(United States* v. *Mexico)*, the Commission established under the Convention of 11 April 1839 awarded interest at 6 per cent per annum on the principal amount awarded, "that being the legal rate of interest in Florida at the time of the advances" (III Whiteman, *Damages in International Law*, 1978). The same Commission allowed 6 per cent interest in a case which arose in the state of Louisiana because that was the legal rate in that state (III Whiteman, *Damages in International Law*, 1979).

On the basis of the foregoing cases and many similar cases, it is settled in international law that in order fully to compensate the claimants, interest should be paid from 1 April 1968, the date of the requisition, to the date the claim is paid, at the rate of 5 per cent per annum, the applicable legal rate in Italy.

Summary of Legal Arguments

I. The principles of customary international law and the applicable Treaty provisions govern consideration of this claim.

II. The taking of the assets of ELSI (an Italian corporation whose shares were owned by the American claimants) without payment of compensation therefore, violated customary international law and the US-Italian Treaty of Friendship, Commerce and Navigation, as supplemented (FNC Treaty)

A. Customary international law prohibits the taking of the property of a foreigner without the payment of prompt, adequate and effective compensation, as does Article V, paragraph 2, of the FNC Treaty. This rule applies to all of the rights and interests held directly or indirectly by the claimants in ELSI, particularly in view of paragraph 1 of the FNC Treaty Protocol.

B. Article I of the FNC Treaty Protocol proscribes the arbitrary or discriminatory prevention of American corporations from controlling and managing enterprises they have been permitted to establish or acquire in Italy. The seizure of

ELSI's assets prevented the claimants from exercising any control or management over ELSI in violation of this Treaty provision.

C. Arbitrary or discriminatory impairment of the claimants' rights, interests, and investments in ELSI are prohibited by Article I of the FNC Supplement. The seizure of ELSI's assets, particularly without the assumption of any responsibility for ELSI's liabilities, impaired the claimants' rights and interests, and all of their investments in ELSI to the extent that the Italian company was forced into bankruptcy, and the claimants' rights, interests and investments therein were obliterated.

D. Article VII of the FNC guarantees the claimants the right to acquire and freely dispose of real and personal property in Italy. Seizure of ELSI's assets and other measures taken by governmental officials clearly violated this treaty provision. It was impossible for the claimants or their Italian corporation to dispose of any of ELSI's assets, and even the Curator in ELSI's bankruptcy had had no choice but to sell them to a government-controlled corporation.

E. Article VI of the FNC Treaty provides that ELSI's facilities in Italy shall not be subject to unlawful entry or molestation. Such facilities were seized by the Government and occupied by ELSI workers in violation of the Treaty provisions and Italian law.

III. Paragraph 2 of the FNC Protocol and Article V of the FNC Supplement assure the claimants' enterprises in Italy certain rights and privileges and other advantages to be enjoyed by industry in the Mezzogiorno. These rights, privileges and advantages were withheld from ELSI.

IV. The Government of the United States has standing to present this claim on behalf of its American corporate nationals as shareholders of ELSI.

A. Under any test recognized by international law (siége, social, genuine link or situs of incorporation) the claimants are American nationals.

B. The Government of the United States has standing to present this claim on the basis of the claimants' shareholder interest in ELSI.

1. Customary international law has long recognized the right of a government to present claims in respect of damage to a foreign corporation in which its nationals have a substantial interest. Raytheon and Machlett owned all of the ELSI stock. Also, as a result of the acts and omissions of the Government of Italy ELSI is defunct and bankrupt, and a corporation of the respondent's nationality, factors which further solidify standing of the United States to present this claim.

2. The FNC Treaty is clear in a number of its provisions in giving the United States standing to present a claim on behalf of its shareholder nationals. Paragraph 1 of the FNC Treaty Protocol, for example, provides protection of property interests held directly or indirectly. Such a provision, from its plain meaning, but more particularly when studied in the perspective of the use of its terms in customary international law, clearly covers all of the claimants' interests in ELSI, including its shareholder interests.

V. The claimants have exhausted their local remedies in Italy. ELSI immediately appealed the requisition of its property. Over one and one-half years later the requisition was held to have been illegal. Prompt overturn of the requisition was the only remedy which would have averted the claimants' damage. They have no standing, as ELSI stockholders, to sue the Government of Italy on the facts which support the claim.

OPINIONS REFERRED TO IN MEMORANDUM OF LAW IN SUPPORT OF THE CLAIM OF RAYTHEON COMPANY AND THE MACHLETT LABORATORIES, INCORPORATED AGAINST THE GOVERNMENT OF ITALY IN CONNECTION WITH RAYTHEON-ELSI S.P.A.

[See infra, *Reply of the United States, Annexes 3 and 4]*

THE CLAIM OF RAYTHEON COMPANY AND THE MACHLETT LABORATORIES, INCORPORATED, AGAINST THE GOVERNMENT OF ITALY IN CONNECTION WITH RAYTHEON-ELSI S.P.A.

Exhibits I-1 through III-25

I-1. CERTIFICATE OF INCORPORATION OF RAYTHEON COMPANY [AS AMENDED]

[Not reproduced]

I-2. RAYTHEON CERTIFICATE OF GOOD STANDING

[Not reproduced]

I-3 TO I-31. DOCUMENTATION OF CITIZENSHIP FOR OFFICERS OF RAYTHEON

[Not reproduced]

I-32 TO I-39. DOCUMENTATION OF CITIZENSHIP OF DIRECTORS OF RAYTHEON

[Not reproduced]

I-40. Machlett Certificate of Incorporation

[Not reproduced]

I-41. Machlett Certificate of Good Standing

[Not reproduced]

I-42 to I-46. Documentation of Citizenship of Officers of Machlett

[Not reproduced]

I-47 to I-49. Documentation of Citizenship of Directors of Machlett

[Not reproduced]

I-50. Secretary's Certificate with Respect to Ownership of Machlett Shares

[Not reproduced]

I-51. First National City Bank Confirmations of ELSI Shares Held for Raytheon and for Machlett

[Not reproduced]

I-52. ELSI's Confirmation to Lybrand of Its Capital Structure and Shareholders

Palermo, 22.1.1968.

Dear Sirs,

After having examined Raytheon-ELSI's official books, we hereby certify and confirm the following:

1. The total capital of Raytheon-ELSI S.p.A. on 31 December, 1967, was of Lit. 1,500,000,000.
2. On that date the aforesaid capital was divided into 1,500,000 shares as follows:

   — 750,000 ordinary shares of 1,000 lire each, marked "A".
   — 750,000 preference shares of 1,000 lire each, marked "B".

   Preference shares marked "B" enjoy priority in the distribution of the assets of Raytheon-ELSI up to their par value in the event of apportionment of such assets to the stockholders. Furthermore they may be converted into ordinary shares marked "A" upon request of the shareholders.

   Machlett Laboratories Inc. appears as the registered owner of 33,750 ordinary shares marked "A"; Raytheon Company appears as the registered owner of 1,466,250 shares. The following is a breakdown of the certificates registered in the name of Raytheon Company:

Certificate number	*Number of shares*	*Par value of shares*
1	200 shares "A"	200,000
2	200 shares "A"	200,000
3	200 shares "A"	200,000
4	200 shares "A"	200,000
5	200 shares "A"	200,000
6	200 shares "A"	200,000
7	200 shares "A"	200,000
8	200 shares "A"	200,000
9	200 shares "A"	200,000
10	200 shares "A"	200,000
11	200 shares "A"	200,000
12	200 shares "A"	200,000
13	200 shares "A"	200,000
14	200 shares "A"	200,000
15	463,850 shares "A"	463,850,000
17	249,600 shares "A"	249,600,000
18	750,000 shares "A"	750,000,000

3. Certificates 1, 2, 3, 4, 5, 6, 7, 8 and 9 are held as surety for the directorship of Mr. J. D. Clare (1), Mr. Aldo Profumo (2), Mr. J. J. Stobo (3), Mr. H. L. Bianchi (4), Mr. J. A. Scopalliti (5), Mr. C. L. Calosi (6), Mr. F. Ruta (7), Mr. A. Lodolo D'Oria (8) and Mr. A. Rovelli (9). These certificates are filed at Raytheon-ELSI, Via Villagresia No. 79, Palermo.

   Certificates 10, 11, 12, 13, 14, 15, 17 and 18 are deposited in the name of Raytheon Company with Credito Italiano, Palermo.
4. Furthermore, please be informed that Raytheon-ELSI has obtained the prescribed authorization by the Ministry and has successfully accomplished all legal formalities. Therefore, the Board of Directors, during the meeting which is going to be held sometime in February next, will approve the increase of

the Company capital from Lit. 1,500,000,000 to Lit. 4,000,000,000. The increase will be made by issuing No. 2,500,000 shares, divided as follows:

— 1,250,000 ordinary shares of 1,000 lire each, marked "A";
— 1,250,000 preference shares of 1,000 lire each, marked "B".

Raytheon Company will purchase the entire stock of shares.

The operation will be carried out by turning the credit of Lit. 2,500,000,000 claimed by Raytheon Company from Raytheon-ELSI into No. 2,500,000 shares of 1,000 lire each.

(Signed) C. POLIZZOTTO,
(Secretary General).

(Signed) J. B. MAZZOTTI,
(Administrative and Financial Manager).

II-1. MANUFACTURING AND SALES AGREEMENT BETWEEN RAYTHEON MANUFACTURING COMPANY, WALTHAM, MASSACHUSETTS, USA, AND FABRICA ITALIANA RADDRIZZATORI APPARECCHI RADIOLOGICI, GENOA, ITALY

[Not reproduced]

II-2. TEXT OF INCEPTION AGREEMENT OF 21 OCTOBER 1955

[See I, Memorial of the United States, Annex 11]

II-3. NOVATION AGREEMENT TRANSFERRING MANUFACTURING LICENCE TO ELSI

[Not reproduced]

II-4. Investment History

(Lire in millions)

Year		Raytheon		Machlett		La Centrale		SOFI		FIRAR		Total	
1956	April					+495	+66%	+150	+20%	+107	+14%	+750	
	May	+105	+14%							−105	−14%	750	
1959	January	+70				+330		+100				+500	Recapitalization
		175	14%			825	66%	250	20%			1250	
	October					+250	+20%	−250	−20%				
		+200	+16%			−200	−16%						
		(75)				(175)						(250)	Devaluation
		300	30%			900	70%					1000	
1961	August	+190	+19%			−190	−19%						
		490	49%			510	51%						
	November	+490				+510						+1000	Recapitalization
		980				1020						2000	
1962	December	+1600	+11%			+700	−11%					+2300	Recapitalization
		2550	60%			1720	40%					4300	
1964	Third Quarter	(1380)				(920)						(2300)	Devaluation
		1200				800						2000	
	December	+2000	+20%				−20%					+2000	Recapitalization
		3200	80%			800	20%					4000	
1967	Second Quarter	(2000)				(500)						(2500)	Devaluation
	April	+266.25	+17.15%	+33.75	+2.25%	−300	−20%						
		1466.25	97.75%	33.75	2.25%							1500	
		+2500	+1.91		−1.41							+2500	Recapitalization
		3966.25	99.66%	33.75	0.84%							4000	
	Cumulative Investment in Equity	7421.25		33.75		1595						9050	
	Guarantees:												
	Banca Nazionale del Lavoro	2140											
	Banca Commerciale Italiana	2000											
	Banco di Roma	130											
	Banco di Sicilia	840											
	Total	5110											

II-5. SETEL AGREEMENT

This Agreement entered into at Waltham, Massachusetts, as of the 2nd day of January 1960, by and between Raytheon Company, a corporation organized and existing under the laws of the State of Delaware, United States of America, having a principal office at Waltham, Massachusetts, USA (hereinafter called "Raytheon"), and Société Européenne de Téléguidage, société à responsabilité limitée au capital d'un million de nouveaux francs français, organized and existing under the laws of the Republic of France, having a principal office at Paris, France (hereinafter called "Setel"),

Witnesseth:

Whereas, the Governments of the Federal Republic of Germany, the Kingdom of Belgium, the Republic of France, the Republic of Italy and the Kingdom of the Netherlands (hereinafter called the "Participating Governments") have established, and the North Atlantic Council has noted, approved, and adopted the establishment of the Nato Hawk Production Organization, consisting of a Board of Directors and the Nato Hawk Management Office (agent of the Board of Directors) as a Nato subsidiary body within the meaning of the agreement on the status of the North Atlantic Treaty Organization signed at Ottawa on 20 September 1951, to direct and supervise the Nato Hawk program; and . . .
. . . authorities, then Raytheon agrees, when requested by Setel, to negotiate with Setel with respect to the licensing of a suitable firm in a Participating Country having the approval of the Nato Hawk Production Organization for the production of such Common Item in the said country.

(D) If the Board of Directors of the Nato Hawk Production Organization shall elect to allow to be given to Elettronica Sicula (ELSI) an order, on the same terms and conditions as are offered by Setel to subcontractors and are accepted by them and at reasonable prices in the light of the quantities offered and for reasonable delivery schedules, to manufacture a quantity of the magnetrons now or hereafter used in Hawk which is within the capabilities of ELSI, and thereafter such Organization shall desire a second source for such magnetron or magnetrons other than Compagnie Générale de Télégraphie sans Fil with which Raytheon already has licence agreements with respect to magnetrons, one relating to technical assistance and one to patents covering magnetrons, Raytheon shall negotiate an agreement with any concern acceptable to Raytheon which is selected by Setel with the approval of the Nato Hawk Production Organization with respect to technical assistance and patents, making available technical assistance to such concern to the same extent as is provided in paragraph 1.02 and for a patent licence with respect to the production of such magnetron.

In the event that such source and Raytheon cannot agree as to the terms of such agreement, Raytheon shall grant to such source, and shall be deemed to have hereby granted, a patent licence for the production, maintenance and operation of Hawk at a royalty rate of 4 per cent based upon the sales price of such magnetrons determined in accordance with the provisions of paragraph 4.10 (B) upon sales of such magnetrons for the Nato Hawk Program.

Raytheon warrants that, if ELSI is provided in timely fashion with test and ageing equipment comparable to that supplied to Raytheon as Government Furnished Equipment for the test and quality control of magnetrons made by Raytheon for Hawk, either

(1) ELSI shall, if given timely orders therefor, produce magnetrons for Hawk of a quality equal to those magnetrons produced for Hawk by Raytheon on an adequate delivery schedule and at a price not greater, in the light of the quantities ordered and the stage of production, than the US prices charged the United States Government by Raytheon for the same magnetron and Raytheon shall exercise its best efforts to bring about such production by ELSI, or

(2) Raytheon shall, if ELSI is in default or threatens to be in default on such orders, assume ELSI's obligations, under the orders placed therewith and deliver said magnetrons, at a price which shall be the lower of *(a)* the ELSI price or *(b)* at a price not greater than the price at the time of such assumption being charged the United States Government by Raytheon for domestic delivery for the same magnetron, adjusted for differences in quantity.

Raytheon shall grant under its patents, know-how and information to Setel and/or to the NPCs or the concern or the concerns selected by Setel for the manufacture of the items listed in Exhibit A, for the Nato Hawk Program, the right to make, use and incorporate such items in the Hawk Missile System in the Participating Countries and to sell such items as a part of the Hawk Missile System both in the Participating Countries and outside of such countries to the full extent Raytheon may do so without incurring liability to others than to the subcontractors listed in Exhibit A. Furthermore, Raytheon shall cause those of its subcontractors listed in Exhibit A, who are selected pursuant to paragraph 1.03 to render assistance with respect to the items listed in Exhibit A, to grant under their respective patents, know-how and information to Setel and/or to the NPCs or the concern or the concerns selected by Setel for the manufacture of the items listed in Exhibit A, for the Nato Hawk Program, the right to make, use and incorporate such items in the Hawk Missile System in the Participating Countries and to sell such items as a part of the Hawk Missile System both in the Participating Countries and outside of such countries to the full extent that the said subcontractors may grant such rights without incurring liability to others.

The grant or grants referred to above in this paragraph 2.08 shall not, however, extend to Common Items, other than . . .

II-6. Radarange Literature

[Not reproduced]

II-6A. Union-Management Accord on Lay-Offs

[Italian text not reproduced]

IX. Interorganizational Agreement of 5 May 1965 on Lay-Offs for Personnel Cutbacks

between the General Confederation of Italian Industries; the Intersind Trade Association; the ASAP — Association of Petrochemical Industries operating with State participation;

and the General Italian Labour Union; the Italian Confederation of Union Workers; the Italian Workmen's Union;
between the General Confederation of Italian Industries; the Intersind Trade Association; the ASAP — Association of Petrochemical Industries operating with State participation;
and the CISNAL — Italian National Confederation of Union Workers;
between the General Confederation of Italian Industries; the Intersind Trade Association; the ASAP — Association of Petrochemical Industries operating with State participation;
and the CISAL — Italian Autonomous Confederation of Union Workers.

The participating organizations arrive at the formulation of this agreement with the intent to provide for a suitable instrument which, being conducive to co-operation between the respective organizations and the member industries represented, would contribute to a peaceable solution of possible differences in labour relations due to lay-offs. This is in consideration of situations where excess personnel would have a negative effect on production cost jeopardizing the position of the business while on the other hand the lay-off of such personnel would create social problems especially in areas of high unemployment.

This agreement establishes a conciliative procedure the scope of which is understood to be aimed at and limited to the specific objectives of the agreement proper and which, should there be lacking reconcilement, does not in any way limit the rights or capabilities of the parties hereto.

Article 1. Corporate management, whenever it sees the necessity of reducing the number of workers employed for the purpose of cutting back or converting the business or the shop operation, will so advise, the regional labour organizations, sufficiently in advance and through the appropriate union local, to permit implementation, where applicable, of the procedure outlined below; it will indicate the reasons, the number of workers to be involved in the layoff, and the effective date.

Companies employing more than 100 workers, and planning the suspension of operations for more than 30 days affecting more than 20 per cent of the work force or even 500 or more employees, will advise the appropriate labour organizations through the union local concerned, indicating the reasons, number of workers involved, and expected duration of the layoff.

Article 2. The regional labour organizations can ask the industrial association concerned, within seven days of notification of the situation per first paragraph of the preceding article, to meet with them for examining the reasons for the intended personnel curtailment on the basis of the information provided by the company concerned and any realistic, concrete possibility to avoid the layoff entirely or in part perhaps by transfers within the company without, however, constituting a non-productive burden for the company.

If such a meeting is not requested within seven days, the action can take place without delay. If, however, one of the labour organizations requests the meeting, the latter must be held within the following five days.

The procedure covered in this agreement must be consummated within 25 days from the date of notification of the labour organizations per Article 1 above.

If the company justifies its intended action with a technological conversion or reorganization or the labour organizations unanimously recognize such a situation, the deadline given in the preceding paragraph will be extended by two weeks.

The reconciliation procedure between the union organizations must be unconditionally carried out within the time-limits specified in this agreement, with the understanding that the company will suspend any layoff action until the said

deadlines have expired or until it is found by all concerned that reaching agreement within the said time-limits is impossible.

In the meeting mentioned above, the employers' associations and the workmen's unions can avail themselves of the assistance of representatives of the company concerned and, respectively, of the Internal Commission or one of its representatives.

Both in the case of agreement and in the event of non-agreement, the company, determining which workers are to be laid off, will follow these comparative criteria; technical and productivity requirements; seniority; family-care considerations.

Article 3. The procedures according to this agreement relate to operations normally employing more than ten workers. For facilities having a union Representative in management, the procedure established in this agreement is limited to a conciliative review between management and the said Representative. In the other operations with up to 100 workers, the time-limit for the review of the planned lay-off as per Article 2 above is reduced to two weeks.

Article 4. The parties hereto agree that workers laid off for personnel reduction will receive, apart from the severance pay provided for in collective contracts, a flat allowance for an initial period of unemployment.

This allowance will be paid out by way of an insurance organization governed by appropriate legislation and controlled along guidelines for which the parties hereto will submit specific proposals to the cognizant authorities.

Formal declaration:

The organizations of the two parties hereto, prepared to implement the provisions of Article 4 above, hereby declare that they do not intend to make any changes regarding the points so far covered.

Article 5. The layoffs effected for personnel reduction are indeed motivated by no other considerations, and the workers involved have the right to be rehired by the same company if the latter does any hiring within a year's time for functions or specialized jobs previously held by the personnel laid off. In this case the rehiring will be made, under observation of objective criteria, in the reverse order of the layoffs.

Article 6. The stipulations of this agreement do not apply to layoffs due to the expiration of term contracts, or contracts for specific building construction work, or for seasonal or irregular jobs.

Article 7. This agreement becomes effective on 1 June 1965 and will be valid until 31 December 1968, to be automatically extended from year to year unless cancelled by one of the participating organizations at two months' notice prior to the original or the extended expiration date.

Explanation *re* Articles 1 and 2:

The notifications according to Articles 1 and 2 are to be given by the regional industrial association to the . . . organizations, on an equal level (union labour exchange or labour offices), except if the industrial association's territorial limits of responsibility are different in which case the notifications will be given to the corresponding labour organizations wherever they are located.

Explanation *re* Article 6:

In consideration of the particular importance or frequency of specific single jobs in the building industry it should be explained that the concept of specific jobs in the said industry also covers gradual completion of single phases of work which require the successive utilization of workers of different qualifications.

Statement *re* Articles 2 and 3:
With reference to the provisions of Articles 2 and 3 governing the action to be taken by the company in the different hypothetical cases considered in the paragraphs of the said Articles, it is to be understood that the notification of layoff and the time-limit for advance notice in respect of individual workers become effective as from the completion of the procedure outlined in the said paragraphs.

Statement *re* Article 2:
In the hypothetical case where an agreement is reached relative to the number of personnel to be laid off, the labour organization may examine the list of the employees affected for the purpose of pointing out individual cases where possible re-examination and substitution of others may be justified on the basis of the criteria per last paragraph of Article 2, without such re-examination being allowed, however, to delay the action by the company.

Read, confirmed and signed.

COMMON DECLARATION

The parties hereto, convinced of the need to pursue greater and more efficient utilization of the work force for the purpose of economic and social development, and aware of the importance as well as the delicate nature of employment problems, stress the necessity to jointly examine the circumstances surrounding personnel reductions for identifying their causes, for helping to limit their negative impact and, by common agreement, to come up with satisfactory solutions acceptable to the public authorities.
The parties hereto therefore agree:

(a) to periodically examine, between them, the employment situation on a national level, in general and for the individual sectors of industry, for the purpose of gathering the greatest possible amount of current information and projections regarding employment problems resulting from conjunctural economic situations and from general technological progress;
(b) to bring the results of the above examinations to the attention of public authorities either for a possible further analysis or for a decision and action by the public authorities themselves, and also for an improvement of the instruments of income support for the workers affected by the personnel reductions as well as those for job training.
For the purpose of implementing point *(a)* above the parties hereto agree that the examination of employment problems is the responsibility of the Confederations assisted, in matters pertaining to specific sectors, by the respective national trade unions in the industries concerned.
The objective of such an examination, besides determination of the nature, characteristics and problems of employment conditions, is the formulation of near-term and medium-range working plans.
For the implementation of point *(b)* above, and for arriving at a co-ordinated and rational employment policy with efficient collaboration between government authorities and professional organizations, the parties hereto entreat the following:

Establishment, on a national level, of a suitable ministerial entity for handling general and specific employment problems and for instituting, on consultation with the parties hereto and with the cognizant local agencies where necessary, whatever steps are appropriate;

Upgrading of the Compensation Service to permit better classification of all cases, extension of benefits on behalf of workers laid off in personnel cutbacks as provided for in the respective interorganizational agreement, and improved, faster handling;

Stepped-up efforts to retrain personnel in the case of reorientation or technical reorganization either of an individual company or an entire sector of the industry, under co-ordination of the public resources available for that purpose on a national or international level.

II-7. IRI Chart

[Not reproduced]

II-8. Banco di Sicilia Bulletin

[Italian text and English translation not reproduced]

II-8A. Press Clippings on IRI Takeover

[Italian text and English translation not reproduced]

II-9. Text of Transportation Subsidy Law

[Italian text not reproduced]

EXCERPT FROM *LEX*, PART I, PAGE 1718

Decree by the Ministry dated 29 March 1967 (in *Official Gazette* No. 171 of 10 July 1967), on the Reduction of Maritime Shipping Rates in Accordance with Article 15 of Legislative Act No. 717 of 26 June 1965.

In concurrence with the Minister for Special State Participation in (the development of) Southern Italy and with the Minister of Finance, the Minister for the

Merchant Marine, in consideration of Article 15 of Law No. 717 of 26 June 1965, decrees the following:

Article 1. For ocean-freight transportation, between national ports, of raw materials and semifinished goods consigned directly to industrial facilities operatively established and located within the Mezzogiorno (Southern Italy), and intended for direct use by these facilities in their production work, a 5 per cent reduction applies to all standard freight rates and tariffs excluding embarkation, unloading and insurance charges, as stipulated under the provisions of the agreements outlined below.

An analogous rate reduction also applies to the transportation of merchandise produced by industrial facilities operatively established and located within the Italian Mezzogiorno and shipped to locations outside the Mezzogiorno.

EXCERPT FROM *PROVVEDIMENTI LEGISLATIVI*, PAGE 1179

Article 15

Reduction of Tariffs for Maritime and Rail Transportation

The rail freight tariffs established in the second paragraph of Article 7 of the legislative decree No. 1598 (1) of 14 December 1947 issued by the provisional government and ratified by law No. 1482 (2) of 29 December 1948, also apply to the movement of materials and machinery required for the modernization of industrial facilities. Analogous benefits apply to the transportation of raw materials and semifinished goods needed in the production process and for industrial conversions, as well as for transporting to destinations outside the Mezzogiorno finished products of industrial companies located within the said territory.

The rail freight rates referred to in the first paragraph also apply to agricultural and related products.

Analogous reductions are permitted for transportation by ocean vessels, scheduled or otherwise, including vehicle ferries.

EXCERPT FROM *PROVVEDIMENTI LEGISLATIVI*

Decree by the Ministry dated 29 March 1967 (in *Official Gazette* No. 172 of 11 July 1967), on the Reduction of Maritime Shipping Rates in Accordance with Article 15 of Legislative Act No. 717 of 26 June 1965.

In concurrence with the Minister for Special State Participation in (the development of) the Mezzogiorno (Southern Italy) and with the Minister of Finance, and in consideration of Article 15 of Law No. 717 of 26 June 1965, the Minister for the Merchant Marine decrees the following:

Article 1. Ocean freight of merchandise referred to in the second paragraph of this Article, between national ports and destinations within the territory outlined in Article 3 of Law No. 546 (1) of 10 August 19 .. (?) as amended and under the provisions of Article 1 of Law No. 717 (1) of 26 June 1965 and subsequent articles, shall be subject to a reduction of 5 per cent on the standard freight rates and tariffs excluding embarkation, unloading and insurance charges. For shipments handled by the state-subsidized shipping line such rate reduction applies to the

standard tariffs of the same; for shipments handled by independent carriers the rate reduction is governed by the provisions of Articles 5, 6, 7 of this decree.

The benefits according to the preceding paragraph apply to construction and building materials, machinery and any other items required for the original construction, the reconstruction, the conversion, the expansion and the modernization of *(a)* operatively established industrial facilities, *(b)* any other shop operation and supportive system within the premises of the said facilities.

* * *

II-10. Text of 30 Per Cent Procurement Law (Excerpts)

[Italian text not reproduced]

Paragraph 915. Legislative Act (Decree) No. 40 by the Provisional Government, dated 18 February 1947, on Supply and Job Contracts reserved by Government Agencies for Industries of the Mezzogiorno. (Published in the *Official Gazette* No. 51 of 3 March 1947.)

Article 1. For a period of 10 years from the effective date of this decree the agencies of the Italian Government are authorized to reserve for industries in the regions of Lazio, Campania, Basilicata, Calabria, Puglie and Sicily, supply and job contracts valued at not less than one-sixth of the total project amount.

Paragraph 983. Legislative Act No. 835 of 6 October 1950, on Supply and Job Contracts reserved by Government Agencies for Industries of the Mezzogiorno and the Lazio Region, and Definition of the Mezzogiorno (Southern Italy) and Insular Italy. (Published in the *Official Gazette* No. 245 of 24 October 1950.)

Article 1. The agencies of the Italian Government are *required* to reserve supply and job contracts referred to in legislative Act No. 40 (1) of 18 February 1947, for the industries, including small businesses and artisan shops, in the provinces of Lazio, Abruzzo, Molise, Campania, Lucania, Puglie, Calabria, Sicily, Sardinia and the Isle of Elba. The same requirement applies to the Administration of the national railroad system and of the Navy, relative to contracts referred to in legislative Acts No. 374 of 14 June 1945 and No. 503 (2) of 15 November 1946.

Article 16. Reservation of 30 per cent of Supply and Job Contracts by the Public Sector. Notwithstanding the provisions of Law No. 835 of 6 October 1950, and except where more favourable terms are contained in other laws now in force, the percentage of supply and job contracts stipulated in the said Law No. 835 is hereby increased to 30 per cent in favour of industries and artisan shops located in the territories outlined in Article 3 of Law No. 646 of 10 August 1950 as amended.

The same percentage also applies to the territories indicated in Article 1 of Law No. 835 (3) of 6 October 1950 as amended.

* * *

II-11. ANDREOTTI'S SPEECH OF 25 JULY 1968

[Italian text and English translation not reproduced; for another English translation, see I, Memorial of the United States, Annex 46]

II-12. CORRESPONDENCE WITH FIAT

3 August 1967.

Mr. John D. Clare
Vice President — Raytheon Europe
President — Raytheon ELSI S.p.A.
Via Ferdinando di Savoia, 6
Rome.

Dear Mr. Clare,

Thank you for your letter of July 31. The conversations with your people were certainly of interest to us, and we appreciated the opportunity afforded by their recent visit here.

Fiat positively intends to get a foothold in the field on a scale larger than is now the case with our Aviation activities. We shall need time, however, to explore the possibilities and do the required study work. We plan to do this by steps over the next three months or so, and in a context that includes also other contacts we already have.

Anyway, we shall welcome the honour of a visit from your distinguished Chairman of the Board Mr. Charles Adams, during his trip to Italy in the first half of September. I look forward to hearing further about his schedule through your Mr. Bianchi, to make sure I am available to meet your Chairman personally.

(Signed) G. BONO.

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31 July 1967.

Dr. Gaudenzio Bono
Managing Director
FIAT S.p.A.
Corso Marconi, 10
Torino

Dear Dr. Bono,

I have now received the report from Messrs. J. Stobo, A. Profumo and R. Bianchi of their meeting with you in Turin last Wednesday 26th July. We were

encouraged to arrange this meeting following our last discussions with the Hon. La Leggia of ESPI and Dr. E. Carbone, General Manager of the Ministry of Industry and Trade, with whom we have been discussing the Raytheon-ELSI situation and plans. The Hon. La Leggia told us that on Tuesday 24th ESPI would be having discussions with FIAT both over the car assembly plant in Sicily and over the situation in Raytheon-ELSI, with a view to your joining ESPI and ourselves as part of a joint activity related to Raytheon-ELSI.

We felt that it was important that you had the opportunity to really understand our view of our new philosophy in ELSI, what we are actually doing and what we are trying to do, and hence we were very pleased to follow up the Hon. La Leggia's suggestion that we should contact FIAT directly for this purpose. I hope that the meeting was satisfactory from your point of view in providing this information.

From the reports of the Raytheon-ELSI people it would appear that you are considering further possibilities as a result of the meeting and I presume as a result of your meeting with ESPI. I understand that it was left with you to contact Mr. R. Bianchi in Rome for information to enable you to consider these possibilities. I am sure you will realize that we are dealing with a very dynamic situation and that the recent Raytheon Management activity, coupled with Raytheon planning for the future, is not at all reflected in the present balance sheet for instance, which is necessarily more of a historical document.

With the appropriate partners in Sicily, we are enthusiastic about the future possibilities and feel it would be well worthwhile to produce for you an additional note summarizing our proposals to ESPI, our present activities and our future plans, and to have this available with any other information that we pass on to you. When this is ready I think it would be very worthwhile if we could have the opportunity to discuss it with you. I am expecting that Mr. Charles Adams, the Chairman of the Board of the Raytheon Company, will be in Italy during the first two weeks of September, so perhaps this would be an appropriate time to try to arrange these discussions. I will ask Mr. Bianchi to contact your office in the very near future to see if a mutually convenient date can be arranged.

(Signed) John D. CLARE,
Vice President — Raytheon Europe
President — Raytheon-ELSI S.p.A.

II-13. MINUTES OF MEETING WITH IRI OF 4 JANUARY 1968

[See also I, *Memorial of the United States, Annex 15, Exhibit C]*

MEETING OF IRI-RAYTHEON — 4 JANUARY 1968

SUMMARY OF KEYPOINTS

Comments by Dr. Medugno of IRI

1. IRI have looked at the new study presented by Raytheon and have come to the same conclusions as those reached by Finmeccanica in the previous study.

2. There are no new factors as compared to one year ago.
3. There are still sizeable losses coupled with reduced sales levels.
4. The 6 billion lire capital requested can only be used to reduce the debt and hence reduce the interest expense.
5. The investment in plant and equipment during recent years is lower than the depreciation. The money is, therefore, not needed for working capital.

Hence IRI see no purpose in participating and really no point in discussing the possible new product situation.

Mr. Clare's answers to Dr. Medugno's initial comments

Comment No. 2. There have been very significant changes in the company performance, management support and product policy as outlined in detail in the last two reports. There is factual evidence to strongly refute this comment No. 2.

Comment No. 3. JDC reviewed product line by product line — as given in the reports — to show that we consider stabilization and growth is possible with a suitable Italian partner.

Comments No. 4 and 5. Large past losses produce a large debt equity ratio which eventually drives a company into a "run away" situation. The 6 billion lire would not only reduce the interest charges but by improving the debt equity ratio and allowing an increased profitability it would also allow for new investment and support for new products and further increase in profits.

The most important point, however, is to introduce new products along the lines suggested in the report as soon as possible. We consider it of the utmost importance that this is discussed.

Dr. Medugno's comment on new products

6. As far as new products are concerned, it would be very difficult to put in new products to increase the sales level up to 12 billion lire necessary to protect the 130 people already on training plus the additional 250 people planned for.

Mr. Clare's answer to comment No. 6

It was indicated that IRI annual sales are presently 2,300 billion lire. The provisions of two billion lire value of new products to ELSI (to match a similar contribution from Raytheon sources) does not seem to be a very large problem to be solved as the key basis for a positive expansion of the already existing asset of Raytheon-ELSI.

General Comments by J. D. Clare

(a) After the first refusal by Finmeccanica, the reasons for us seeking an Italian partner and for approaching ESPI have been given in our various reports.

(b) We have created an electronic facility dealing with sophisticated products. This now exists as an asset with facilities, trained people, products and markets. As indicated in the reports this has been very costly indeed for Raytheon.

(c) We are proposing that expansion is based on stabilizing present products and then feeding in production only of new products supported by engineering and marketing elsewhere.

(d) Together with an Italian partner this asset can either be expanded along the lines suggested in the report or alternatively it can be run down.

(e) By our own efforts we have shown that the present product lines can be stabilized and new products can be fed in along the lines we suggest — we are looking for some organization in Italy that is interested in the planned expansion of this already existing asset in Sicily.

(f) We thought that it was within IRI's terms of reference to be interested in such situations particularly with regard to the possible development of electronics in the Mezzogiorno as part of the 5-year plans.

IRI and Finmeccanica point out that within the IRI Group, there are no concrete possibilities of ensuring a direct market outlet for Raytheon-ELSI's production. The only exceptions to this statement concern areas of marginal interest, or areas in which other IRI companies, which already have substantial problems of their own to be solved, are currently operating (as for example ATES, which also is in Sicily).

In summary, IRI believes that Raytheon-ELSI's situation cannot be made economically sound on the basis of the program outlined in the documentation submitted, and therefore does not see a possibility of intervention in the company. This belief is strengthened by IRI's conviction as mentioned above that its intervention would not bring about any significant change in the marketing position of the company, or as a consequence in the company's basic economic position, which would remain a serious problem area.

However, IRI desires to point out that even though — with great regret — it cannot accept Raytheon's request at this time, it remains possible that a later request by Raytheon might receive more favorable consideration. Such a decision could come when IRI, which intends to develop its activities in the electronics field, has completed an analysis in this area which is now being made in cooperation with other national groups interested in the electronics sector.

This analysis, which is expected to take one year, will permit a review of the general problem with much greater understanding. It should also lead to a determination of whether it will be possible for IRI to contemplate a special program of intervention to assist in putting Raytheon-ELSI on a sound basis, as requested by Raytheon.

Mr. Clare indicated his disappointment with the present decision made by IRI and took note of the further declarations of the Institute, stressing that unfortunately much time has passed since the first conversations on the ELSI problem, and that in the intervening period Raytheon has had to devote many efforts to the ELSI situation, without outside assistance.

II-14. Justin Guidi's Description of January Earthquakes

[Not reproduced]

II-15. HILLYER'S MINUTES, DATED 21 FEBRUARY 1968, OF THE HON. CAROLLO'S MEETING ON 20 FEBRUARY 1968 WITH C. F. ADAMS

[See also I, *Memorial of the United States, Annex 15, Exhibit B, and* III, *Correspondence, Nos. 41, 52 and 54]*

21 February 1968.

MEETING WITH HON. VINCENZO CAROLLO, PRESIDENT OF THE SICILIAN REGION, IN HIS HOTEL ROOM IN ROME, 20TH FEB.

Present: Messrs. Adams, Clare, Hillyer, and Profumo.

CFA opened the meeting with the first paragraph of our prepared speech (Raytheon is convinced that ELSI can succeed with an appropriate partner, but we will not put up any more cash, etc.), and asked JDC to present our interpretation of Hon. C's position at our last meeting.

Hon. C. interrupted saying he is aware he made a commitment to us that IRI or ESPI would intervene within a month which has not been fulfilled because of the earthquakes. The position today is as it was in December, but tomorrow or at latest the day after tomorrow, he will meet with Messrs. Priti, Colombo, Andriotti, and Petrilli to discuss the overall package program to aid Sicily. As a part of this plan, Hon. C. hoped to obtain a Central Gov't commitment to develop the electronics industry in Sicily. This commitment would politically be equivalent to insuring IRI help for ELSI.

JDC emphasized that too much time has passed and that although FIAT has offered us a Director, IRI will only agree to provide an unofficial advisor. CFA added that IRI would not consider a Selenia and ELSI merger which we had proposed.

Hon. C. was quite aware of what IRI had told us, and knows that CIPE cannot act until the five-year plan is out. However, in his meetings of the next day or two he hopes to obtain a political commitment for electronics in Sicily, which will insure IRI action in the next 8/10 months and which will allow ESPI to act with fewer limitations. In short, the interests of Raytheon and the Region coincide, as

1. The Region wishes to protect any sources of jobs, and therefore wishes to protect ELSI, and
2. The Region wishes to use ELSI as its principal reason for centring the national electronics plan on Sicily and in fact on ELSI, and is using ELSI as a positive element in the current Ministerial level talks.
3. If Hon. C. can get a National Gov't commitment to come to Sicily through ELSI, this helps everyone. There will be a "yes" or "no" reply on this in the next day or two; Hon. C. will call us to meet again when he knows the answer and before he returns to Sicily.

CFA stressed that ELSI cannot survive without immediate cash help, which Raytheon cannot provide. JDC drew a precise time chart showing:

(a) 23 Feb. — Board Meeting.
(b) 26 to 29 Feb. — inevitable bank crisis
(c) 8 March — we run out of money and shut the plant.

Hon. C. repeated that our interests are the same, to keep ELSI alive and to improve it. He hopes to achieve this aim in the best way for all of us by obtaining a political commitment for support from IRI within the next two days. However,

if this plan does not succeed, he gives us his "broadest assurances" that ESPI would then promptly intervene with Lire 4 billion.

CFA stated that while our interests coincide with those of the region, as a private company we do have obligations to our stockholders. While we can continue to provide ELSI with management and technology, we cannot provide money, without which ELSI will shortly disappear.

JDC posed five questions as follows:

1. Will Hon. C. visit the plant this week?

   Ans. No. *because he will be here in Rome working on Moro et al.* Anyway he did visit the plant six years ago.

2. Will he promise to talk to us again before returning to Palermo?

   Ans. Yes.

3. If the National Gov't will not intervene, what will be the extent of ESPI's intervention?

   Ans. A very difficult question based on our decision on whether we have the experience and the intelligence locally to manage such an enterprise. (Hon. C. obviously felt local intelligence would not be sufficient, later stating that ESPI would run the company into the ground in a year or two if left to its own devices.) JDC attempted valiantly to argue that with a FIAT director and possibly an IRI director acting for ESPI, ESPI could make a go of a majority position, particularly with continuing management help from Raytheon. Carollo would not buy this argument, unless the presence of FIAT and/or IRI was backed up by a financial commitment.

4. If the National Gov't will not intervene before you return to Palermo, can you give us an immediate private commitment that the Region will intervene?

   Ans. Yes.

5. How long will it take ESPI to go through the bureaucratic formalities leading to final investment?

   Ans. 30 to 60 days.

The meeting concluded with expressions of sympathy to Hon. C. for the disasters in the Region and of gratitude for his attention to our problem. (It was decided by private exchanges not to leave any documents with Hon. C. The preprepared "notes for the meeting" were left at his hotel later that evening with point (8) and the preceding paragraph on possible labor problems deleted. The following day, 21 Feb., a letter outlining Raytheon's conditions for continuing at ELSI together with a draft shareholders agreement with ESPI and summary thereof, were delivered to Hon. C's hotel.)

S. H. H.

II-16. C. F. Adams' Letter to the Hon. Carollo

[Italian text not reproduced]

(Translation)

Confidential – By Hand

21 February 1968.

Hon. Vincenzo Carollo
President of the "Giunta
Regionale Siciliana"
c/o Hotel Metropol
Rome

My dear Honorable President,

I would like to express our gratitude for the understanding and the constructive spirit you demonstrated in our talks of last night on the Raytheon-ELSI situation. I would also like to confirm to you the complete willingness of Raytheon Company to stand behind the positive points outlined in the notes for our meeting with you which we left at your Hotel following the meeting. In summary, given appropriate assistance, Raytheon remains willing, if you should so desire, to act as follows:

1. Continue to provide management assistance to ELSI in Palermo, and the support of our international organization for the sale of ELSI products.
2. Continue to provide and increase the technical support to ELSI from our US company.
3. Negotiate a merger of Selenia and ELSI, or a suitable business combination between the two, if this is permitted by Finmeccanica.
4. Transfer the production of marine radar from Selenia to ELSI, if this is permitted by Finmeccanica.
5. Provide technical advice to the Sicilian Region on the general development of its electronic industry.
6. Spread the payment of all amounts now owing by ELSI to Raytheon Company over a ten-year period.

Naturally, as a private industrial company with obvious responsibilities to our shareholders, we must define without ambiguity certain minimum indispensable conditions for the continuation of our participation in ELSI. We state as a premise that these conditions are rendered necessary by years of hard work and very large investments of capital which we have dedicated to our Palermo associated company, and all this at our own initiative.

These conditions will apply whether or not the Central Government gives you a political commitment to assist ELSI. To keep our Sicilian company in existence, we must count on your consent, in general, to the following:

1. Raytheon Company will not undertake to supply further financial contributions to ELSI.
2. As already indicated in our reports to ESPI, the use of any new investment in ELSI must include the cancellation of all bank guarantees currently provided by Raytheon Company in favor of ELSI.

3. We would prefer to become minority shareholders in ELSI. As a maximum compromise, we could maintain a 50 per cent participation in shareholdings. We cannot consider a solution which would leave us as a majority shareholder.
4. A 50/50 participation between Raytheon and ESPI would require the investment of 4 billion Lire on ESPI's part. In such an event, we would have to ask assurances that an additional intervention will be forthcoming in some form capable of permitting the cancellation of all other bank guarantees we are currently supplying in favor of Raytheon-ELSI.
5. To insure that the banks will not cause the closing of Raytheon-ELSI within the very near future, the management of the company should be authorized within the next few days to communicate to the banks on a strictly confidential basis that the Region has undertaken to assume a participation in ELSI of at least 4 billion, which will be paid in no later than 30 April 1968.

I submit these conditions now not to take a harsh or insensitive attitude for the problem of ELSI and the Region, but only because I wish to clarify such conditions without possibility of misunderstanding the general position of our company as a private enterprise.

Furthermore, I attach to the present letter a draft of a proposal (and a relative summary), which indicates the form of the agreement with ESPI which we would prefer.

We also feel under a duty to bring to your knowledge the fact that, because of the intense competition which has recently arisen in the field of cathode ray tubes for television sets, from a strictly commercial point of view it would be necessary to review and correct certain aspects of the agreements between ELSI and the Unions, even though this might turn out to be unwelcome by the Unions themselves. The management of ELSI proposes to initiate the necessary negotiations without delay, in order to carry them to conclusion before the Region intervention is made a matter of public knowledge. It is also dutiful on our part to inform you that the introduction of new proposals in ELSI may not take place within a period of time sufficiently short to absorb the personnel now assigned to subsidized training courses. At least from an industrial point of view, it would be advisable to solve also this problem before the public is made aware of the Region's intervention.

I personally, and all of my colleagues, sincerely appreciate all the efforts you have dedicated to the problem of Raytheon-ELSI. We all hope that it will be possible to solve this problem in the best common interest.

Raytheon Company

(Signed) Charles F. ADAMS,
Chairman of the Board.

II-17. JOHN CLARE LETTER TO THE HON. CAROLLO DATED 28 FEBRUARY 1968

[Italian text not reproduced]

28 February 1968.

Hon. Vincenzo Carollo
President of the Junta
for the Sicilian Region
Orleans Palace
Independenza Square
Palermo

Dear Hon. Carollo,

I will not conceal that I was disappointed and disturbed to realize yesterday that you would not be at the meeting in Rome, after I had been informed that you would be present. Hon. La Loggia outlined again for us your viewpoint which really reconfirmed what you told us in our meeting last week. A copy of the notes we produced of our meeting with Hon. La Loggia is enclosed.

I will be visiting Palermo tomorrow and I hope that I shall have the opportunity to meet with you as you promised at our last meeting in Rome. I shall then have the opportunity to hand deliver these notes. If I cannot meet with you, I will arrange to send this letter and the notes to you and will then regretfully have to begin to presume that your decision is negative.

I would like to reconfirm our position:

1. We do not want just money. We need:

(a) New capital;
(b) A partner to help us obtain the benefits to which Mezzogiorno companies are entitled;
(c) A partner to help us find new products.

This is as we have consistently stated throughout all of our reports.

2. We will not take a majority position.

3. Our offer of the 50/50 arrangement is our ultimate compromise. We need you to be committed as much as we are. This will still call for an investment of six billion lire of which two billion will now have to be in some interest-free form other than ordinary capital stock.

4. We need to renegotiate our agreements with the Unions. We regard this as an essential prerequisite for any viable future.

5. We regard it as essential to trim down the present personnel to become as competitive as possible before further expansion.

6. Time is now very short. I have already told you about the problems which are pressing us, in relation to our time schedule according to which events may precipitate irreparable consequences.

This is just a reconfirmation of the points we have already made clear to you. I did indicate to Hon. La Loggia a possible alternative solution which you might like to consider. He promised that he would report this to you over the telephone and I am looking forward to discussing this other possibility with you when we meet tomorrow.

(Signed) John D. CLARE,
Vice President, General
Manager, Europe.

cc: Hon. La Loggia
(ESPI)

II-18. Announcement of Decision to Cease Trading

[Italian text and English translation not reproduced; for another translation, see infra, *Rejoinder of Italy, Document 21]*

II-19. Minutes of ELSI Board Meeting Where Decision Taken to Cease Trading

[Italian text not reproduced; for the English translation, see I, *Memorial of the United States, Annex 15, Exhibit D]*

II-20. Minutes of Meeting with the Hon. Carbone

[See I, *Memorial of the United States, Annex 15, Exhibit G]*

II-21. Form of Dismissal Letters to Employees[1]

[Italian text not reproduced]

FORM OF DISMISSAL LETTER

(Translation)

Dear Sir,

For many years, Raytheon-ELSI has had, and continues to have, great losses. Conscious of the importance of the company to the public of Sicily and of Palermo, our shareholders have contributed many billions of lire to promote the success of the company.

During the last twelve months, your Management has made great efforts to obtain new capital and products from many sources, both governmental and industrial. These efforts, unfortunately, have not had positive results. Raytheon-ELSI, therefore, is forced to cease its activities because it is rapidly approaching a total lack of resources with which to operate.

Consequently, your Management is compelled to dismiss all of its employees. Only a few persons will be retained temporarily who are needed to handle all necessary action relative to the administrative, commercial and technical aspects

[1] The dismissal letters were mailed on 29 March 1968.

of closing the company's activities. These few persons will also be needed to organize and carry out without delay the payment of all that is due to the dismissed personnel.

With deep regret, we hereby communicate to you your dismissal with immediate effect for the foregoing reasons. To facilitate your search for new work, the company agrees that you need not work before or during the period of the notice which in normal circumstances would have been sent to you. As a consequence, as of today, you are no longer to report for work since the company has no more work to offer.

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. It will be your Management's task to notify you as soon as possible of the arrangements being made for the full payment of all monies due to you, as well as for the handling of all connected administrative actions.

Your Management wishes to express to you their appreciation for the work done by you for the company and sincerely hopes that you will be able to obtain soon new and adequate employment.

RAYTHEON-ELSI S.p.A.
The Managing Director.

II-22. FORM OF LETTERS TO RETAINED EMPLOYEES

[Italian text and English translation not reproduced]

II-23. MR. OPPENHEIM'S ANALYSIS OF ASSETS AND INVENTORY

[See **I**, *Memorial of the United States, Annex 17, Exhibit A]*

II-24 TO II-28. EXPRESSIONS OF BUYER INTEREST IN ELSI PROPERTY

31 March 1969.

Raytheon Company
141 Spring St.
Lexington, Mass. 02173

Attention: Mr. Thomas L. Phillips,
President

Dear Sir,

I have read a report in the *Wall Street Journal* that your Sicilian Italian venture is having difficulties.

I am a partner in a machine tool company, and equipment manufacturing distributor. Additionally, I am a principal in a wide group of manufacturing companies that have interests here and abroad.

I would be happy to consider what you have as a surplus situation, or as a manufacturing situation.

My activities are well known to:

First National City Bank
399 Park Ave.
New York, N.Y. 10022
Mr. Eric Schmitt, V.P.
Mr. Thomas Creamer, Sr. V.P.
Tel. 559-3154.

(Signed) Louis D. SRYBNIK.

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25 April 1969.

Dear Mr. Srybnik,

Thank you for your recent letter to Mr. T. L. Phillips, President of Raytheon Company, indicating an interest in Raytheon-ELSI S.p.A.

We are confident that you appreciate that operations of the Palermo subsidiary were terminated early in 1968. However, your suggestion is currently being considered and, if further discussions appear appropriate, you will be advised at an early date.

(Signed) John B. BOND.

Mr. Louis D. Srybnik
S&S Machinery Company
140-53rd Street
Brooklyn, New York 11232.

bcc: J. Oppenheim
C. H. Resnick.

J. J. Guidi. Rayelro, Rome. MJRC extremely interested in purchasing microwave tube equipment and possibly some semiconductor equipment from ELSI. We will send our engineers to examine equipment available as soon as you can give us reasonable assurance that you can sell to us. Please forward description of equipment. Fukagawa. MJRC.

Piraeus, 8 April 1969.

Raytheon Co.
Int'l Sales & Services
Lexington Mass.
US 02173.

Gentlemen,

As we are preparing a TV Factory also TV picture tubes factory in Greece, and as we heard from our last trip in Europe, you are selling your factory in Italy for TV picture tubes in black and white. If this is true please let us know all the conditions and terms of all the machinery sale.

(Signed) D. HALAZONITIS.

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19 May 1969.

Mr. D. Halazonitis
Radiotelephoniki
2 Paleas Trapezis Street,
Piraeus, Greece.

Dear Mr. Halazonitis,

Thank you for your letter of April 8 inquiring as to a TV Factory in Italy. We presume that your letter refers to our former subsidiary, ELSI, located in Palermo, Sicily.

The assets of ELSI are under control of a curator whose name and address are as follows: Avv. Giuseppe Siracusa, Curatore del Fallimento della ELSI S.p.A., Piazza de Ungheria 84, 90141 Palermo, Sicily, Italy.

There may well be individual negotiations with respect to the purchase of equipment for product lines including television tubes in the future. There may also be public auctions held at which you may wish to participate. I would suggest

that you write to the curator directly expressing your interest and inquiring as to conditions and terms.

(Signed) Joseph OPPENHEIM,
Vice President
International Affairs.

Cc. Avv. G. Bisconti.
Avv. G. Siracusa.

P.S. If you will furnish us with copies of your inquiry to the curator, we will attempt to be helpful in connection with your interest wherever we can.

Piraeus, 12 June 1969.

Raytheon Company
Lexington/Mass 02173.

Dear Mr. Oppenheim,

Thank you very much for your kind letter of 19th May, contents of which has been duly noted.

As you can see as per enclosed copy of our letter addressed to Mr. G. Siracusa, we are asking of what we shall need.

(Signed) D. HALAZONITIS.

Piraeus, 12 June 1969.

Avv. G. Siracusa
Piazza de Ungheria 84
90141 Palermo
Sicily

Dear Sir,

We got your address from Raytheon Company and we would like to inform you that we are preparing a TV Factory also TV picture tubes Factory in Greece. We have heard that ELSI Factory machinery and equipment will be sold out. As we are interested please let us know all the conditions on this.

D. HALAZONITIS.

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18 February 1969.

Mr. Egidio Rinaldi
Via Biscolati, 76
Roma, Italy

Dear Mr. Rinaldi,

Up to this date, I have not received the list of equipment, with prices, which Mr. Siracusa promised to send promptly.

Could I trouble you again to inquire from Mr. Siracusa what has happened?

SEMICONDUCTORES CALIFORNIA, S.A.
(Signed) F. J. KING

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7 August 1968.

Mr. Joe Oppenheim
Lexington Corporate Headquarters
Lexington, Massachusetts.

Dear Joe,

Fritz Gross called me yesterday and asked me to meet with Mr. Myhre, General Manager of Terma Elektronisk Industri A/S, whose card is enclosed.

Briefly, Mr. Myhre was interested in the possibility of his company producing the S and X Band items formerly produced by ELSI. He evidenced interest in purchasing ELSI's equipment and in obtaining related technical assistance from Raytheon.

Several of the officials of his company will be in Rome in the near future for discussions with Selenia Officials. He would like for them to see you at that time about the possible purchase of this ELSI line.

(Signed) Howard E. HENSLEIGH.

Unnumbered Documents, Volume II

III-1. Diary Entries regarding Discussions with the Hon. Carbone on 29 March and 30 March[1]

[See I, *Memorial of the United States, Annex 15, Exhibit H]*

III-2. Mayor's Decree of Requisition

[Italian text not reproduced; for the English translation see I, *p. 39]*

III-3. Copy of 1955 Statute

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 35]*

III-4. Copy of 1865 Statute

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 34]*

III-5. ELSI's Telegram and Appeal to the Mayor of Palermo

[Italian texts not reproduced]

9 April 1968.

TELEGRAM TO THE MAYOR OF PALERMO

Raytheon-ELSI is firmly opposed to the requisitioning (foreclosure) of the company property ordered by you and to the initiation of related inventory proceedings. We consider the requisitioning as a mere attempt to delay the

[1] The said discussions took place on 30 and 31 March 1968.

proceedings. We consider the requisitioning as a mere attempt to delay the solution of the problem and to create false hopes among the ELSI workers, in the company and in the Region. Please note that the position of Raytheon-ELSI is as follows. First, the requisitioning is illegal. Second, entering the property for initiating an inventory is illegal. If you enter the facility without formal approval by the cognizant military authorities you incur the risk of violating the laws and regulations governing national security and military secrets and you will be responsible for any such violations. Third, you will be responsible for any cost and expenses up to the date the property is restored to the company. Fourth, you will be responsible for any damages to the property. Fifth, you will be responsible for any damages to Raytheon-ELSI and its shareholders that may result from the loss of control over the property by the Raytheon-ELSI management including damages or losses through nonfulfillment of contractual obligations. Sixth, apart from the fundamental illegality of the requisitioning please note that you are not authorized to use, touch, inspect or inventory the books, archives, warehouse, supplies, equipment, money or other property of Raytheon-ELSI not specifically listed in the requisitioning order. Seventh, you have no right to use the trademark or registered name belonging to Raytheon-ELSI or used by it under license from third parties. Eighth, you have no right to use patents or technical information belonging to Raytheon-ELSI or used by it under license from third parties. Ninth, you have no right to use any personnel currently employed by Raytheon-ELSI. Tenth, you have no right to interfere in the contractual relations of Raytheon-ELSI. Eleventh, your invitation to Raytheon-ELSI to send observers does not include the necessary guarantees for the personal safety of these observers. Twelfth, the management of Raytheon-ELSI will vigorously pursue all available legal avenues and shall take any other steps conducive to the revocation of the requisitioning with resulting damages, against the mayor and the Central Government and individuals who commit illegal acts in any form.

Copies of this telegram being sent to the Hon. President of the Council, Moro. The Ministers Fanfani, Pieraccini, Andreotti. The President of the Sicilian Region Carollo. The Embassy of the United States in Rome and the American Consulate General in Palermo as well as the Prefect of Palermo, Colonel Alemanno, SID-USPA, Col. Inzerillo, Palermo, Dr. Fenu, Co-ordination Service and Ing. Laurin, Raytheon-ELSI.

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14 July 1969.

(Translation)

Raytheon-ELSI S.p.A., with registered office in Palermo, Via Villagrazia 79, by its legal representative

Whereas

— the Mayor of the City of Palermo, by order served on 2 April 1968, ordered the requisition of the plant and equipment of the company, located in Palermo, Via Villagrazia 79;

— the company considers said order of the Mayor absolutely illegal and lacking any lawful grounds, and also arbitrary and unfit to solve the social and economic problems referred to in said order;
— said illegal and arbitrary order of the Mayor is causing serious damages and may cause irreparable damages to the company;
— the company intends to resist said illegal and arbitrary order of the Mayor using all legal means, and demands repayment of all damages suffered and to be suffered;

Invites

the Mayor of Palermo to revoke immediately said order in order to prevent the situation from becoming worse and further irreparable damages being suffered;

Declares

— that it rejects any and all responsibility however arising out of, or connected with, said illegal and arbitrary order;
— that in any event, beginning with the moment said illegal and arbitrary order has been served, — without prejudice to any other right of the company — the responsibility for anything that may happen relative to the plant and equipment and to every other matter forming the object of said order or of subsequent orders rests exclusively with the authority which has issued such order or orders and the company shall take or accept no responsibility whatsoever, and in particular, without limiting the generality of the above, said Authority and its agents shall have each and every responsibility arising out of the violation of, or negligent, mistaken or omitted observance of security rules for the plant, the equipment and every other asset of the company; the violation of, or negligent, mistaken or omitted observance of rules relating to the protection of military secrets; the negligent, mistaken or omitted use of any equipment or object located on the premises of the company, harmful events such as fire or other natural events;
— that in any event, starting with the moment said illegal and arbitrary order has been served — without prejudice to every other right of the company — every cost, expense and burden relative to the plant, the equipment and the use of same, their maintenance, etc., shall be exclusively borne by the authority which has issued the order;
— that in any event starting with the moment said illegal and arbitrary order has been served — without prejudice to every other right of the company — each and every liability however arising out of the impossibility for the company to fulfill — or to fulfill in time — its obligations because of its inability to dispose of the plant and of what is situated therein or in any way because or by reason of said illegal and arbitrary order shall rest with the authority which has issued such order and not with the company.

Warns

the Mayor of the City of Palermo not to further violate or interfere with the rights of the company and in particular, without limiting the generality of the foregoing, not to interfere in any manner with the activities of the company's governing bodies or officers in the performance of the mandates lawfully vested in them; not to use in any manner the name, trademark, patents, industrial and commercial secrets owned by the company or used by it under lawful agreements

with third parties; not to interfere in any manner with the relationships between the company and its customers or its suppliers or between the company and its employees; and further recalling the considerable contribution of capital, technology and education that Raytheon-ELSI has brought to the Sicilian economy and to Palermo in particular, in answer to an invitation by the Italian and the Regional Government to private industry with a view to facilitate and accelerate the industrial and economic development of the island, warns the Mayor of the City of Palermo not to implement with further illegal and arbitrary acts an order which is essentially confiscatory in substance, if not in form, an order which appears as a hostile act against private industry and against American industry in particular which has looked and still looks upon Sicily with particular friendliness and benevolence.

RAYTHEON-ELSI S.p.A.
for The Board of Directors,
(Signed) Justin J. GUIDI,
Managing Director.

11 April 1968.

Signed to certify the authenticity of the signatures affixed at the bottom of the foregoing act and in the margins of the first sheet, countersigned by me, by Mr. Justin Joseph Guidi, born in New Alexandria, Pennsylvania (USA) on 16 November 1924, resident in Rome, Via Salsomaggiore 4, and for the purposes of his office in Palermo, Via Villagrazia 79, a person of whose identity I am certain.

Rome, 11 April 1968.

(Signed) Dr. Carlo RAITI,
Notary in Rome.

At the request of Mr. Justin Joseph Guidi, legal representative of Raytheon-ELSI S.p.A., resident in Rome, Via Salsomaggiore 4, and for the purposes of his office in Palermo, Via Villagrazia 79, the undersigned adjutant judicial officer has notified this act to the Mayor of Palermo, in Piazza Pretoria, Palace of the Eagles, in the hands of Mr. Vincenzo Ferrari, an employee of the Legal Affairs Department.

12 April 1968.

(Signed) Giovanni FRINCHI,
Adj. Judic. Officer — Palermo.

III-6. NEWSPAPER CLIPPINGS DESCRIBING WORKER DEMONSTRATIONS

[Italian text and English translation not reproduced]

III-7. ELSI'S APPEAL TO THE PREFECT

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 36]*

III-8. THE PREFECT'S DECISION

[Italian text and English translation not reproduced; for another translation see I, *Memorial of the United States, Annex 76]*

III-9. THE CURATOR'S COMPLAINT AGAINST THE ITALIAN GOVERNMENT AND THE MAYOR OF PALERMO FOR DAMAGES

[Italian text and English translation not reproduced; for another English translation see I, *Memorial of the United States, Annex 79]*

III-10. MINUTES OF 16 APRIL 1968 MEETING WITH THE HON. CAROLLO

MEETING WITH HON. CAROLLO

Present: J. D. Clare, J. Oppenheim, J. Scopelliti

Palermo, 16 April 1968

Hon. Carollo asked what had happened at the meeting held with Minister Pierascini. Mr. Clare replied that in effect nothing had happened. Pierascini is still talking to IRI, but cannot tell IRI what to do. We explained carefully what our proposal of selling the assets really means. The Minister was interested in this, asked for details about the price put on the assets, and mentioned the possibility of IRI coming in with new products.

Hon. Carollo stated that tomorrow Prime Minister Moro will hold a definitive meeting with the Ministers and experts concerned. One of the problems to be faced is that the Region does not know exactly what Raytheon wants.

Mr. Clare replied that we have told the Region many times and in great detail what we want. Of course any proposal is subject to negotiation, but basically we have consistently asked for financial participation by the Region and by IRI, and for new products from IRI. If ELSI is left as it is, it will continue to lose money, which IRI has quite correctly noted. Yet IRI is in a position to help Raytheon bring new products into ELSI. IRI's present product lines are not sufficient to maintain the company, and therefore IRI will not participate. However, with IRI's product support, ELSI could be made profitable.

Hon. Carollo stated that Raytheon has always emphasized the value of ELSI's trained labor force. However, the Central Government has been waiting for a demonstration of our financial and production strength, which we have not given. Had we been able to show some concrete results, we would have been able to deal from a strong position; instead, with the factory closed, the situation has been precipitated

Carollo's feeling is that Raytheon just wants to get out of ELSI, with the thought that there may be a tax break on some of the losses. However, Raytheon of course wishes to realize the best price possible for the assets and know-how of ELSI, perhaps 10 to 12 billion lire. Carollo's belief, based on studies made by his experts, is that the assets are worth much, much less than this. A solution might be to arbitrate the sale price from Raytheon to the Region, with an arbitration board of three men representing the Region, Raytheon, and the local magistrate. However, since the plant is closed, the value of the land, buildings, and material has been reduced by 90 per cent. Raytheon made an error, in Carollo's opinion, by closing the plant before proposing liquidation and thus automatically devaluing the assets.

Carollo is quite prepared to hire all ELSI's personnel, even at 2.5 billion lire a year, and put them to work in the mines until we go bankrupt and sell off our assets. If he can face this possibility, we must too.

IRI will come to Sicily with a plant for telephone equipment. Carollo had hoped we would show strength by being present with an open factory, in which case IRI might have dealt with us. With a closed factory, we have no position.

Speaking frankly, Carollo told us that he has agreement from CIPE that an electronics plant employing 2,000 people will be established in Palermo, which is satisfactory from a political point of view. From the Region's point of view, it is well worth while to keep ELSI's personnel together on the Region's payroll for two years at a cost of four billion lire, as this amount will be returned many times over by the taxes the new plant will pay. This plan will be reviewed at tomorrow's meeting with Moro. Carollo would prefer to see ELSI's people working with ELSI remaining open, as in this manner there would be a chance of maintaining both ELSI's product lines and the products of the new plant.

However, if ELSI remains closed, the banks will not help Raytheon. Carollo feels that, unfortunately, Raytheon has not followed his advice; we had the strength to influence the Central Government before closing ELSI. As things stand, there is no point in dealing with IRI while ELSI is closed.

Mr. Clare pointed out that we have made continuous efforts to interest the Central Government in our problem, and have not been listened to. We have proposed many ways of solving the ELSI problem, including the specific telephone equipment as a new product for ELSI which IRI now plans to make as a separate venture, and no one was ever willing to negotiate with us. In the meantime we kept putting in money and management effort, until we just reached the end of the line. Should Raytheon liquidate ELSI, we will have left 14 billion lire in Sicily, money that has served to train people in difficult skills, and that has considerably helped Italy's balance of payments as half of ELSI's production was exported.

Carollo asked if we have approached IRI on a package basis, giving up a part of our share of Selenia in return for IRI help on ELSI. If we negotiate just about ELSI, it will be hard to interest IRI, but a Selenia/ELSI package might interest them.

Mr. Clare said that such a possibility had been amply explored and turned down by IRI. He expressed surprise that the Government is willing to undertake the cost of building and starting-up a new plant. The ELSI plant exists, and has value for the region. Yet from June to December 1968, when Hon. Carollo was

finally elected President of the Region, Raytheon could find no one who would even listen seriously to our proposals. We worked as hard as we could both to improve ELSI's operations and to obtain Government help, but when no help was forthcoming we had to shut down. Now all we can offer is the sale of our assets. If the Region is not interested in them, we will sell them off as best we can inside or outside Italy, and the Region will be the loser.

Carollo indicated that he understands Raytheon's desire to leave, but the Region does not have the technical or managerial skill to operate such a plant. IRI would be a possible substitute for Raytheon. As a thought, we might wish to inform our banks and creditors that we wish to liquidate, and seek an agreed liquidation placing all the assets in the hands of the banks. As the major bank creditors are IRI banks, they might put pressure on IRI to come in. If Carollo could state to Moro tomorrow with a written confirmation that ELSI will be liquidated, that Raytheon will not cover ELSI's debts, and that ELSI's debts will be paid only to the amount covered by the liquidation value of the assets, this would be useful to him.

Mr. Clare replied that until recently, we have been planning a positive future for ELSI. We are not prepared to state our position on liquidation vis-à-vis the banks; this will be determined by what develops in the near future.

Carollo replied that he can probably help us. Raytheon is willing to let ELSI go bankrupt. There are two roads possible, as follows:

1. Re-open the plant, which gives us strength with our creditors because they will know that if we should close again, the asset recovery potential would be greatly reduced.
2. Keep the plant closed, which is a position of great weakness that can only lead to bankruptcy.

Mr. Clare replied that we are not in a position to follow the first road, while very damaging for Raytheon, should prove a strong point for Carollo in the long run.

Hon. Carollo said that the problem is that IRI is upset that Raytheon has all the strength in the Selenia agreement. In fact, IRI hates Raytheon. There will be a battle between Raytheon and IRI, and we should deal from the strength of having ELSI open. IRI is such an adversary of Raytheon that they have advised Carollo to wait for their new plant and not to negotiate on ELSI, as Raytheon can be forced to kneel down. Raytheon would be well-advised to re-open the ELSI plant, and with the Region's help force IRI to negotiate. Otherwise, we are prepared for liquidation, but it will not be advantageous for Raytheon.

Hon. Carollo concluded the meeting by saying that he will know more after the meeting with Moro in Rome the following day; we can call him to learn the results.

III-11. Hillyer's Notes of Late April Meeting with the Hon. Carollo

[See I, Memorial of the United States, Annex 37]

III-12. THE HON. CAROLLO'S LETTER REGARDING ELSI

[Not reproduced; for an English translation see I, *Memorial of the United States, Annex 38. See also* I.C.J. Reports 1989, *pp. 34-35]*

III-13. RAYTHEON'S LETTER TO ELSI ADVISING IT WILL PUT IN NO FURTHER CAPITAL

7 March 1968.

The Board of Directors of
Raytheon-ELSI S.p.A.
Via Villagrazia 79
Palermo

Attn.: Mr. John D. Clare,
Chairman.

Gentlemen,

On review of the proposed balance sheet of Raytheon-ELSI S.p.A., as of 30th September 1967, and reports of operating statements since that date, it becomes apparent to us that Raytheon-ELSI requires additional equity capital in order to continue its operations.

The Management of Raytheon Company has carefully reviewed the history of its participation as a stockholder in Raytheon-ELSI. To date Raytheon's equity investments (exclusive of accounts receivable owed to it and guarantees currently outstanding) is about 7.5 billion Lire.

When added to the guarantees outstanding, Raytheon's investment and obligations with respect to Raytheon-ELSI amount to more than 12 billion Lire.

As you know, the Management of Raytheon Company and of Raytheon-ELSI have made a determined effort to obtain equity participation during the past year by IRI, ESPI, FIAT and other Italian concerns. To date, none of them has been willing to advance the needed capital.

We have studied our overall obligations to the Stockholders of Raytheon Company and have also taken into account the newly imposed restrictions upon foreign investments by the Government of the United States.

Under the circumstances, Raytheon Company cannot obligate itself further and must decline to subscribe to any further stock which might be issued by Raytheon-ELSI or to guarantee any additional loans which might be made by others to Raytheon-ELSI.

We regret the necessity for this decision which is the only one open to us in the circumstances.

Raytheon Company,
(Signed) Charles F. ADAMS,
Chairman of the Board.

III-14. Oppenheim's Letter to the Hon. Carollo

[See I, *Memorial of the United States, Annex 39]*

III-15. Provisions of Italian Code Requiring Bankruptcy

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 41]*

III-16. Copy of Petition in Bankruptcy

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 43]*

III-17. Ajudication of Bankruptcy

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 44]*

III-18. History of Creditors' Committee

[Not reproduced]

III-19. Copies of the Advertisements of the Auction

[Not reproduced]

III-20. Affidavits of Avv. Bisconti, Mr. Oppenheim and Avv. Resnick

[Italian translation not reproduced; for the English translation see I, *Memorial of the United States, Annexes 29, 27 and 28, respectively]*

III-21. Provisions of the Criminal Code with Respect to Unlawful Occupation of Property

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 95]*

III-21A. Authorization for Payment by Mayor of Palermo of ELSI's Former Workers

[With Sicilian Regional Law No. 16 of 7 June 1969 and newspaper clipping in Annexes]

[Italian text and newspaper clipping not reproduced]

Palermo, 27 June 1969.

Region of Sicily
Office of the President
Regional Treasury Department, I.R.S.S. Div. I
File No. 106695

Subject: Regional Law No. 16 of June 1969 — Provisions on Behalf of the Employees of the former ELSI of Palermo

To: Bank of Sicily, Palermo
Central Institute for Savings, Palermo
The Hon. Judge in the Bankruptcy Case of
Raytheon-ELSI at
the Civil Court of Palermo

Article 5 of Regional law of June 1969, reprinted in the Official News of the Sicilian Region No. 28 of same date, provided for a Region-financed guarantee on behalf of the above banking institutions for the severance pay due the workers previously employed by Raytheon-ELSI of Palermo, based on the amounts allowed for as part of the bankruptcy liabilities determined by the Court.

In connection with the above the interested banking institutions are requested to furnish, at the earliest date possible, a statement of participation also indicating the extent to which each of them will provide financing.

For the issuance of a formal guarantee the undersigned will obtain the following documentation:

— abstract of the bankruptcy statement released by the Clerk of the Court relative to the individual credits granted the said workers indicating, for each of them, the job title held within the bankrupt company;
— authorization by the Court to proceed with the steps provided for in Articles 4 and 5 of the above-mentioned Regional law, subject to the condition outlined in the last paragraph of Article 4.

We look forward to receiving your immediate response.

The Deputy Assessor
(Attorney Giuseppe CELI).

LAWS AND REGULATIONS

Legislative Act No. 16 of 7 June 1969.
Provisions on behalf of the employees of the former ELSI, Palermo.

Region of Sicily

The Regional Assembly has approved, and the Regional President has enacted, the following law:

Article 1

For the purpose of the provisions of legislative act No. 12 of 13 May 1968, the additional release of L.405 million is authorized to cover the period 1 January-30 April 1969.

Article 2

The compensation provided for in Article 1 of the aforesaid legislative act may not exceed L.300,000 per month and is payable to those employees of the bankrupt Raytheon-ELSI Company who worked at the Palermo facility and will be taken over by Elettronica Telecomunicazioni in accordance with the terms of the agreement submitted to the Secretary of Labour on 29 January 1969.

Article 3

The compensation allowed by legislative act No. 12 of 13 May 1968 and subsequent additions and amendments also applies to the employees of the bankrupt Raytheon-ELSI for the periods during which they were supported by I.N.A.M. and received medical and medicinal care without collecting economic compensation.

The cost resulting from the application of this article will be covered out of appropriations authorized for the implementation of the legislative acts referred to above.

Article 4

The credit institutions entrusted with the disbursement services of the Region are authorized to lend to the workers previously employed by Raytheon-ELSI of Palermo the amount of severance pay due them but for the bankruptcy situation administered by the Court.

The credit institutions will be covered for the credits granted by appropriate liabilities on the part of the employees concerned.

Article 5

The loans made under the provisions of the preceding article are guaranteed by way of subsidies by the Region. Such guarantee is limited to the principal only and is available for the maximum amount of L.1,100,000,000 for a period not exceeding one year from completion of the liquidation of Raytheon-ELSI.

Article 6

The advance or loan according to the preceding articles will be granted at an interest rate of 7 per cent per annum which includes peripheral expenses and fees. Resulting costs will be charged against the Region.

Article 7

The workers previously employed by Raytheon-ELSI of Palermo and eligible for full compensation under the provisions of Article 2 of legislative act No. 1115 of 5 November 1968, will be paid, at the expense of the Region, a compensation amount corresponding to 20 per cent of the total retribution, calculated in accordance with the above-cited criteria.

The former employees of Raytheon-ELSI, top management excluded, who will be rehired by the new company at a later date, shall receive a compensation corresponding to the basic retribution but not exceeding the limits determined in Article 2 of the Regional Law No. 4 of 8 March 1969, nor the time-limits indicated in Article 2 of legislative act No. 1115 of 5 November 1968.

For the purpose of the provisions of this Article 7, a total expenditure of up to L.295,000,000 is authorized.

Article 8

Payment of the compensation under the provisions of this law will be the responsibility of the Regional Assessor's Office. The money required will therefore be made available to the Sicilian Fund for the Assistance and Placement of Unemployed Workers, established per Regional D.L.P. (law) No. 25 of 18 April 1951.

Article 9

The burden arising from Articles 1 and 7 of this legislation will be absorbed by using the money assigned for other measures in favour of ELSI/Palermo as allowed for in the arrangement per item 10833 of the Regional expense-budget forecast for the year 1969.

Article 10

The burden possibly resulting from the subsidy guarantee per Article 5 above will be covered by the assignment of L.1,100,000,000 from item 20731 of the Regional budget for the year 1970, financed by utilizing part of the funds available through the 1969 cessation of the expenditure authorized by the first paragraph of Article 12 of Regional law No. 10 of 4 June 1964, coming up again in the 1969 fiscal year under the provisions of Article 3 of Regional law No. 12 of 3 May 1966.

The burden resulting from Article 6, estimated at L.77,000,000 per annum for three years beginning this year, will be covered in the fiscal year 1969 by utilizing part of the funds available under item 20911 of the budget report, providing for Regional budget expenses in the said fiscal year, leaving requirements in the amount of L.154,000,000 for the two following fiscal years for which L.4,000,000 will be raised by utilizing part of the funds available through the 1969 cessation of expenditures authorized by the first paragraph of Article 12 of Regional law No. 10 of 4 June 1964, coming up again in the 1969 fiscal year under the provisions of Article 3 of Regional law No. 12 of 3 May 1966, while the remaining L.150,000,000 will be raised with funds available from the cessation of expenditures at the conclusion of decennial obligations, as authorized per Article 4, first paragraph, of Regional law No. 51 of 5 August 1957.

Article 11

With the above Article 10 depending on list No. 4 attached to the budget forecast for the current financial year, the following variations apply:

Capital expenditures	*Amount in L. million*
Item 20911 — Money required for covering outlays, obligations, etc.	
Object of provision	
— Decreasing portion: Provisions for industrial development incentives . . .	below 77
— Increasing portion: Other provisions on behalf of the employees of the former ELSI/Palermo	over 77

Article 12

The President of the Region is authorized to arrange, by appropriate decrees, for the necessary budget adjustments.

Article 13

This legislative act will be publicized in the Official News of the Sicilian Region and will become effective on the day of publication. All concerned are obligated to observe it, and enforce its observance, as a Law of the Region.

Palermo, 7 June 1969.

FASINO

MACALUSO.

III-22. Press Releases by Central Government in November of 1968 Reporting ELSI Takeover

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 47]*

III-22A. Newspaper Clipping Regarding IRI Promises Made in November

[Italian text not reproduced; for another English translation see I, *Memorial of the United States, Annex 59]*

Palermo — Sunday, 6 April 1969, *Giornale Di Sicilia*

ELSI "There Was an Agreement" says Carollo by Ettore Serio.

It should have been merely a demonstration of solidarity with the employees of ELSI, for 428 days engaged in a desperate battle to save their factory from closing. The intervention of several regional deputies, and especially of the ex-President of the Region, Carollo, has transformed it instead into a real and true political debate, which will have, almost certainly, repercussions at the Sale d'Ercole.

Last night the Politeama Theater was filled almost to the boxes. For the "Easter of the ELSI workers" all the feminine movements and the other factories of Palermo had given their assent. The interior of the Theater had been festooned with a long series of slogans. "We are wrong — said one — to hope in who does not know how — nor wish — to resolve our problem." And another: "We want to be free from need. Give us work to make us feel free."

Phrases of this type give an idea of the tone of the interventions of various orators (basic syndicalists, exponents of the feminine movement, political men) who followed one another to the microphone. But the most important intervention came from the Honorable Vincent Carollo, who had been seated in an armchair in the last row and who had been loudly called to express his thoughts. Rather, more precisely — as Colombo, one of the secretaries of the Chamber of Labour clearly told him to "confirm" several of his declarations from the time when he was President of the Region which have been afterwards denied by the parties concerned with the solution of the ELSI problem. Colombo was referring to a notice of last October when Corollo and competent ministers of the National Government had given as attained the agreement on the relief of the Guadagna factory on the part of IRI.

Last night Carollo confirmed the news, inserting a clamorous element in the polemics of these days. He said: "There is an agreement: precise, written, and signed." It foresaw the relief of ELSI by IRI in the same financial terms that were considered when the formation of a mixed society — IRI-IMI-Region was delineated.

The agreement, as Carollo explained last night, foresaw the acquisition of the factory by IRI for the sum of four billion. It was quite agreed upon that IRI would desert the first auction presenting itself instead at the second, which had, precisely, as a base-sum four billion. Regarding the problem of the supplies it was instead decided that they would be sold out in successive phases. The proceeds

would have gone to the creditors, less a rate of 30 per cent for administration fee. "What I say is so true —" continued Carollo, "that immediately after this conversation, the directors of IRI came to Palermo in order to form ELTEL. They even succeeded in entering the factory, obtaining that the workers should construct the 'oscillators' commissioned by Nato."

Carollo then added, and this deals with another very important element, that the society of creditors declared itself satisfied with the terms of the agreement. Even the bankruptcy trustee gave his own assent "who made no captious resistance". "What happened between then and today," concluded the ex-President of the Region, "I do not know nor have I been informed." And in this conclusion is gathered a polemic note in comparison with the actual regional government.

Two things are remarkable in Carollo's remarks:

(1) In October the agreement would have been achieved even on the purchase price;

(2) The society of creditors and the bankruptcy trustee would have demonstrated their own satisfaction.

In reality, however, it happened then that IRI (through ELTEL) has continued to speculate for a fall, no longer respecting the obligation taken; but it also happened that the society of creditors and the bankruptcy trustee themselves also backed up, reproposing the problem of the provisions to acquire together with the factory. So that the next bid, set for 3 May, has as a base of five billion notwithstanding that the price of the sole factory has fallen to 3 billion and 200 million (the supplies are valued at 1 billion and 800 million).

Many obviously did not maintain their obligations and this was already known. But Carollo's statement, which spoke of a written agreement, has shifted the debate to a purely political plane.

The Honorable La Torre, present immediately after, has said for example that

> "after this news given by Carollo we must immediately bring this explanation to the Regional Assembly. The Communist Party will propose a new debate and the constitution of a parliamentary commission which will betake itself to Rome to deal with the whole matter."

Feliciano Rossitto, regional secretary of the CGIL, has mentioned on his part "manoeuvers by Raytheon and IRI to tire the workers of ELSI. We have need of clarity" he continued. "The Regional Assembly must clear up what happened in October and what changed afterwards."

Rossitto then faced the fundamental issues of the problem. He stated that the battle for ELSI is, in reality, the battle for Sicilian industrialization, for the economic rebirth of the island, and he admitted that even the unions have to carry out a new strategy, using "the confederations at a national level". What is the most important proposal to come forth from last night's meeting? To obtain, in fact, that the workers of Milan fight for the problems of their Sicilian work friends, is one of the aspirations, almost mythic, of the Southern workers' world. Will the CGIL succeed in realizing this kind of miracle?

Last night's meeting, characterized by Carollo's statements, has not, however, lost its original spirit, which was to demonstrate the solidarity of the whole city to the employees of ELSI. There have been interventions by the Honorable Rosario Nicholetti who has inserted the problem of the electronics industry into the vaster one of the Palermitan economy; of the syndicalists Bellomo, Riccobono, Garofalo, Viola and of Miss Franca Castiglia, who has brought the support of the Palermitan feminine movements.

The sum gathered for the ELSI workers' Easter amounts to approximately 3.5 million. It will be used to form a "resistance fund". From these sums, the workers will draw for a coming trip to Rome. Purpose: a new protest against IRI.

III-23. PHOTOGRAPH OF IRI-STET SIGN

[Not reproduced]

III-23A. PRESS ANNOUNCEMENT OF TAKEOVER BY ELTEL, 17 APRIL 1969

[Italian text and English translation not reproduced]

III-24. MINUTES OF CREDITORS' COMMITTEE ON 29 MARCH 1969

[Italian text not reproduced; for another English translation see I, Memorial of the United States, Annex 60]

Legal Office,
Bisconti
Rome . . .
Milan . . .

MINUTES OF CREDITORS' COMMITTEE MEETING

On 29 March 1969, a meeting of the Creditors' Committee took place at the premises of the Raytheon-ELSI facility at Via Villagrazia 79 in Palermo. The Committee consisted of the following gentlemen:

Dr. Bruno Lipari, Director of the B.N.L., Palermo — Chairman;
Dr. Ing. Silvio Laurin — member;
Mr. Giovan Battista Riccobono — member;
Mr. Antonio Miserendino — member;
Att'y Giuseppe Bisconti — member;
Also present was the Liquidator, Att'y Giuseppe Siracusa.

The Liquidator advised the Committee of the results of the negotiations with representatives of Eltel for the leasing of the facility and pointed out these essentials:

Price L.150,000,000 per year. Duration 18 months with premature and immediate termination in the case of a judicial sale. Regular maintenance and commis-

sioning at the expense of the lessee. Possibility to bring in new equipment for new types of work. Restoration of the facility in the same condition in which the lessee took it over.

The Liquidator also advised that a third attempt will have to be made at the auctioning of the property, and he asked for a vote on a price reduction for the raw materials.

On the first item, the Creditors' Committee did not vote in unanimity.

Att'y Bisconti voted against the lease since its only effect would be to favor one private party and to make it essentially impossible to sell the facility to any third party other than Eltel; the rent is considerably less than the depreciation of the equipment when used, and despite any precautions by the Liquidator the lease would necessarily involve access by Eltel to Raytheon Company's industrial secrets for whose violation Raytheon Company could hold the Liquidator equally responsible. He added that under these circumstances a decision on the part of the bankruptcy administrators to grant a lease to Eltel would constitute a departure from their very charter which is to safeguard the interests of the creditors and not to favour private parties. The other four members voted in favor of the lease of the facility for a period of between six months and a maximum of one year provided that Eltel purchases at the same time all the raw materials inventoried, at a price of not less than L.1.8 billion. They are also prepared to reduce the corresponding rental fee even though the amount allowed for already appears to fall short of economic considerations.

On the second item, Attorney Bisconti voted against a reduction of the price of the raw materials based on the inventory report, maintaining that the price first considered is excessively low as it is. He pointed out that the best way to sell the material under favorable conditions was that originally intended for the liquidation of Raytheon-ELSI, namely, the separate sale of each individual production line together with the appertaining raw materials.

The other members voted in favor of a sale of the raw materials at a reduced price not below L.1.8 billion, all in one lot at the time the facility is sold. This solution of a sale in one block was opposed by Mr. Riccobono.

Read, approved and signed: B. Lipari; Giuseppe Bisconti; Antonio Miserendino;
Giovan Battista Riccobono; Silvio Laurin;
The Liquidator Giuseppe Siracusa.

This is a true copy of the original: The Clerk (sig. illegible). Palermo, 5 June 1970.

III-25. Raytheon Europe's Brief in Opposition to Proposed Lease

[Italian text not reproduced; for another English translation see I, Memorial of the United States, Annex 62]

(TRANSLATION OF BRIEF TO THE JUDGE IN PALERMO)
CIVIL AND CRIMINAL TRIBUNAL OF PALERMO

To the Honourable Judge in Charge (Giudice Delegato) of the Bankruptcy of Raytheon-ELSI S.p.A.

Your Honour,

As you know at the meeting of 29 March 1969, the Creditors' Committee in the bankruptcy of Raytheon-ELSI S.p.A. was called upon to express its opinion in relation to the proposed lease of ELSI's plant and pertinent equipment to Eltel S.p.A., an affiliate of Siemens (IRI Group).

The reasons underlying my unfavourable opinion are expressed in the minutes of said meeting in a summary way as required by the needs of concise minutes. I believe it my duty to clarify hereby in greater detail the reasons of my dissent. For such purpose, it is necessary to outline in a summary way the development of events of the last months relating to the ELSI case.

In the course of summer of 1968 there took place various negotiations at which participated also the Curator, Avv. Giuseppe Siracusa, Senator Caron in representation of the Italian Government, representatives of private companies interested in taking over in one form or another ELSI's plant, representatives of IRI, IMI and ESPI.

Said negotiations, in spite of the difficulties that were encountered, were preparing a global solution to the problem of ELSI, which taking into account the serious social problem represented by the unemployment of approximately a thousand persons at the same time protected the interest of the creditors. Said negotiations, and in particular the negotiations with a French group, were abruptly discontinued by the Italian Government after a meeting which took place in Rome on 13 November 1968, following which a press release was issued [by the Italian Government] of which I am attaching hereto a photostatic copy, indicating the decision of the Italian Government to cause IRI-STET to intervene in order to take over the plant of ELSI.

Said decision was received as a triumph in the Sicilian political environment, it was greeted benevolently by the workers of ELSI to such an extent that the Raytheon-ELSI name was taken off the façade of the plant and was replaced with the words IRI-STET which until today, as far as I know, are still on the façade of the plant at Guadagna [location of ELSI plant in Palermo].

STET, which had been designated by the Italian Government for such operation, has formed together with Siemens [a subsidiary of STET] an affiliate in Palermo under the name of Eltel S.p.A. The purpose of Eltel S.p.A. was that of participating at the auction for the purchase of the plant and inventory of ELSI.

In order to facilitate this transaction, above all taking into account the time necessary for completion of the auction sale and the following formalities, the Creditors' Committee expressed a favourable opinion at its meeting of 3 December 1968 in relation to the temporary operation of the magnetrons line in order also to enable Eltel, or Siemens for it, to participate in the supply of magnetrons to Nato, in such a way retaining for ELSI a customer of absolutely primary importance. From the standpoint of the creditors, the temporary operation of the line appeared beneficial in so far as it would have kept high the value of the plant retaining a customer of such importance. The express condition of the temporary operation was the purchase of the plant by Eltel. Raytheon Company, owner of the proprietary rights necessary for the manufacture of said magnetrons, maintained a benevolent attitude with the view of favouring a total solution of the ELSI problem.

All this notwithstanding, at least until the date of the last meeting of the Creditors' Committee and, judging from the Sicilian press until today, there has been no declaration nor any proposal coming from Eltel or the IRI group addressed to the bankruptcy officials, relating to the purchase of the plant.

The *Giornale di Sicilia* of 6 April 1969 reports a statement issued by the Honourable Carollo [past President of the Regional Government of Sicily], to the effect that last fall IRI had agreed in writing to purchase the plant (without inventory) for 4 billion Lire.

IRI, notwithstanding the alleged commitments, has let two auction sales go unattended with the obvious purpose of causing in such a way the price to become lower. The attitude of IRI leads one to suspect that this manoeuvre shall continue for several months until such time as the price of the plant, because of the reductions that the law permits (but does not require) will go down to such a low value that the solution of the serious social problem represented by the one thousand workers of ELSI may also convert itself into an enormous bargain for IRI and into an enormous damage to the creditors of ELSI. The aforementioned decision by the Italian Government, which was communicated to the press through the attached press release of 13 November 1968, has in fact made impossible the participation of private groups in the auctions for the purchase of the ELSI plant (and the fact that interested private parties are mentioning that the provisions of the bankruptcy laws are fully respected because anybody has the right to participate at the auctions, has the taste of a bitter mockery in a country like Italy, the fatherland of law).

In consideration of the decision of the Italian Government to take over the ELSI plant through a group controlled by it and of the attitude taken by the labour unions and of the occupation of the plant by the workers and in consideration of all the actions carried out by the workers to the end that it be IRI to take over the plant in preference to any other group, it would be naive to think that any responsible private group may decide to bid at an auction. It is to be noted in this respect that the international press has given emphasis to the press release of the Italian Government of 13 November 1968 to such an extent that some journals, including also the monthly *Journal of the American Chamber of Commerce for Italy*, had already announced the solution of the ELSI problem through the completed take-over of the plant by IRI.

All this notwithstanding, until today Eltel has not made any offer to purchase. Today, it requests a lease for a period of it seems 18 months without making any commitment as to the purchase at any price.

It is impossible to see what benefit there may accrue to the creditors from the lease. On the contrary, it appears that the lease can only cause damage to the creditors because Eltel, once it has obtained possession of the plant — notwithstanding the provision that may be included in the lease agreement by which the same shall be terminated in the event of purchase by third parties of the plant or part thereof — shall have presumably no interest in purchasing the plant or in any way it shall have no urgency to purchase the plant and a consequence of all this shall be that through successive auctions the price shall be reduced to such a point as to depreciate completely the plant of ELSI. On the other hand a private group which might still think of purchasing the plant or part thereof, knowing of the aforementioned decision of the Italian Government and knowing that IRI is also in the possession of the plant, can only be absolutely discouraged even from taking into consideration such a possibility.

I must add also that the lease of the plant shall make it impossible for the Curator to sell the inventory at any reasonable price. In accordance with a communication made by the Curator, Avv. Giuseppe Siracusa, at the latest meeting of the Creditors' Committee, Eltel is said to have offered to buy part of the inventory at a price of approximately Lire 600 million.

In relation thereto, one cannot avoid observing the following:

(a) the price offered by Eltel is extremely low, especially if related to the value of the inventory determined by the appraiser appointed by the Tribunal, which was itself considered extremely low by the experts in the marketing of electronic products;

(b) inventory can be sold at a reasonable price only to whomever uses the plant; therefore, if the inventory is separated from the plant and if an attempt is made to sell the inventory separately the only result shall be that the inventory will be sold as scrap or that it will be absolutely impossible to sell a substantial part thereof;

(c) in the aforementioned situation, Eltel shall be in a position to impose the conditions at which it may buy the inventory for its own use.

This aspect of the problem was finally seen also by the other members of the Creditors' Committee, who did want to attach a condition to their favourable opinion on the proposed lease, namely, that Eltel must purchase all the inventory even if at a price further reduced of Lire 1,800,000,000.

In the light of the above events, which are known to everybody in addition to having been fully reported by all the press, it is obvious that the proposed lease would have the only effect of favouring a third party, that is to say Eltel, in either acquiring the plant at an extremely low price or even in enabling Eltel to avoid the political and social problem which has been thrown onto it by the Government's decision of 13 November 1968, without purchasing the plant. Indeed, and please pardon me for being too suspicious your Honour, in consideration of the decision announced by the IRI-STET group to build a plant for telephone equipment in Palermo, one does not see why IRI could not in a year and a half or two years approximately, namely, when presumably the telephone equipment plant shall be in being, merely transfer the workers from the ELSI plant to the new plant. For the aforementioned reasons, indeed, if Eltel will not make an offer and hence shall acquire the ELSI plant, nobody else shall participate at the auctions; hence, the lease will be likely extended and certainly in such direction shall be pressed the requests of the politicians and the unions.

I have explained all these reasons in the course of the meeting of the Creditors' Committee of 29 March 1969. While I obtained the consent of all the other members in so far as the analysis of the situation and of the events that have determined such situation are concerned, and while there has been at all the meetings of the Creditors' Committee a unanimous consent in criticizing and condemning the action of the Italian Government and the attempts of the IRI group to impose a solution which lowers the value of the ELSI plant beyond measure, the formal decision of the Committee has been as results from the minutes of the meeting of 29 March 1969. I do not presume hereby to subtract myself from the majority rule, since I remained a clear minority in the Creditors' Committee. The reason which forces me to clarify my position is that I respectfully believe that the Creditors' Committee, as an official organ of the bankruptcy proceedings, expressing a favourable opinion on the lease is abdicating its own function, which is that of protecting the interest of all the creditors (and not only of the creditors who are directly represented in the Committee) and not that of favouring a private party even if for socially valid reasons. It is in this respect that I have spoken of a deviation from the institutional purposes of bankruptcy proceedings.

The Sicilian and the national press have amply documented the occurrence of meetings, of negotiations, of verbal and written agreements, etc., relating to the future of the ELSI assets to such an extent as to justify the doubt as to whether the interested parties think that the official organs of the bankruptcy proceedings

are those established by law or instead thereof the meetings of national and regional political authorities, union leaders, representatives of IRI or its affiliates, etc., and as to whether instead of a public auction with all the substantive and formal guarantees of law there shall take place a disposal on a "fire-sale" basis achieved through private negotiations.

Your Honour, I would be naive and not honest if I concealed the difficulties of the situation and above all if I concealed the difficulties of the task which the Curator, Avv. Giuseppe Siracusa, has so ably performed and I wish here to express my absolute esteem of said gentleman. However, in the presence of a series of acts of political interference and of acts of government which have caused this situation, I believe that the official organs of the bankruptcy proceedings must take a different attitude. It was an act of Government that caused the insolvency of ELSI, namely, the illegal requisition ordered by the Mayor of Palermo in his capacity as an official of the Italian Government, which was not revoked by the Prefect of Palermo, who had the duty and the power to so do notwithstanding the requests received; it was an act of Government which, notwithstanding any false appearance of respect of legal procedures, practically has made and makes it impossible for a private group to participate in the purchase of the ELSI plant, namely, the decision by the Italian Government, amply publicized, to cause IRI to intervene in order to take over the ELSI plant. It was also an act of Government, which is about to be formally completed, which has attempted to separate the interest of the workers in so far as creditors from the interest of the remaining creditors in maintaining a high value for the ELSI plant, namely, the decision of the Regional Government of Sicily (allegedly suggested by members of the Rome Government) to guarantee to the workers payment of their termination indemnities, thus separating their lot from that of the other creditors. Today in substance, Your Honour, the threatening statement contained in the letter which the former President of the Sicilian Region, the Honourable Carollo, delivered to the representatives of ELSI on 20 April 1968, is proving to be true, namely,

> "*IRI shall not purchase neither for a low nor for a high price, the Region shall not purchase, private enterprise shall not purchase. Let me add that the Region and IRI and anybody else who has any possibility to influence the market will refuse in the most absolute manner to favour any sale.*"

In consideration of this situation, notwithstanding the difficulties which one may also personally encounter, I believe it is the duty of the Creditors' Committee to take a different attitude in front of the Government and IRI which permits an adequate protection of the interests of the creditors.

In the course of the aforementioned meeting of 29 March 1969, I insisted again that as an alternative to the sale of the plant together with the inventory, there should be considered also the sale of separate lines. My insistence was due to the fact that when Raytheon-ELSI intended to proceed with an orderly liquidation of its activities (which was made impossible by the requisition) it did consider as the best way to realize a high value for the assets the sale of separate lines, each line comprehensive of inventory, raw material, work in process and finished products. The reason therefor — and I should believe that few people in the world have an experience equal or higher than that of the Raytheon technicians in this field — is that by selling separate lines one is addressing itself to a market of potential buyers much greater than that of any buyers which may be interested in acquiring an entire plant in a predetermined locality that cannot be changed; moreover, the sale of separate lines permits the sale of inventory to the user of the line and therefore to the party which is in need of the inventory and as a

consequence thereof at a high price. I realize that an offer of separate lines would be politically an extremely unpopular act and that it might bring about adverse action by the unions such as, for example, the occupation of the plant. On the other hand, it seems to be the only alternative to what will otherwise be a complete depreciation of the assets of ELSI, which will bring about as a necessary consequence a valuation of the bankruptcy in its entirety, of the causes and responsibilities for the same, which has no correspondence with the reality because the bankruptcy and the amount of the liabilities which are not covered through the realization of the price obtained from the assets would be a result not of normal and natural events in bankruptcy proceedings but rather of political impositions and abuses (pardon me for the expression) which were applied over and over without interruption from the spring of last year until today.

Your Honour, I trust that you will understand the reasons underlying my dissent and why I am expressing it outside and beyond my formal participation in the Creditors' Committee. I believe I am compelled to make this clarification and more complete statement of my position by the duties imposed on me by the robe which I ideally wear.

(Signed) Avv. Giuseppe BISCONTI,
Representative of Raytheon
Europe International Company
in the Creditors' Committee.

III-26. CURATOR'S APPLICATION TO LEASE ELSI PLANT

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 61]*

III-27. APPEAL OF DECISION TO LEASE

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 63]*

III-28. COURT DENIAL OF APPEAL ON LEASE

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 64]*

III-29. MINUTES OF CREDITORS' COMMITTEE MEETING IN MAY 1969

[Italian text not reproduced; for another English translation see I, Memorial of the United States, Annex 65]

On 2 May 1969, at the former Raytheon-ELSI S.p.A. of Via Villagrazi 79, Palermo, a meeting was held by the Creditors' Committee comprising Mr. Riccobono G. Bottute, Dr. Bruno Lipori, Ing. Silvio Laurin, Attorney Egidio Rinoldi sitting in for Attorney Giuseppe Bisconti per attached power of attorney, and Mr. Antonino Miserendino.

The liquidator attorney Giuseppe Siracusa informs the committee that in the production lines of the plant, material in various stages of completion was left and has been there since the shut-down of the operation in March of 1968. This material has been inventoried and appraised at the total value of L.217,300,000.

In the lease agreeement the liquidator obligated himself to remove the said material from the production lines and to have it stored in the warehouse. However, the removal was not possible without certain losses and expenses. The liquidator indicates that the above material valued at L.217,300,000 does not include hardware owned by military authorities which was inventoried and appraised separately at L.24,000,000. For the non-military material inventoried by Ing. D. Benedetto at L.217,300,000, Eltel has offered an as-is purchase price of L.105,000,000. The liquidator invites the committee to express their opinion regarding the purchase by Eltel. Attorney Rinaldi declares that before the committee votes on the possible sale it is necessary to make sure that the material in question is not subject to military secrecy requirements, i.e., classified. Attorney Rinaldi expresses his opposition to the sale in view of the aforesaid and of the following: At least in the case of some items, the material is in various stages of completion and continuation of the production process constitutes, or might constitute, violation of industrial know-how or patent rights exclusively proprietary to third parties. Eltel which is not a co-owner of the bankrupt company, has no right to use the licences and know-how of ELSI. Also, the offer by Eltel was made in contradiction to the provisions established by the Court which authorized the lease, and the lease itself might therefore be revoked. Consequently, Eltel's application represents an improper interference with current court proceedings. The price offered by Eltel is ridiculously low, being considerably below the already underpriced value established in the inventory. Based on information requested from Semiconductors S.p.A. California, ATECC, and Elettrovalvula S.p.A. in respect of the possible acquisition of the discharge-lamp and kinescope lines, with the appropriate materials, the said lines would bring a price corresponding to the appraisal made, and it is therefore difficult to see how Eltel can propose to pay less than 50 per cent of the appraised value.

The offer by Eltel proves, also in respect of the price question, what has been stated by Raytheon Europe International Co. in their memorandum to the Court dated 8 April 1969, and in the complaint submitted to the Court on 10 April 1969, namely, that by virtue of the lease by Eltel that company can dictate the terms of the purchase of the material of interest to them, making it practically impossible to sell the items at a reasonable price. On 3 May 1969 an auction was scheduled for the sale of the entire ELSI operation in one block. The sale was authorized with a formal provision stipulating the terms and conditions.

It is all the more surprising that, contrary to normal practice and to the abovementioned conditions of sale, the application by Eltel could be taken into consideration even by the creditors' committee before the auction was held and before a definite authorization was given for the separate sale of the material in question.

The application itself demonstrates that Eltel operates on the basis of a well thought-out plan which is in essence geared to a maximum devaluation of ELSI's business from which Eltel alone would benefit. It is therefore difficult to understand why despite the resolution and the procedure regarding the sale of the operation, one considers the Eltel request prior to the public auction when such an offer by Eltel can be of advantage to no one but Eltel while it means a clear loss for us. It is the lease arrangement with Eltel which makes it in fact impossible to *sell the facility* to anyone other than Eltel (or companies of the IRI group), which contributes to the devaluation of the ELSI operation and thus results in a direct loss on the part of the creditors' *(next sentence completely illegible)*.

In voting against the Eltel proposal, Attorney Rinoldi confirms what was the subject of the memorandum of *8* April *1969* and the tenor of the *complaint of 10* April 1969 submitted by Raytheon Europe International Co. in connection with the proposal and the provision for authorizing the leasing of the plant to Eltel.

The Eltel proposal on which the creditors' committee was to vote is meant to play a role in a series of governmental measures which, ever since Spring of last year, have in fact been essentially aimed at a confiscation.

Attorney Rinoldi . . . *(illegible)* . . . to Attorney Bisconti of Raytheon Europe Int. Co. The other four members of the creditors' committee, considering the difficulty of selling the material without also disposing of the tools and the fact that this reduces the value of the materials sold separately from the facility itself to a minimum, and also considering the fact that the material has been sitting in the *production area for a long time, also that*, according to Dr. Santoro, no offer was received from anyone else by the Clerk's office of the Court of Palermo, as of 1.45 p.m., for participation in the auction scheduled for 3 p.m. — the deadline having been 1 p.m. — vote in favour of the sale of the material for the price of L.105,000,000.

Signed: Lipari, Egidio Rinoldi, Ing. Laurin, Riccobono G. Battista,
Antonino Miserendino.

The Liquidator,
(Signed) Att. G'pe SIRACUSA.

BANKRUPTCY RECEIVER FOR SOCIETÀ RAYTHEON EL.SI., S.P.A., 90125 PALERMO, VIA VILLAGRAZIA 79

(Registered mail) Palermo, 26 April 1969.

Mr. G. B. Riccobono
Palermo (full address in orig.)

Mr. Antonino Miserendino
Palermo

Mr. Silvio Laurin
Palermo.

Raytheon Company
Attn: Att'y G. Bisconti
Rome

Banca Nazionale del Lavoro
Palermo Office.

The creditors' committee will meet on Friday, 2 May 1969, 12.00 noon, at the above address, Via Villagrazia No. 79, to discuss and vote on the following issue:

Purchase by EL.TEL. of all the material currently in the production area, at the price of L.105,000,000. The said material was inventoried and appraised at L.217,000,000. Not included in the sale will be materials subject to military classification and currently in the appropriate production area, valued at about L.24,000,000.

The Liquidator,
(Signed) Att'y Giuseppe SIRACUSA.

III-30. CURATOR'S APPLICATION FOR AUTHORITY TO SELL WORK IN PROCESS

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 69]*

III-31. NEWSPAPER CLIPPINGS *RE* UNATTENDED AUCTIONS

[Italian text and English translation not reproduced]

III-32. ELTEL VALUATION OF ELSI'S ASSETS

[Italian text not reproduced]

The Hon. Judge presiding over the Bankruptcy Case of Raytheon ELSI S.p.A.

CONSIDERATIONS

by the Società Italian Telecomunicazioni Siemens S.p.A. relative to the real value of the technical assets of the former Raytheon-ELSI Company.

Premise: ELTEL-Elettronica Telecomunicazioni S.p.A., member of the IRI-STET group and potential buyer of the plant and equipment of the former Raytheon-ELSI facility — disagrees with the appraisal made some time ago by the expert appointed by the president of the bankruptcy section of the Court of Palermo, and with others made earlier for a transfer of ownership of the aforesaid property. These appraisals have in common that they do not reflect the true, provable condition of the facility.

To illustrate, by way of assumption, the principal motives for the appraisals which diverge so drastically from that which ELTEL insists on arriving at, the following comments are presented, concentrating essentially on three points of argumentation:

(1) Statement of *appraisal* — made on behalf of Società Italiana Telecomunicazioni Siemens (majority shareholders in ELTEL) — of the items concerned and of the criteria applied (Chap. I);

(2) Reconstruction (on 31 March 1969) of the *book value* of the above-mentioned technical assets, starting with the last balance sheet of 30 Sep. 1967 of the bankrupt Raytheon-ELSI Co., and appropriate recalculation (Chap. II);

(3) Comparison between these two levels of valuation and the *judicial appraisal*, showing as cases in point the estimated figures for a number of items which constitute the most obvious examples of discrepancies between the conclusions made by the expert and those which are closer to reality (Chap. III).

The following pages will suitably illustrate and amplify these basic points. However, a few general preliminary considerations may be in order, with particular regard to the basic assumptions which prompted a more correct appraisal of the property in question as is obvious from the results of the reconstruction of the accounting records.

It is also underlined that, in both approaches taken in the estimates mentioned above, reference was made exclusively to the theoretical property value while, as would seem to be common business practice, the appraisal of an enterprise (or any segment thereof) should always follow these two guidelines:

- The static or passive value, meaning an appraisal by the so-called analytical method intended to determine the value, at any given point, of all the individual property items;
- The dynamic or economic value, meaning an appraisal by the so-called global method intended to determine the value of the enterprise as a function of its capability to produce income based on its actual past performance and, more so, on its future profit potential.

It is current practice to take a mean value between the property estimate and the profit estimate so as to correct for any possible excess values which could result from the application of only one appraisal method.

In the case here at hand, the global method was not applied, since the largely red-ink results of past operation, the current state of bankruptcy of the enterprise, and the current absence of any prospect for distributable profits of the business in its present form would have led to the conclusion that this Palermo facility *has a negative value*.

In fact, this facility not only fails to constitute a real and actual source of income but, as is shown by the analytical appraisal of the individual property items, this industrial firm — in its present highly precarious state and being in need of technical updating — has indeed deteriorated to a point where substantial expenses and new investments will soon be required to bring the organizational and production system back to the necessary minimum level, and also to compensate for the rapid obsolescence of the technical equipment inherent in this sector of the industry.

The constant need for capital (a third aspect under which the enterprise as a potential source of income is to be assessed) for new major technical investments in the future constitutes yet another reason for a downward adjustment of the estimated value.

Chapter I. Appraisal by Società Italiana Telecomunicazioni Siemens

For appraising the technical assets, the following maximal criteria were applied: *First*, the current value was considered, strictly on basis of market value per items without taking into account any prospective profits as referred to above which in this case would come out negative anyway. Current value refers to the current cost of purchase or new construction minus a deduction for normal wear and tear.

Second, consideration is given to whether the individual items are designed for "general" or for "specialized" use.

The items appraised (except for a few parts eliminated because they are useless for future work programs — see p. 342, *infra*) were most generously taken as functionally integrated into an operating business enterprise, but the valuations would come out different, and lower, if the equipment and machinery were considered and sold as separate, individual items.

With all this taken into account, the appraisal by SIT Siemens, broken down in more detail further below, indicate the following figures:

A.	*Land and buildings*		
	A. 1. Land	L.360,750,000	
	A. 2. Building	L.398,300,000	L.759,050,000
B.	*Equipment, machines and tools*		
	(see detailed breakdown)		L.1,027,100,000
			L.1,786,150,000
A.	*Land and Buildings*		
	A. 1. Land		L.360,750,000

The terrain on which the factory is located has an area of about 48,100 square metres, situated on the eastern perimeter of the city between Via Villagrazia and the deep valley through which runs the Oreto river. The terrain declines toward the river, with a total drop of about 4 metres. The only access to the facility is from Via Villagrazia, a narrow and rough road which would not permit two-way traffic by large vehicles except in a few widened spots.

The entire area of the plot can be subdivided as follows:

1.	Area covered by buildings	about	17,050 sq.m.
2.	Roofed area (sheds)	about	1,450 sq.m.
3.	Factory roadways and courtyards	about	10,000 sq.m.
4.	Parking lots and other paved space	about	18,600 sq.m.
5.	Steep, unused grades	about	1,000 sq.m.
		Total	48,100 sq.m.

The property has an inclining peripheral zone which is occupied by simple dwellings, and, in between, cultivated fields and lemon orchards.

The zoning plan of the Palermo Community provides for this area a "clean-industry belt" which, however, does not cover all of the land parcels making up the former Raytheon-ELSI complex.

Considering the type of zoning, and on the basis of local comparisons, a price of L.10,000/sq.m. for small lots can be considered reasonable which includes the cost of surveying and the construction of the infrastructure worth about L.2,500/sq.m. For the complete plot of about 48,100 sq.m., a price of L.7,500

per sq.m. can therefore be considered equitable which would thus come to L.360,750,000 for the entire area.

A.2. *Buildings* L.398,300,000

The industrial facility was constructed in increments between 1957 and 1963. As a result, the buildings are of different types of construction and show a lack of organic development and interrelation. The upshot is an array of buildings of extremely diverging styles, with irrationally distributed and, consequently, inadequately functional space. The height of the buildings varies from a minimum of 2.20 metres to a maximum of over 7 metres. The buildings were apparently constructed in a generally sloppy manner. The framing shows no visible cracks with the exception of one junction beam, while widespread damage is evident at the welds between masonry and the reinforced-concrete structure. These damages could in part be the result of seismic tremors. The roofing of the buildings consists of asphalt material which shows widespread water seepage due to age and to mechanical ruptures. The extension joints and flashings between the various building sections were poorly executed and invite equally water seepage almost everywhere. Such water leaks through the roof and probably poor workmanship have caused plaster to come off especially on the ceiling. The overall plaster work is in bad condition. Most of the floors are of asphalt, cement slabs, and red sandstone. With a few exceptions, they are in bad shape. The sandstone is cracked in many places down to the subsurface. Windows and doors are few and small, and generally of poor quality and workmanship. The paint is largely in need of renovation. The sanitary facilities are predominantly located in unventilated areas, and the mechanical ventilation provided is inadequate. The sanitary fixtures and plumbing are insufficient and by now in sad condition.

The cafeteria is equipped with inadequate and worn-out furniture and its hygienic condition is less than good. In general, the many deficiencies of the facility are accentuated by the long time of inactivity.

The following examples further underline a few aspects of the buildings which fall short of meeting the standards for safety and sanitary working conditions established by the law, and which require quick remedial action and considerable outlays prior to resumption of work:

1. workshop sections located in insufficiently high and poorly ventilated rooms;
2. absence of a sprinkler system;
3. basement rooms used for the storage of cardboard boxes and other flammable material;
4. boilers as well as electric generator equipment installed in narrow and scarcely ventilated rooms;
5. workshops with doors too small in relation to the number of people;
6. sanitary facilities in precarious condition, etc.

For a valuation of the buildings the method adopted has been to divide the areas into five categories, in consideration of the characteristics and the degree of sophistication of the areas concerned, their range of possible utilization and the adequacy of furnishings and equipment, as shown below (see attached layouts, sub. A, B, C):

1. rooms with low ceilings, with coarse ("rustic") finish, little or no ventilation, usable only for housing equipment or for the storage of low-value materials;

2. rooms with high ceilings (about 7 metres), with "semirustic" finish not airconditioned nor heated, designed for storage use or heavy shop work not requiring any particular "clean-room" conditions or climate control;
3. rooms similar to those described under 2 above but with a ceiling height of about 4 metres;
4. rooms with fully finished walls and ceilings usable either for delicate work or as factory offices and equipped with air conditioning;
5. rooms fully finished, specially designed for office use, and air conditioned.

For each type of work space the construction cost is indicated below, derived from comparisons with other, similar structures. The valuation is made by reducing the current cost of construction by 30 per cent in consideration of the age of the buildings (about 7 years), and by another 20 per cent (except for the rooms under item 4 for which only 10 per cent is deducted) in consideration of the poor workmanship and of the reduced functionality resulting from the irrational space planning.

Room Type	Area sq.m.	Const. cost L./sq.m.	Total constr. cost, L.	Valuation appraisal %	Total net
1	4,730	15,000	70,950,000	50	35,475,000
2	5,520	22,000	121,440,000	50	60,720,000
3	7,190	20,000	143,800,000	50	71,900,000
4	9,160	30,000	274,800,000	60	164,880,000
5	830	60,000	49,800,000	50	24,900,000
Total	27,430		660,790,000		357,875,000

The supportive facilities which constitute an integral part of the plant are appraised as follows:

1. Sheds of metal construction, glazed, with fibre-cement or fibreglass roofing, cement floors

   2,290 sq.m. at L.6,000 L.13,380,000
2. Roadways, walks and courtyards, with crushed-rock subsurface, hot-topped

   10,000 sq.m. at L.1,500 L.15,000,000
3. Levelled and surfaced (unpaved) areas for parking lots and yard space

   18,600 sq.m. at L.500 L.9,300,000
4. Single-floor building for the storage of alcohol and distillation equipment

   110 sq.m. at L.25,000 L.2,750,000

Total L.40,430,000

The resulting total appraisal of the buildings thus comes to L.398,300,000.

B. *Industrial equipment, machines and tools*

It should be stated at this point that the equipment and tools of the Complex-OST-RAX section and of the semiconductor group cannot be counted as part of the property considered since they have for some time been useless economically; they are excluded from our appraisal and remain at the disposal of the liquidator for possible sale elsewhere.

The sections included are as follows:

Section	*Appraisal, L.*
(B1) MEC (Central Shop)	62,474,000
(B2) LAC (Chemical Laboratory)	18,000,000
(B3) DCQ (Quality Control Department)	17,000,000
(B4) MET (Electronic Microwave Tubes)	172,800,000
(B5) MET — Tools	12,000,000
(B6) SCA (Telephone Conductors)	7,500,000
(B7) LAMPS (Lightbulbs)	6,605,000
(B8) TRC (Cathode Ray Tubes)	333,630,000
(B9) Combined Inventory (MET Testing and Control)	43,000,000
(B10) SIM (Technical Service and Maintenance)	316,085,000
(B11) Miscellaneous	11,946,000
(B12) X-Section (tools with third parties)	4,000,000
(B13) Logistic Equipment and Tools	22,060,000
	1,027,100,000

(B1) *MEC-Section* (Main Shop) L.62,474,000.

The bulk of the equipment and tools belonging to this section is in bad repair and, with a few exceptions, of rather mediocre quality. The latter is confirmed by the considerable, expensive repair work needed for putting these machines back into operation. Many punch presses and cut-off machines are not equipped with the prescribed safety devices according to the accident prevention standards of ENPI. Some of the machines were acquired in 1961, according to the records, but the imprinted year of manufacture shows 1959.

The appraisal was based on assumed market values and, in only a few cases, on the degree of fair wear and tear.

(B2) *LAC Section* (chemical, metallographic and spectrographic laboratory) L.18,000,000.

All instruments and tools were subjected to physical-analytical examination. The quality and condition of the equipment were found to be satisfactory. The appraisal was based on operating condition.

(B3) *DCQ Section* (Quality Control Department) L.17,000,000.

All instrumentation was subjected to a physical-analytical examination, pointing up equipment of good quality and universal utility. The appraisal was based on operating condition which was found to be generally good.

(B4) *MET Section* (Electronic Microwave Tubes) L.172,800,000.

An analysis was made of physical consistency of the equipment, pointing up the presence of items which have been in use for many years. In general, the appraisal was based on operating condition; for a few items (delay line modulators), their special nature was taken into account, where they were designed for production work which by now can be considered outdated. For the chemical apparatus, showing many damages by breakage, corrosion, etc. — due also to inactivity — the appraisal was based on the assumed market value. A few equipment items intended for previously abandoned production work (electronic kitchen ranges) were not included in the appraisal.

(B5) *MET — Tools Section* (equipment and tools for electronic microwave tools) L.12,000,000.

These are equipments and tools whose working condition can be judged only in actual operation. In view thereof, after verification of their physical condition, a global estimate was made.

(B6) *SCA Section* (low voltage telephone conductors) L.7,500,000.

This is technically obsolete equipment for which the assumed market value should have been taken. However, in view of the fact that for certain production activities, SIP could still use such equipment, the appraisal was based on operating condition.

(B7) *LAMP Section* (light bulbs) L.6,605,000.

A physical examination was made of the individual equipment items. These items were used for production work already abandoned prior to the shutdown, and the appraisal was therefore based on assumed market value.

(B8) *TRC Section* (cathode ray tubes) L.333,630,000.

The equipment had been purchased in 1959/1960 from Selit S.p.A., from Thomas Electronic and, to a lesser extent, from other specialized American suppliers. The testing equipment, however, had been acquired second-hand from Raytheon USA. The reactivation and the technological updating of the equipment will require an overall investment of the order of L.200-250 million. An analysis was made and the appraisal based on operating condition, under deduction of the cost installation (L.50 M) and of the lamination equipment (L.22 M) taken down some time ago and now largely irretrievable. The conveyor system was appraised at the assumed market value.

(B9) *Combined Inventory Section* (electronic microwave tube and control equipment) L.43,000,000.

Each individual item was examined. The instruments which are universally usable for testing and control and a few test ovens in reasonable shape were appraised on the basis of their operating condition. The chemical equipment and other instruments were largely found to be in a state of deterioration and were appraised at the assumed market value.

(B10) *SIM Section* (Equipment service and maintenance) L.316,085,000.

(1) The capital equipment and smaller machine tools for maintenance are largely vintage items and, for reactivation, require considerable investments for maintenance and repair by specialized contractors. The large equipment consists of heterogeneous types from diverse suppliers. The electrical tools just barely meet minimum standards and offer no guarantee for continued performance. The array of equipment on hand betrays the absence of an organized plan. In fact, the items seem to have been made available piecemeal whenever the need came up. It was also impossible to check their functional value since the plant was idle. The appraisal was generally based on operating condition.

(2) The central power equipment was appraised on the basis of operating condition. It is stressed that the reactivation of the entire facility must be viewed in light of the original condition for the restoration of which it may

be necessary to discard some of the main equipment which would mean the replacement of a considerable segment of the central power system.

(B11) *Miscellaneous* L.11,946,000.

This sector comprises the most varied items which to examine was only partly possible. For the equipment of universal utility and for partitions (of wood, glass and metal) their condition determined the assessment while for the "sundries" the appraisal was based on assumed market value.

(B12) *X-Section* L.4,000,000.

These are dies, moulds and tools with third parties and thus not available for a physical examination. The appraisal necessarily had to be done by way of a lump assessment.

(B13) *Logistic Equipment* L.22,060,000.

This was appraised on the basis of operating condition. These are tools, furniture and accessories for offices and for service functions, found to show signs of long use and to be in bad condition.

Chapter II. Financial Review

The financial reassessment referred to in the Premise above is summarized in the following tabulation:

	Net Value	*Reassessed Value*	
In L.1,000's	ELSI Statement 30 Sep. 1967	After ded. fiscal recovery transfer and with amort. by 31 March 1969	Elimination of unacceptable 20% increase
	(1)	(2)	(3)
Land	166,969	166,969	166,969
Buildings	809,142	670,012	670,012
Subtotal A	976,111	836,981	836,981
Equipment and machines	4,181,344	2,146,722	1,788,936
Coating (electrolyt.) booths	42,950	22,910	19,092
Furnaces/burners	262,467	66,130	55,108
Various tools	222,387	34,275	28,562
Furniture + log. equip't	113,564	43,352	43,352
Subtotal B	4,822,712	2,313,389	1,935,050
Subtotal A + B	5,798,823	3,150,370	2,772,031
Motor vehicles	17,165	6,993	6,993
Total	5,815,988	3,157,363	2,779,024

Re Column 1

This shows the values (in L.1,000) of the various property categories as stated in the last official balance sheet of the bankrupt Raytheon ELSI and referring to fiscal year ending 30 September 1967. The said balance sheet shows under assets a total of L.7,086,281 K in technical property, under liabilities a sinking/depreciation fund of L.1,270,293 K, thus arriving at a net value of L.5,815,988 K.

Re Column 2

For each individual property category the relative values were reconstructed, eliminating first of all the L.463,597 K in "fiscal appreciations" representing fictitious value increases which are in no relation to the effective property value, and the L.1,239,083 K in transfer (under assets and liabilities) made in the last fiscal year, which transfers relate to a balance in equal amounts in fixed assets and corresponding depreciations for fully amortized items.

The depreciation allowance as at 30 September 1967 was recalculated under application, for all company operations, of the straight single rates used during the years without taking into account accelerated depreciation, which is important in the electronics business more than elsewhere. Raytheon ELSI had not written off any depreciations between 1 July 1960 and 31 December 1962 while in other fiscal periods, especially between 15 August 1956 and 30 June 1960, reduced depreciation rates were applied. The depreciation fund was updated under application of the single straight depreciation rates for the period 1 October 1967 to 31 March 1969.

This revision of the accounting records, correct in every respect, brings the total net property assessment to L.3,157,363 K, differing from the total value per balance sheet (column 1) by L.2,658,625 K. This difference can be broken down as follows:

L.1,221,889 K for charging straight simple-rate depreciation up to 30 September 1967;

L.973,139 K for depreciation, always at simple straight rates, during the period 10 October 1969 to 31 March 1969;

L.463,597 K for appreciation credits unsupported by any real increase in property value.

Re Column 3

The examination of the accounting records revealed that, with the only exception of the buildings, furniture, utility equipment and motor vehicles, the company unjustifiably added to the remaining amortizable items shown under assets at purchase price (already including duty, transportation and packing) plus installation cost, an increase in value calculated at 20 per cent covering the assumed general cost of administration (G and A or, in Raytheon ELSI's terminology, S.G.A.). This allowance under property assets corresponded to an apparently equivalent reduction in the annual cost of operations. Deducting from the figures in column 2 the amount corresponding to this totally arbitrary 20 per cent increase in value which is unjustifiable from the administrative point of view, one arrives at a new value of L.2,779 M. Incidentally, it should again be underlined that in such financial statements no use is made of the accelerated depreciation method (Art. 98, T.U.) which is particularly important, or rather a must, in the type of business in which ELSI was engaged, in view of the rapid technical obsolescence of the industrial equipment involved.

The total appraisal thus arrived at in column 3 still does not reflect a correct financial picture of the technical value of the bankrupt Raytheon ELSI facility. An extensive analysis was made of the investment during the last year of operation (1966/1967), with a less detailed examination of the preceding fiscal year (1965/1966). It covered the type of and accounting for orders for new equipment which was entered under assets and which constituted practically all of the incremental technical assets during the mentioned two fiscal years. It was thus possible to ascertain that in determining the figure to enter for incremental property, one always tended to use ever higher figures for such annual increments, above and

beyond the already unjustifiable practice of starting off with a 20 per cent over-valuation (for G and A) of incremental equipment and machinery. The essential items brought out in the analysis of a few such new-equipment orders during the 1966/1967 and 1965/1966 fiscal periods are summarized in the attached statement, section D. More details relative to the orders analyzed can be submitted if necessary. The spot examination of the new equipment orders in 1966/1967 has pointed up, besides the already mentioned 20 per cent over valuation to cover G and A, value figures marked up by at least 30 per cent. For 1965/1966, it was demonstrated that nearly all of the incremental figures examined reflected allowances for operating expenses, costs which should have been charged against the appropriate account and whose entry under assets appears totally unjustified. It was not possible to perform an analogous audit of the orders in the fiscal years preceding the two mentioned since the accounting records available were insufficient. Even if one takes into account the depreciation rates, mentioned above, for the period 1 October 1967/31 March 1969, it can be reasonably stated that at least 15 per cent of the total technical assets per column 3 (land and motor vehicles excluded), meaning about L.400 M. constitute the artificial increase in value. Consequently, a recalculation of the assets of the bankrupt Raytheon ELSI facility — performed also in accordance with the provisions of Article 2425cc — would lead to a total value certainly not higher than L.2,400 million.

From the total of L.2,772,031 K (column 3 further above), representing revised figures (deducting 20 per cent for G and A) for the asset balance, we would arrive at the values shown below after adjusting for the said mark-ups (valuated incorrectly at 15 per cent):

In L.1,000	*Value per column 3*	*15% Difference*	*Net value after deducting 15%*
Land	166,969	—	166,969
Buildings	670,012	100,502	569,510
Equip't., Mach., tools	1,935,050	290,256	1,644,794
Total*	2,772,031	390,758	2,381,273

* This obviously includes the equipment and tools of the Complex, OST, RAX and Semiconductor divisions.

Chapter III. Conclusions

A. Comparison between the revised value and the SIT Siemens Appraisal

A comparison between the updated, revised values (with the above 15 per cent deducted) and the estimate made by SIT Siemens (Chap. I) is made as follows:

In L.1,000	*Value per column 3 minus 15%*	*SIT Siemens appraisal*	*Difference*
Land	166,969	361,000	+ 194,031
Buildings	569,510	398,000	− 171,510
Equip't., mach., tools	1,644,794	1,027,100	− 617,694
Total	2,381,273	1,786,100	− 595,173

The following summarizes a few major considerations and reasons for the difference between SIT Siemens' appraisal and the revised values shown above which, for equipment and machinery, are derived from the factors set forth below:

(A1) *Land*

A comparison between the values per accounting records and the values estimated in the appraisal was considered pointless in view of the continuous increase in the price of industrial land during the past decade. Reference is therefore made to the criteria outlined in Chapter II, paragraph A1 ("land").

(A2) *Buildings*

The book values cannot give a realistic reflection of the actual value of the buildings when one considers that the applied fiscal depreciation rates do not correspond to the actual physical depreciation of the items concerned, the condition in which these buildings are, being truly precarious (see Chap. I, para. A2); also, when one considers that the physical arrangement and the type of construction, ill-conceived and antiquated, now makes these buildings relatively unsuitable for the implementation of modern production techniques especially in an area as much in the vanguard of technology as electronics.

The valuation of the buildings made in the official or judicial survey appears to be quite far removed from the realities of business, in that the total value attributed to the buildings proper is more than twice that established in the above review of the accounting records and even more than one-third higher than the original purchase/construction price. It seems unreasonable therefore, to apply to this item the rates per square metre or cubic metre arrived at in the judicial appraisal since these would constitute valuation rates corresponding to the construction cost of new, modern industrial buildings far superior to those in question whose state of serious decay is obvious to anyone.

(A3) *Equipment, Machinery and Miscellaneous Tools*

The differences between SIT Siemens' appraisal and the values per review of the accounting records are shown in the attached tabulation, section E.

Before examining the more significant differences one must remember that (as already said further above) the relative value of the items in the Complex-OST-RAX-Semiconductor section and of those in Rome and Milan (at a total of L.439,884 K) must be deducted from the total difference, since Eltel cannot in any way be interested in taking over these items which are left for disposal by the liquidator who can sell them directly.

For the equipment Eltel can take over, the difference is thus reduced (as shown in the tabulation, section E) to about L.177 million, all of which is attributable to kinescopes (picture tubes). In that latter sector it is possible, however, to identify a pattern of significant differences which are shown in the attached schedule, section F. The criteria applied by SIT Siemens for the valuation of the TRC sector (CRT=cathode ray tubes), already mentioned in Chapter II, paragraph 11, are principally based on the condition of the items, with reference also to analogous, more modern equipment currently on the market. The divergence between the net values per accounting review and the SIT Siemens valuation, outlined in the attached listing, thus makes it evident that the ordinary, straight-line depreciation method applied to the items in this sector was not sufficient to cover the actual technical and technological obsolescence of the equipment concerned. The aforegoing considerations relative to the differences between the net values per accounting review and SIT Siemens' appraisal serve to point up, for the items to be taken over by Eltel, the essential validity of the valuation given in Chapter I

(L.1,786 M) and its strict overall adherence to the market value of the items to be taken over.

B. Observations on the Judicial Survey

Before concluding this report it seems necessary to make reference once more to the judicial survey, apart from what has already been said further above regarding the factory buildings, to point up the perspective from which the judicial survey was made.

In scanning through the appraisal figures for equipment machinery, tools, etc., appearing in the said survey, one was able to find a few particularly salient discrepancies in terms of both the financial aspect and the methodology applied, reviewed as follows:

Item 03170 delay line modulators, 80KV, 120mA, for magnetrons, appraisal	L.36.0 M
Item 03173 delay line modulators, 80KV, 120mA, for magnetrons, appraisal	L.34.0 M
	L.70.0 M

These two modulator items were manufactured in-house in 1967; the total cost of assembly according to the books was:

item 03170	L.28 M		
item 03173	L.26 M	L.54.0 M	
minus amortization which differs		L.10.8 M	L.43.2 M
from the figure in the survey by			L.26.8 M

Item 03555 magnetron test modulator, appraised at	L.5.0 M
Made in-house in 1962 at a total cost of	L.5.0 M
After deduction of amortization the remaining value would be	L.1.5 M
Item 4133, Heliarc welder, appraised value	L.1.3 M
Purchased in 1963 for	L.1.2 M
After amortization/depreciation, the remaining value is	L.2.5 M
Item 2631, 4-position chute, appraised at	L.3.5 M
It was found that the previous management had already labelled this equipment as scrap	Scrap value
Items 02775/2776, two furnaces for vacuum treatment, 1800, appraised at	L.22.4 M
This is the current purchase of similar equipment. The furnaces on hand were installed in 1963. Deducting depreciation (L.110 M), the remaining maximum value would be	L.6.5 M
Items 5167 to 5319:	
154 removal carriages with motorized pumps and "traps", appraised at	L.107.8 M
The valuation of a completely equipped carriage by Raytheon ELSI technicians was L.300 K each, for a maximum total of	L.46.2 M
Item 05065, 05057, 05111, etc., conveyors, appraised at	L.40.0 M
This would be a cost of L.29.5 K/metre. The current purchase price of identical equipment, new, is L.15 K/metre.	

The resulting total is	L.20.3 M
Incremental cost of installation, appraised at	L.49.6 M
Considering a cost of L.5 K/metre (current quotations), a new installation would be	L.7.0
The total for the conveyor equipment is:	
Per appraisal	L.89.6 M
effective value	L.27.3 M
variance	L.62.3 M
Old lamination equipment, appraised at	L.22.0 M
It is easily seen that this equipment does not exist anymore, except for a few kilograms of scrap	Scrap value
Item 07045, electrolyzer 280/D/70C, appraised at	L.59.0 M
It is out of service, is six years old (bought in 1963) and cannot be used for danger of explosion. Reconditioning would cost about L.18-20 M involving more than a month's work.	
The previous administration already considered this equipment as useless and uneconomical to operate and had it replaced with a smaller unit (07045) found adequate for the job. Its power supply was used for the smaller unit which put the said larger equipment out of commission. It can be sold for scrap value only	Scrap value
Items 7791 to 7832, Barbieri airconditioning equipment, appraised at	L.100.0 M
Requires repair and maintenance work estimated at L.30 M.	
The current price of a similar system in operating condition is:	L.60.0 M
The assessable value is thus	L.30.0 M
Items 07636 and 7637, two Ingersoll compressors, appraised at	L.4.1 M
Found unusable. The old Raytheon ELSI administration already considered them unserviceable and had them replaced with other equipment	Scrap value
Item 07525, acetone distillator, appraised at	L.1.0 M
The previous administration had it shelved and prohibited its use because of its dangerous condition	Scrap value
Items 08861/08864, four Hobart converters, appraised at	L.2.0 M
Already taken out of commission by the previous administration and replaced with others with steel tubes of different diameters. Appraised at L.12 M for 3,400 metres, L.24 M for 8,000 metres, total appraisal	L.36.0 M
Actual current value is about L.1,500/metre including installation, total	L.17.0 M
Electrical wiring (cables), appraised at L.2,000/metre for 35,000 metres	L.70.0 M
Current value, installed, not more than L.1,000/metre, total	L.35.0 M
Lighting, appraised at L.5,000 each for 1,800 lamps	L.9.0 M
Actual current unit price is L.2,500, totalling	L.4.5 M

C. Concluding Observations

On the basis of the general considerations contained in the introductory part of this report, it is deemed necessary to add a final observation to underscore that the base price for the auction covering the assets of the bankrupt Raytheon ELSI operation appears to be unrealistic. As said above, the valuation made by SIT Siemens considered the individual items as functionally integrated in a going industrial operation. Consequently this did not take into account that the buildings and equipment were left in a state of abandonment for over a year during which not even the most elementary preservatory maintenance work was performed. Ordinary maintenance of this type had been negligent and insufficient for several years.

No consideration has yet been given — and this point must be underlined as particularly important — to the enormous cost to be incurred by the future owners in cleaning up, repairing, refurbishing and restarting the production facility of the former Raytheon ELSI Company. This regeneration cost will certainly amount to not less than 2-300 million lire, and the job will take many months. Needless to say that a program designed to bring about a gradual economic recovery of the industrial facility must involve either a massive reconversion of the existing production along the line of updated electronic technology, which would require a substantial restructuring of the equipment, or the transfer to Palermo, from other facilities, of new equipment and tools which would create jobs for a few hundred unemployed workers.

Società Italiana Telecomunicazioni.
Siemens S.p.A.
(Signature)

III-33. ELTEL Announcement of Offer to Buy at 3.2 Billion Lire

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 68]*

III-34. ELTEL Offer to Buy at 4 Billion Lire

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 70]*

III-35. MINUTES OF CREDITORS' COMMITTEE MEETING OF 6 JUNE 1969

[Italian text not reproduced; for the English translation see I, *Memorial of the United States, Annex 71]*

III-36. COURT AUTHORITY FOR FOURTH AUCTION

[Italian text not reproduced]

CIVIL COURT OF PALERMO

ORDINANCE FOR THE SALE OF THE FACILITY, RAW MATERIALS AND SEMIFINISHED GOODS OF THE BANKRUPT RAYTHEON ELSI S.P.A.

The Court

Having read the request by the liquidator/receiver to proceed with the sale of the electronics company Raytheon ELSI S.p.A. of Via Villagrazia in Palermo, including the bankrupt company's property as well as its raw materials and semifinished goods but excluding materials for the production of semiconductors as listed in the inventory sheet;

Having reviewed the technical-survey report of 11 October 1968 by Prof. Mario Puglisi which serves as a reference relevant to the facility, equipment and machinery; the inventory statement with attached exhibits which serve as a reference in respect of the description and valuation of the raw materials and semifinished goods with the exception stated above;

Having read the technical advice by Prof. Mario Puglisi of 31 May 1969 which disputes the claim that the sale of some of the raw materials and semifinished goods as operational parts could constitute a violation of industrial secrecy (conventions);

Having reviewed the application presented by ELTEL in which the latter declares being prepared to acquire the facility with all its supplies, including the finished products, for L.4 billion;

Having considered that it is both reasonable and in the interest of the creditors to consent to the request by the liquidator/receiver to exclude from the sale the raw materials, semifinished and finished products related to semiconductor production also in view of the fact that these are finished products and basic materials of no use to a buyer intending the fabrication of new types of finished goods;

Having considered that the auction arranged for 3 May 1969 for the sale of the facility and supplies remained without bidders;

Having considered that the base price for the sale of the facility may be set at L.3.2 billion and that for the sale of raw materials and semifinished goods may be set as low as L.800 million; and

Having noted the favorable opinion of the creditors' committee relative to the sale of the facility together with the raw materials and semifinished goods and their willingness to settle for the price last stated, as expressed on (date illegible);

Therefore Orders

To proceed with the sale, by public auction and to the highest bidder, of the electronics firm Raytheon ELSI S.p.A. located on an area of land about 48,103 square metres in size and accessible from Via Villagrazia No. 79, registered in deed No. 51345 of the Palermo NCT, sheet 72 section 203 part b, and section 204 part b, sheet 73 sections 85, 307, 225, 226, 230, 233, 231, 234, 455, 456, bordering in the north on the Oreto river, in the south on Via Villagrazia, in the east on Cassina and in the west on Guajana, comprising buildings, equipment, machinery, various tools and implements for production of cathode ray tubes, microwave tubes, X-ray tubes, conductors, semiconductors and complex components as described in the technical report by Prof. Ing. Mario Puglisi dated 11 October 1968 which is to be considered repeated and transcribed in full as an integral part of the record;

To also proceed with the simultaneous sale of the raw materials and semifinished goods on hand at the facility, and in general warehouses in Palermo (excluding those items which are intended for semiconductor production) which belong to the said electronics firm and are described in the attached inventory list.

The sale will be subject to the following limitations:

1. Exclusion of all items claimed by third parties as well as raw materials and semifinished goods disposed of by the liquidator or used for maintenance purposes and therefore not available. Exclusion of all the raw materials and semifinished goods intended for semiconductor production. Exclusion of all items not physically on hand at the facility except those at the (Palermo) general warehouse.
2. Prior to the auction, the buyer must inspect, or have inspected on its behalf, the facility with all its buildings, machinery, equipment, tools and furnishings as well as all raw materials and semifinished goods to ascertain their current condition. The presentation of a bid will be considered as confirmation that such inspection has been made so that the successful bidder cannot under any circumstances apply for a price abatement or indemnification, there being no guarantees given (see also Art. 1487, Civil Code).
3. Exclusion of all finished goods, including rejects, wherever they may be located, of all motor vehicles, equipment of the Milan and Rome office: goods consigned and delivered to customers, items furnished to agents against deposits, and all materials and tools owned by Nato (Administrative Bureau) and located at the factory.
4. The sale of the facility with land, buildings, equipment, tools and machinery as well as raw materials and semifinished goods will be on an "as-is" basis, with no responsibility or guarantee on the part of the liquidator in connection with direct or indirect fees, obligations, liens, or charges.

The sale shall be made in one single lot subject to the following conditions:

The auctioning base price is four billion lire of which L.3.2 billion covers the electronics facility and L.800 million the raw materials and semifinished goods.

To participate in the bidding the offerors must first pay the amount of L.350 million as a bid bond plus L.480 million for pre-established expenses. Competitive bidding must be in increments of not less than L.6 million of which L.5 million will go toward the facility and L.1 million toward supplies.

The auction sale is scheduled for 12 July 1969 at 10 a.m. in the public auditorium of the third civil department of this Court, presided over by the judge assigned to this bankruptcy case.

The bidders must pay the above specified bond and expense amounts by 9 a.m. of the day scheduled for the auction, at the Clerk's Office (bankruptcy section) of this Court, in the form of official legal deposit. Within thirty days after adjudication, the successful bidder must come up with the full bid price by paying the difference between the said price and the bond deposited, in the same form as indicated above.

The buyer takes possession of the property, the raw materials and the semifinished goods on the day the transfer-of-ownership decision is issued in accordance with Article 586 of the Code. All the expenses connected with the sale including sales tax and property-transfer fees will be borne by the buyer.

The unsuccessful bidders will receive back the bond and expense deposit paid by them. For three consecutive days prior to the sale, a notice will be posted on the bulletin board of this court containing all the provisions of this ordinance, with an identical notice appearing in the Official Newspaper of the Sicilian Region in the name of the Clerk.

The liquidator will furnish an abstract of this ordinance to the creditors with outstanding claims having the right of pre-emption on the property, as well as possible hypothecary creditors, who have registered at least two weeks prior to the date scheduled for the auction.

An abstract of this ordinance will be published in the name of the liquidator in the following papers: *24 Hore*; *Il Globo*; *Il Corriere della Sera*; *Il Giornale di Sicilia*; *Die Telegrafe* of Amsterdam; *Le Monde* of Paris; *Frankfurter Allegemeine* of Frankfurt/Main; *Financial Times* of London; *Nihonkeiza Shimbun* of Tokyo; the *New York Times*; and *Le Soir* of Brussels. The abstract to be published will be issued in Italian for the Italian newspapers, in French for the Paris and Brussels newspapers, in German for the Frankfurter paper, and in English for all the other newspapers mentioned.

Palermo *(date illegible)*

The Clerk *(Signature)*

The President Judge *(Signature)*

(handwritten footnotes illegible)

III-37. Appeal to Bankruptcy Court

[Italian text not reproduced]

CIVIL AND PENAL COURT OF PALERMO

THE HON. JUDGE IN THE BANKRUPTCY CASE OF RAYTHEON ELSI S.P.A.

APPEAL

In opposition to the ruling made by the Court in the bankruptcy case of Raytheon ELSI S.p.A., on 7 June 1969.

Raytheon Europe International Company, through Attorney Giuseppe Bisconti special procurator by power of attorney issued on 28 August 1968, certified by Notary Public George B. Klim on 4 September 1968 and legalized by the Italian Consul-General in Boston, F. Tonci Ottieri, on 11 September 1968; defended by the said Attorney Giuseppe Bisconti of the Court of Rome and represented by Attorney Francesco Calamia of the Court of Palermo by appropriate proxy (see margin) at whose office at Via Napoli 84 in Palermo he will be domiciled pending completion of the proceedings hereby initiated —

(In margin: In my capacity of special procurator of Raytheon Europe International Company I hereby delegate power of attorney to Mr. Francesco Calamia, attorney at law, to represent the said Company as legal proxy in all the phases and aspects of these proceedings, and I shall be domiciled in the legal sense at his office at Via Napoli 84, Palermo. Signature and certifications.)

Hereby states

— that Raytheon Europe International Company (hereinafter called "REIC") is a creditor of the bankrupt Raytheon ELSI S.p.A. (hereinafter called "ELSI") with unsatisfied claims against the latter;
— that REIC is represented in the creditor committee of ELSI;
— that the ELSI creditor committee, in a meeting on 6 June 1969, was asked to agree to a proposal by the liquidator/receiver, Attorney Giuseppe Siracusa, which related, *inter alia*, to an offer by Eltel submitted to the Court for the acquisition of the ELSI facility and its assets for the amount of L.4,000,000,000 (four billion lire), with an auction to take place on 12 July 1969 for the sale of the said facility and assets at the minimum price of L.4 billion of which L.3.2 billion would cover the buildings and equipment and L.0.8 billion would cover raw materials and semifinished goods, excluding those intended for the production of semiconductors and excluding all finished goods;
— that in the said meeting the creditor committee members expressed their respective opinion as follows: two members favourable, the President abstained, the undersigned (in the above-mentioned capacity) was against it;
— that on request by the liquidator, the Court decided on 7 June 1969 to proceed with the sale by public auction, on 12 July 1969, of the facility equipment and tools of ELSI at the price and under the conditions indicated above. In consideration of the above, Raytheon Europe International Company, on its own behalf as a creditor and in the interest of all the other creditors of ELSI, submits its

Appeal

against the ruling made by the Court in the bankruptcy case of Raytheon ELSI S.p.A. on 7 June 1969, for the following reasons:

1. Reference is made to the memorandum by the Appellant dated 8 April 1969 and to the appeal by the same dated 10 April 1969, which he incorporated in full in the appeal here submitted.

2. The events following the said memorandum and appeal unfortunately confirm what was said in the same, to the effect that *the lease arrangement makes it impossible to sell* the facility or individual segments thereof *to third parties* other than Eltel or other affiliates of the IRI group. This was demonstrated by the result of the last auctioning attempt of 3 May 1969 which saw no bidders, and it will be demonstrated again at the auction attempt scheduled in the decision of 7 June

1969, which, as can be expected with certainty, will see no bidder other than Eltel or an IRI affiliate, for the reasons that led to the lease.

3. *The lease has contributed to the reduction in value* of the ELSI business as is evident from the price reduction (in relation to the substance) established in the ruling which is the subject of this appeal.

4. *The lease has enabled Eltel to dictate the selling price.* After having presented an "irrevocable" offer (yet on noncommittal terms) for the acquisition of the facility for L.3,205,000,000, Eltel submitted to the Court, on 27 May 1969, another offer (this time not only noncommittal but not even "irrevocable" anymore) to acquire the facility and all its assets for the amount of L.4 billion. Disregarding the small difference between the Eltel offer and the price proposed by the liquidator, the base price for the auction scheduled for 12 July 1969 is *essentially that* indicated by Eltel.

5. For the reasons mentioned in the memorandum and the above-referenced appeal, *Eltel's sole reason for the lease was and still is to assure Eltel of a favourable position for the acquisition of the ELSI business, with substantial disadvantages for the creditors.*

6. The *sale* scheduled in the ruling against which this appeal is directed because of the *timing and the conditions* involved, is *not in the interest of the creditors* because:

(a) it reduces the price to a point where the registered creditors cannot hope to recover their money; *(b)* it is scheduled at too short an interval from the preceding auction attempt (it should be noted that four such auction attempts were scheduled within a period of less than six months); *(c)* insufficient efforts have been made to sell the facility by segments, i.e., individual production lines, and no published announcement was ever made regarding the possibility of selling the plant in segments. On the contrary, it seems that a very large German corporation had expressed an interest in the acquisition of the very valuable microwave segment the inventory of which is valued at about L.1.5 billion, but was discouraged by people in government circles on the basis of the suppositions made during the creditors' committee meeting on last 6 June where the Appellant heard about it; *(d)* it provides for the sale at a price below that established for the preceding auction in clear contradiction to the justification given for the lease to Eltel which asserted that the lease would permit a sale of the facility at a higher price for reasons of greater operational efficiency.

7. The offer by Eltel of 27 May 1969 is in no way juridically binding and thus leaves that company an option as to whether or not to bid in the auction or to justify a no-bid for any given reason (for instance the small difference between the Eltel offer and the liquidator's proposed figure covering the assets). Within the framework of the various actions taken by the Administration which have caused the insolvency and consequent bankruptcy of ELSI, and of the circumstances that have prevailed to this date, *the net effect of Eltel's offer will be to discourage any private entrepreneur from making a bid in the auction* for the acquisition of the ELSI business once it is publicly known that State agencies are willing to take over the ELSI facility and operations which, in essence, *constitutes a confiscation as far as the private businessman is concerned.*

8. *The only and immediate effect of the lease*, within just a few weeks, *was a reduction in price* of the ELSI facility and its assets, with the risk, for even the privileged creditors (except for the employees of ELSI whose future was guaranteed by the Sicilian Regional Government, that if Eltel should not live up to its obligation (albeit moral rather than legally binding)) to make a bid in the auction on 12 July 1969, the final price would be so much lower.

Request

It is requested that, independent of the appeal submitted to the Court on 9 June 1969, the ruling against which this present appeal is directed be revoked immediately.

Palermo, 9 June 1969.

(Signed) Attorney Francesco CALAMIA.

(Handwritten addendum of 20 June 1969 illegible)

III-38. APPEAL TO COURT OF PALERMO AND ADVERSE DECISION

[Italian text not reproduced]

CIVIL AND PENAL COURT OF PALERMO

APPEAL

AGAINST RULING BY THE COURT DATED 7 JUNE 1969 IN THE BANKRUPTCY CASE OF RAYTHEON-ELSI S.P.A.

Raytheon Europe International Company, in the person of Attorney Giuseppe Bisconti having special power of attorney issued on 28 August 1968, certified by Notary Public B. Klim on 4 September 1968 and legalized by F. Tonci Ottieri, the Italian Consul-General in Boston, on 11 September 1968, defended by the said Attorney Giuseppe Bisconti of the Bar of Rome and represented by proxy (see margin) by Attorney Francesco Calamia of the Bar of Palermo at whose offices, at Via Napoli 84, Palermo, it has its elective domicile for the purpose of the proceedings hereby instituted.

(In margin: In my capacity of special procurator of Raytheon Europe International Co. I hereby delegate power of attorney to Att'y Francesco Calamia for the representation of the said Company as their legal procurator in these proceedings, for which purpose my elective domicile will be at his offices at Via Napoli 84, Palermo. Signed: Giuseppe Bisconti. Certified: *(illeg.)*).

Whereas, Raytheon Europe International Company (hereinafter referred to as "REIC") is a creditor of the bankrupt Raytheon-ELSI S.p.A. (hereinafter called "ELSI") and duly recognized as such;
Whereas, REIC is represented in the Creditors' Committee of ELSI;
Whereas, the ELSI Creditors' Committee, at its meeting of 6 June 1969, was called upon to vote in favour of a proposal by the Liquidator, Att'y Giuseppe Siracusa, regarding, *inter alia*, a request presented to the Court by Eltel for the purchase of the facility and the raw materials/supplies of ELSI for the amount of L.4.0 billion; for holding a fourth auction on 12 July 1969 for the sale of the said facility and materials at the base price of L.4 billion including L.3.2 billion for the factory and equipment and L.800 million for raw materials and semifinished

goods excluding those intended for the manufacture of semiconductors and also excluding finished products;

Whereas, at the said meeting the Creditors' Committee voted as follows: Two members in favour, the Chairman abstained, the undersigned (in the capacity indicated) against;

Whereas, on request by the liquidator, the Court decided, per court order dated 7 June 1969, to proceed with the sale by public auction scheduled for 12 July 1969, of the ELSI facility, equipment and materials (raw and semifinished) at the price and under the conditions indicated above;

Now Therefore, Raytheon Europe International Company, in its name and for its own account as a creditor as well as in the interest of all other creditors of ELSI, hereby submits its

Appeal

against the Court Order of 7 June 1969 in the bankruptcy case of Raytheon-ELSI S.p.A. for the following reasons:

(1) Reference is made to the memorandum of the Appellant dated 8 April 1969 and to its appeal of 10 April 1969 both of which are to constitute an integral part of the records for the purpose of this appeal.

(2) The events following the said memorandum and appeal unfortunately bore out what had been stated in the same, namely, that *the lease actually makes it impossible to sell* the facility or any individual production line *to any third party* other than Eltel (or an associated company of the IRI group). This was manifested by the result of the last auctioning attempt of 3 May 1969 where no bidders showed up, and will become equally manifest in the auction attempt decided upon in the Court order of 7 June 1969; one can safely predict that at this auction there will be no bidder other than Eltel or an IRI company (due to the circumstances which culminated in the lease).

(3) *The lease has contributed to a lessening of the value* of the ELSI operation as is evident from the reduction of the price (relative to the raw materials) established in the Court order against which this appeal is directed.

(4) *The lease has enabled Eltel to dictate the selling price*. On 27 May 1969, after having presented an "irrevocable" offer (yet under noncommittal conditions) to acquire the plant for L.3,205,000,000, Eltel submitted to the Court a new offer (this time not only noncommittal, but not even "irrevocable") for the purchase of the facility and materials at the price of L.4,000,000,000. Disregarding the minor difference between Eltel's offer and the figure proposed by the Liquidator, the base price for the auction scheduled for 12 July 1969 corresponds essentially to that named by Eltel.

(5) For the reasons indicated in the above-mentioned memorandum and appeal, *the lease had and still has the only purpose for Eltel to put the same in a favourable position in connection with the acquisition of the ELSI operation, with considerable prejudice to the creditors.*

(6) *The sale* ordered by the ruling against which this appeal is directed, *in terms of the timing and conditions, is not in the interest of the creditors* because: *(a)* the price is reduced to a point where the creditors' chances of realizing the amounts hoped for are nil; *(b)* the time interval since the preceding auction attempt is too short (it should be noted that four auction attempts were scheduled within a period of less than six months); *(c)* no adequate attempts were made to sell the facility by individual production lines, and the possibility of selling these lines individually has not been publicized at all. In fact, it even appears that a very

large German company which had expressed an interest in the acquisition of the highly valuable microwave production line with an inventory valued at about L.1,500,000,000, was discouraged by government circles, according to suppositions made at the Creditors' Committee meeting of *6 June and noted by the* Appellant on that occasion; *(d)* ordering the sale at a price below that established for the preceding auction manifestly contradicts the justification given for the lease of the facility to Eltel, namely, that the lease would make it possible to sell the facility at higher prices due to its greater operational efficiency.

(7) *Eltel's offer of 27 May 1969 does not* juridically *commit* that company in any way, leaving Eltel the option of whether or not to make a bid in the auction or to give any one justification for a no-bid position (for example, the small difference between Eltel's offer and the figure proposed by the Liquidator for the raw materials).

However, Eltel's offer which was disclosed by the press, will have the effect, within the framework of a number of governmental measures which have caused ELSI's insolvency and subsequent bankruptcy and the situation now prevailing, *of discouraging any private entrepreneur from making a bid in the auction* for the acquisition of the ELSI operation once further publicity has been given to the willingness of political authorities to take over ELSI's plant and business which *in the eyes of a private businessman constitute in essence a confiscation.*

(8) *The only and immediate effect of the lease,* within just a few weeks, *has been a reduction* of the price of the ELSI facility with the said materials, with the danger of serious losses to even the preferred creditors (except for the ELSI employees whose claims are guaranteed by the Sicilian Regional Administration) if, should Eltel not honour its obligation (albeit juridically noncommital) to make a bid at the auction on 12 July 1969, the price is dropped further.

For All These Reasons

and for the reasons outlined by the Appellant in its memorandum of 8 April 1969 and its appeal to the Court dated 10 April 1969, Raytheon Europe International Company requests that the Court immediately revoke the ruling against which this appeal is directed, so as to prevent and avert the most serious, irreparable prejudice it would otherwise entail for the creditors.

Palermo, 7 June 1969

(Signed) Giuseppe BISCONTI,
Att'y Giuseppe BISCONTI n.q.

(Signed) (illegible)
Att'y Francesco CALAMIA.

THE COURT OF PALERMO

Third Section, Civil and Bankruptcy, meeting in the Chambers of the Council and consisting of the following gentlemen:

Dr. Livio Fivrani (?)	President
Dr. Salvatore Burgio (?)	Judge
Dr. Vincenzo Badalamenti	Judge in above case,

Having read the above Appeal;

Having seen the record of the proceedings in the bankruptcy case of Raytheon ELSI S.p.A.;

Considering that the first five points of the appeal relate to the advisability of leasing the facility in respect of the possibility of a judicial sale of the same;

Considering that this Court has already decided this issue in its ruling of 9 May 1969, filed in the Clerk's Office on 19 May 1969;

Considering that the remaining points relate to the timing, conditions and modalities of the sale;

Considering that in this respect the Judge in charge of this bankruptcy case has made good use of his discretional powers,

1. By responding to the need for an expeditious disposition of the operation;
2. By making a small reduction (about 6 per cent) in the price of the raw materials only which is irrelevant with respect to the price established for the last auction sale that saw no bidders;
3. By offering for sale the plant with its appurtenances;

Therefore, deeming the appeal unfounded and unacceptable,

For All These Reasons

The Court rejects the above Appeal.

Palermo, 20 June 1969.

The Presiding Judge,
(Signature)

Filed on 23 June 1969.

The Clerk,
(Signature).

III-39. ASSIGNMENT OF ASSETS TO ELTEL

[Italian text and English translation not reproduced; for another English translation see I, *Memorial of the United States, Annex 74]*

III-40. RAYTHEON AGREEMENT TO GRANT LICENCE

[See I, *Memorial of the United States, Annex 73]*

Unnumbered Documents, Volume III

III-41. APPRAISAL[1] BY COURT-APPOINTED EXPERT

[Italian text not reproduced]

APPRAISAL FOR DETERMINING THE VALUE OF FACTORY, EQUIPMENT, TOOLS, ETC., OF THE ELECTRONICS FIRM RAYTHEON-ELSI S.P.A.

To the Hon. Judge Dr. Vincenzo Badalamenti, Section 3a Bankruptcy, Civil Court of Palermo

Introduction

On 16 September 1968, Counsellor Giuseppe Siracusa, liquidator/receiver in the bankruptcy case of Raytheon-ELSI S.p.A., asked the Judge, the Hon. Dr. Spina of the Court of Palermo, that one or several technical consultants be appointed for determining the value of the plant, equipment and other assets of the electronics firm known as Raytheon-ELSI S.p.A. of Via Villagrazia 79, Palermo, and thus the base price for an auction.

On 19 September 1968, at the recommendation of Attorney Siracusa, the Hon. Judge Dr. Spina appointed the undersigned Prof. Ing. Mario Puglisi, Full Professor of the Department of Radio Technology at the Faculty of Engineering of the University of Palermo, as the technical consultant who was to proceed with the appraisal of the above-mentioned company; he decided that the technical Consultant is to be sworn in at the time the appraisal report is submitted. The undersigned, accepting the appointment and having read the text of the request by the liquidator Attorney Siracusa which stresses the urgency of the appraisal not only for the reasons typical of bankruptcy situations involving industrial corporations, but most of all in view of the high obsolescence rate of the material involved, immediately initiated the appraisal. In the course of this survey, the technical Consultant availed himself of his fiducial co-workers as expressly permitted by the liquidator, verbally and in writing, in order to complete the appraisal at the earliest possible date. Especially for on-site inspections and for individual valuations, the Consultant had the co-operation of Ing. Stefano Riva Sanseverino, professor of nuclear electronics at the University of Palermo.

The appraisal was begun by the undersigned on 20 September 1968, at 10 a.m., on the premises of the electronics firm Raytheon-ELSI S.p.A. at Via di Villagrazia 79, Palermo, and continued every following day, mornings and afternoons, through 29 September 1968, in an effort to obtain and objectively ascertain all the data needed for the completion of the task with which the Court had entrusted the undersigned. The survey progressively produced the data which have been compiled into the report here submitted. For a more organic structuring of the appraisal, this report is broken down into the following chapters:

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[1] Extracts.

1. Outline of the electronics firm Raytheon-ELSI S.p.A.[1]
2. Valuation criteria and appraisal methods.
3. Detailed appraisal of Raytheon-ELSI S.p.A.[1]
4. Summary.
5. Conclusion.

[. . .]

FOURTH CHAPTER

General Summary

This chapter gives a recapitulation and summary of the sectional appraisals shown in detail in the preceding chapter, for establishing the overall valuation of the Raytheon-ELSI S.p.A. electronics company.

(A) Land:	
1. Level ground	L.447,478,500
2. Strongly sloping terrain	1,000,000
3. Improvements for roadways, courtyards, etc.	44,660,000
4. Improvements for parking lots	10,800,000
Total land valuation:	L.503,938,500
(B) Buildings:	
1. Appraisal of buildings	L.1,278,040,000
2. Minus cost of renovation	65,000,000
Total valuation of buildings:	L.1,213,040,000
(C) Equipment and Machinery:	
1. "MEC" Section	L.149,250,000
2. "LAC" Section	29,500,000
3. "COMPLEX" Section	26,280,000
4. "OST" Section	26,850,000
5. "DCQ" Section	31,400,000
6. "MET" Section	344,280,000
7. "MET-TOOLS" Section	60,350,000
8. "SCA" Section	12,950,000
9. "LAMPS" Section	26,310,000
10. "RAX" Section	86,310,000
11. "TRC" (CRT) Section	608,133,940
12. "COMBINED INVENTORY" Section	161,390,000
13. "SIM" Section	523,586,000
14. "SCD" Section	356,640,000
15. "SIM DISTRIBUTION, SUPPLIES, ACCESSORIES" Section	287,450,000
16. "MISCELLANEOUS" Section	39,750,000
17. "X" Section	12,000,000
Total equipment appraisal:	L.2,782,459,940
(D) Capital Equipment:	L.61,150,000

[1] For the purpose of the following report, the designation electronics firm Raytheon-ELSI S.p.A. or, in short, ELSI, always relates to the entire complex comprising land, buildings, plant equpment, machines, tools and furnishings which are the direct object of this appraisal.

FIFTH CHAPTER

Conclusions

From the group totals shown in the preceding chapter for the categories "Land" "Buildings", "Equipment and Machinery", and "Capital Equipment", we derive the value of the Raytheon-ELSI S.p.A. electronics company as follows:

1. Land	L.503,938,500
2. Buildings	L.1,213,040,000
3. Equipment and Machinery	L.2,782,459,940
4. Appurtenances and Furnishings (capital equipment)	L.61,150,000
	L.4,560,588,440

The undersigned Technical Consultant thus considers completed the assignment given him by the Court, declaring that the value of the electronics company Raytheon-ELSI S.p.A. is four billion five hundred and sixty million five hundred and eighty-eight thousand four hundred and forty Lire.

Palermo, 11 October 1968.

The Technical Consultant
(Prof. Dr. Ing. Mario PUGLISI)
(Signature)

IV-1. COMPLAINT OF CREDITO ITALIANO

[Italian text and English translation not reproduced]

IV-2. COMPLAINT OF BANCO DI ROMA

[Italian text and English translation not reproduced]

IV-3. COMPLAINT OF BANCO COMMERCIALE ITALIANA

[Italian text and English translation not reproduced]

IV-4. Complaint of Banco di Sicilia

[Italian text and English translation not reproduced]

IV-5. Complaint of Cassa di Risparmio

[Italian text and English translation not reproduced]

IV-6. Decision in FIMIR Case

[Italian text and English translation not reproduced]

IV-7. Raytheon Brief to Supreme Court

[Italian text and English translation not reproduced]

V-1. Curator's Report of 28 October 1968

[Italian text and English translation not reproduced]

V-2. ELSI Plant Brochure

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V-2A. CURATOR'S ACCOUNTS IN BANKRUPTCY

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BANKRUPTCY CASE OF RAYTHEON EL.SI. S.P.A. PLAN FOR PARTIAL DISTRIBUTION

Claims verified and approved as at 13 November 1969.

Preferred Claims:

Tax collector (state property tax and miscellaneous other tax liabilities	L.255,165,432
Public Registry Office (registration/stamp fee)	L.22,010,000
IRFIS (principal and interest as of 12 July 1969)	L.2,638,347,390
Bank of Sicily (principal and interest as of 12 July 1969)	L.855,066,945
Money due the workers	L.987,868,398
I.N.P.S. (social security)	L.319,058,192
I.N.P.D.A.I. (health insurance premiums)	L.51,238,552
I.N.A.M. (employee insurance)	L.153,953,734
I.N.A.I.L. (workmen's compensation)	L.5,834,945
E.A.S.D.A.I. (management employee insurance)	L.6,680,762
Other preferred claims including turnover tax, customs duties, etc.	L.55,351,500
Total	L.5,350,168,686
Total, ordinary claims:	L.10,221,329,847
Cost of proceedings and administrative expenses as of 31 Oct. '69	L.237,689,207
Storage charges claimed by General Warehousing Consortium	L.421,935
Total	L.238,111,142

Receipts from sale of fixed assets —

From sale of plant and equipment, including the amount charged the buyer on release from receivership	L.3,205,000,000
From lease of the facility	L.47,916,666
Total receipts	L.3,252,916,666
Minus set-aside per Article 113, L.F.	L.300,000,000
Distributable balance:	L.2,952,916,666
(*a*) Proportional cost of proceedings and administrative expenses	L.165,982,146
Balance	L.2,786,934,550
(*b*-204/*c*) Local tax (property tax and late charges on arrears)	L.90,780
	L.2,786,843,770
(*c*-1/*c*) Public Registry Office (registration/stamp fee)	L.22,010,000

Note: This amount was allowed under ambiguous circumstances not yet cleared up, and will be with-

held or deposited according to a forthcoming decision by the Court.	
Balance	L.2,764,833,770
(*d*-130/*c*) I.R.F.I.S. (first mortgage) already paid by subscription on ELTEL's part to a mortgage loan with IRFIS dated 6 August 1969, by Bianca Barbera	L.2,180,000,000
Balance	L.584,833,770
(*e*-130/*c*) I.R.F.I.S. (first mortgage), amount of principal and interest as of 12 July 1969	L.458,347,390
Balance	L.126,486,380
(*f*-221/*c*) Bank of Sicily (second mortgage), applied on account:	L.126,486,380
	—000—

Note: The Bank's remaining claim will be satisfied out of the sale of chattel to the extent provided for in Article 2778/3 C.C. and under the terms of Article 5 of law No. 135 of 16 April 1954, with priority rights on the raw materials on hand.

Receipts from the Sale of Chattel —

From the sale of raw materials	L.801,000,000
From the sale of finished goods and collection of receivables	L.1,107,227,578
Total receipts	L.1,908,222,578
Minus set-asides per Article 113 L.F.	L.625,000,000
Distributable balance	L.1,273,222,578
(a) Proportional cost of proceedings and administrative expenses per Article 111 L.F.	L.72,129,026
Balance	L.1,201,093,552
(b) Claims by secondary lenders (preferred claims per Article *(illegible)*, paragraphs 1 and 2, law No. 153 of *(illeg.)* minus deductions by way of *(illeg.)* in favour of Compagnia Tirrena di Capitalizzazione ed Assicurazione (CTCA) and minus legally approved distraints by third parties (see attached list)	L.984,878,095
Balance	L.216,215,457
(*c*-T.3) CTCA (preferred employee claims)	L.183,000
Balance	L.216,032,457
(d) CTCA (above) (claims . . . *(illeg.)* with deductions for employees (see attached list))	L.2,321,000
Balance	L.213,711,457
(e) Randazzo Angelo S.p.A. (claim allowed per order of the Palermo Magistrate on 1 April 1969, . . . *(illeg.)* distrained by employee Viola Stefano), on the condition that the Court recognize the amount and dispense with the payment	L.226,440
Balance	L.213,485,017
(f) Liquidator/receiver of bankrupt Raytheon-EL.SI., preferred claim allowed by order of the Palermo Ma-	

gistrate of 1 April 1969 . . . *(illeg.)* to the employee Viola Stefano (under same conditions as above)	L.15,000
Balance	L.213,470,017
(g) Niela Colombo, Oldani (T.9), preferred employee claim for the amount allowed by the Magistrate	L.244,863
Balance	L.213,225,154
(h) I.N.P.S. Palermo, preferred claim on paid-up IVS share (t.17) per Article 66, second paragraph, of law No. 153 of 30 April 1969, under exclusion of any other amounts not constituting IVS shares which, per the aforesaid law, have the priority thereby established . . . *(illeg.)*	L.135,175,921
Balance	L.78,049,233
(i) . . . DAI *(illeg.)* (applications No. 180 and 209), preferred claim as under *(h)* above	L.24,793,263
Balance	L.53,255,968
(l) Bank of Sicily, Industrial Credit Department, on account:	L.53,255,968
Special priority on raw materials and finished products per Article 5 of law No. 135 of 16 April 1969.	—00—

Palermo, 18 November 1969.

The Liquidator
(Att'y Giuseppe SIRACUSA).

V-3. SCHEDULE OF PAYMENTS BY RAYTHEON ON GUARANTEED LOANS

SCHEDULE OF BANK GUARANTEES
PAID BY RAYTHEON

Banca Nazionale del Lavoro	Lire 2,272,770,410	($3,636,432.70)
Banca Commerciale Italiana	2,359,955,496	(3,775,928.80)
Banco di Roma	242,594,802	(388,151.70)
Banco di Sicilia	754,160,959	(1,206,657.50)
	Lire 5,629,481,667	($9,007,170.70)

Equals at an exchange rate of $1.6 = Lire 1,000.

V-4. Raytheon's Open Account Claim of Lire 550,000,000

RAYTHEON COMPANY
ACCOUNT RECEIVABLE DUE FROM RAYTHEON-ELSI

Invoice No.	*Transaction*	*Amount*	*Balance*
CC65217	Corporate Special Purchases	$10,576.22	
CC65218	Western Electricity Royalty	59,045.18	
CC65229	Interest on Guaranteed Bank Loan	42,833.71	
CC65230	Nato-Hawk Components	28,650.66	
CC65234	Trade Accounts	566,999.82	
CC65235	Commissions	(5,753.78)	
CC65236	Royalty Account	440,613.71	
CC65237	Management Fee	91,351.62	
CC65246	Accounts Receivable Other	6,656.23	$1,240,973.37
	Industrial Tubes and Other Items Sold to SELIT (Societa Electroniche Italiano)		37,685.12
			$1,278,658.49

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