CORRESPONDENCE

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1. THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA TO THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

6 February 1987.

I wish to inform you that the Government of the United States is today filing with the Court an Application[1] in a case against the Republic of Italy. We are coming before the Court to ask it to resolve our longstanding dispute with the Government of Italy regarding the interpretation and application of the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Italy. The Government of the United States requests, pursuant to Article 26 of the Statute of the Court, that this dispute be resolved by a chamber of the Court.

I have designated the Legal Adviser of the United States Department of State, the Honorable Abraham D. Sofaer, as Agent of the United States in this case. He will be happy to meet with you and the Agent designated by the Government of Italy so that you may ascertain the views of the parties regarding the composition of the Chamber, as provided by Article 17 (2) of the Rules of the Court.

(Signed) George P. SHULTZ.

2. THE CHARGÉ D'AFFAIRES *AD INTERIM* OF THE UNITED STATES OF AMERICA TO THE NETHERLANDS TO THE DEPUTY-REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE, ACTING AS REGISTRAR

[See I, p. 3]

3. THE DEPUTY-REGISTRAR, ACTING AS REGISTRAR, TO THE AGENT OF THE UNITED STATES OF AMERICA

6 February 1987.

I have the honour to acknowledge the receipt today of a letter of this same date from Mr. John P. Heimann, Chargé d'affaires *ad interim* of the United States of America to the Kingdom of the Netherlands, whereby the United States of America has filed an Application instituting proceedings against the Republic of Italy and informing me of your appointment as Agent for the case, with the Embassy of the United States to the Netherlands as address for service.

I further acknowledge the receipt, with that letter, of the original of your Government's Application, bearing your signature certified by His Excellency Mr. George P. Shultz, the Secretary of State, together with a copy thereof, likewise certified by the Secretary of State, and signed by yourself, and 55 uncertified copies. The certified copy, together with a photocopy of Mr. Heimann's letter, was immediately communicated to the Government of the Republic of Italy.

[1] I, pp. 3-40.

I shall not fail to inform you of the reaction of the Italian Government and of such steps as the Court may subsequently take.

(Signed) Eduardo VALENCIA-OSPINA.

4. LE GREFFIER ADJOINT, FAISANT FONCTION DE GREFFIER, À L'AMBASSADEUR D'ITALIE AUX PAYS-BAS

6 février 1987.

J'ai l'honneur de vous faire parvenir ci-jointe, en vous priant de bien vouloir la faire acheminer à destination, une lettre[1] avec annexes adressée à M. le ministre des affaires étrangères d'Italie.

A toutes fins utiles, je me permets de joindre pour vos dossiers copie de cette communication.

5. LE GREFFIER ADJOINT, FAISANT FONCTION DE GREFFIER, AU MINISTRE DES AFFAIRES ÉTRANGÈRES DE L'ITALIE

6 février 1987.

J'ai l'honneur de vous faire connaître que le Gouvernement des Etats-Unis d'Amérique a déposé ce jour au Greffe de la Cour internationale de Justice une requête introduisant une instance contre le Gouvernement de la République italienne.

Je vous prie de bien vouloir trouver ci-joint, conformément aux articles 40, paragraphe 2, du Statut et 38, paragraphe 4, du Règlement de la Cour, copie certifiée conforme de ladite requête. Je vous ferai prochainement parvenir d'autres exemplaires de la requête en question, dans l'édition imprimée, établie par les soins du Greffe, qui en contiendra également la traduction en langue francaise.

Je joins également à la présente communication copie d'une lettre[2] du chargé d'affaires a.i. des Etats-Unis d'Amérique aux Pays-Bas, datée du 6 février 1987 et transmettant la requête susvisée.

Je saisis cette occasion pour attirer votre attention sur les articles 17 et 40 du Règlement de la Cour. Ce dernier article dispose, à son paragraphe 2, que dès la réception de la copie certifiée conforme de la requête ou le plus tôt possible après le défendeur fait connaître à la Cour le nom de son agent. Le paragraphe 1 du même article dispose que les agents doivent avoir au siège de la Cour un domicile élu auquel sont adressées toutes les communications relatives à l'affaire.

6. THE DEPUTY-REGISTRAR, ACTING AS REGISTRAR, TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

(Facsimile)

6 February 1987.

I have the honour to inform Your Excellency that today, 6 February 1987, the Government of the United States of America filed in the Registry of the Court

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[1] Voir ci-après n° 5.
[2] Voir ci-dessus n° 2.

an Application instituting proceedings against the Republic of Italy and to communicate to you herewith the text of that Application.

The usual printed bilingual edition is in preparation, and copies will be supplied to you as soon as possible with a view to the notification contemplated by Article 40, paragraph 3, of the Statute of the Court.

I am also to draw your attention to the fact that the Government of the United States of America, in a letter of transmittal, has requested that the case be dealt with by a chamber of the Court.

7. LE MINISTRE DES AFFAIRES ÉTRANGÈRES DE L'ITALIE AU GREFFIER ADJOINT, FAISANT FONCTION DE GREFFIER

(Télégramme)

13 février 1987.

Ayant été informé de la requête contre l'Italie introduite le 6 février dernier par le Gouvernement des Etats-Unis concernant l'affaire de la compagnie Raytheon-ELSI, j'ai l'honneur de vous communiquer ce qui suit:

1. Par décret en date d'aujourd'hui j'ai nommé le professeur Luigi Ferrari Bravo, ordinaire de droit international à l'Université de Rome, chef du service du contentieux diplomatique, des traités et des affaires législatives, comme agent du Gouvernement italien dans ladite affaire. Toute correspondance avec l'agent du Gouvernement italien devra être adressée à l'ambassade d'Italie auprès du Royaume des Pays-Bas à La Haye, Alexanderstraat 8, où l'agent élit son domicile.
2. Le Gouvernement italien accepte la proposition du Gouvernement des Etats-Unis visant à ce que la présente affaire soit jugée par une chambre dont la composition sera déterminée par la Cour en conformité avec l'article 26 du Statut.

(Signé) Giulio ANDREOTTI.

8. THE PRESIDENT TO THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA

17 February 1987.

I have the honour to acknowledge the receipt of the letter of 6 February 1987, whereby Your Excellency was so good as to inform me of the imminent filing by your Government of an Application instituting proceeding against the Republic of Italy and of its request that the case be dealt with by a chamber of the Court. The Application has since been duly filed in the Registry of the Court.

Note has been taken of the appointment of Judge Abraham D. Sofaer as Agent of the United States and of his readiness to meet me with the Agent of Italy for the purpose of implementing Article 17, paragraph 2, of the Rules of Court. We will give full consideration to the wishes of the Parties in regard to the composition of the chamber.

(Signed) NAGENDRA SINGH.

9. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA [1]

4 March 1987.

I have the honour to inform you that by an Order[2] dated 2 March 1987 the Court decided to accede to the request of the Parties to the case concerning *Elettronica Sicula S.p.A. (ELSI)* for the formation of a chamber to deal with that case. At an election by secret ballot held on that day, the Court elected President Nagendra Singh and Judges Oda, Ago, Schwebel and Sir Robert Jennings to form the Chamber. By the same Order the Court fixed 15 May 1987 as time-limit for the Memorial of the United States and 16 November 1987 as time-limit for the Counter-Memorial of Italy.

I enclose for your information a plain copy of the Order of 2 March 1987; the official sealed copy will be sent to you shortly.

(Signed) Eduardo VALENCIA-OSPINA.

10. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN [3]

24 mars 1987.

Le 6 février 1987 a été déposée au Greffe de la Cour internationale de Justice une requête par laquelle les Etats-Unis d'Amérique ont introduit contre la République italienne une instance en l'affaire de l'*Elettronica Sicula S.p.A. (ELSI)*.

Par ordonnance du 2 mars 1987 la Cour, à la demande des Parties, a constitué une chambre pour connaître de l'affaire et a fixé les délais pour le dépôt des premières pièces de la procédure écrite.

J'ai l'honneur, à toutes fins utiles, de vous transmettre ci-joint des exemplaires de la requête et de l'ordonnance en question.

11. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

15 May 1987.

Pursuant to Order of the Court dated 2 March 1987, I am enclosing the Memorial[4] of the United States of America in the case concerning *Elettronica Sicula S.p.A.*

(Signed) Abraham D. SOFAER.

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[1] A communication in the same terms was sent to the Agent of Italy.
[2] *I.C.J. Reports 1987*, p. 3.
[3] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.
[4] I, pp. 43-458.

12. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

15 May 1987.

I have the honour to acknowledge the filing today, within the time-limit fixed by the Court's Order of 2 March 1987, of the Memorial of your Government in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, referred to a Chamber of the Court, and of two volumes of Annexes.

13. THE REGISTRAR TO THE AGENT OF ITALY

15 May 1987.

I have the honour, in accordance with Article 43 (4) of the Statute of the Court, to communicate to you herewith a certified copy of the Memorial filed today by the United States of America in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, referred to a Chamber of the Court, and of the two volumes of Annexes by which it was accompanied.

The Memorial was filed within the time-limit prescribed by the Court's Order of 2 March 1987.

Additional, uncertified, copies will also be provided for your use.

14. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

15 May 1987.

Further to my letter of today's date, confirming the filing by the Government of the United States of America of its Memorial in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, I have the honour to draw your attention to the following.

The two volumes of Annexes to that Memorial contain a large number of copy documents, but these copies are not certified to be true copies, as required by Article 50, paragraph 1, of the Rules of Court. Furthermore, a number of the documents annexed are in fact translations from Italian originals, and the translations are duly certified as such in accordance with Article 51, paragraph 3, of the Rules of Court. However, that paragraph provides that "When a document annexed to a pleading is not in one of the official languages of the Court, it should be accompanied by a translation . . . ". The intention of the Rules is thus that both the original document (or a copy thereof) and the translation should be made available to the Court.

It would therefore be appreciated if, at your earliest convenience, you would let me have a certificate signed by you as Agent that the Annexes to the Memorial are true copies of the original documents (or of the original translations, as the case may be), and in addition a set of certified copies of the original documents of which translations are annexed to the Memorial.

The certified copies of the Memorial and of the volumes of Annexes have been transmitted to the Agent of Italy, in accordance with Article 43, paragraph 4, of the Statute, and I am also transmitting to him a copy of this letter.

15. THE AGENT OF NICARAGUA IN THE CASE CONCERNING *MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA* V. *UNITED STATES OF AMERICA)* TO THE REGISTRAR

29 June 1987.

In my capacity as Agent of the Republic of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, I respectfully request that my Government be furnished copies of the pleadings and documents annexed presented by the Parties in the case concerning *Elettronica Sicula S.p.A.* (United States of America *v.* Italy).

(Signed) Carlos ARGUELLO G.

16. THE PRINCIPAL LEGAL SECRETARY OF THE COURT TO THE AGENT OF ITALY [1]

1 July 1987.

I have the honour to inform Your Excellency that the Government of the Republic of Nicaragua has asked, pursuant to Article 53, paragraph 1, of the Rules of Court, to be furnished with copies of the pleadings and documents annexed in the case concerning *Elettronica Sicula S.p.A. (ELSI)* (United States of America *v.* Italy). In accordance with that Article, I should therefore be obliged if you would inform me of the views of the Government of Italy on this request.

(Signed) H. W. A. THIRLWAY.

17. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

7 July 1987.

I have the honour to refer to my letter 77975 of 15 May 1987, by which I drew to your attention the fact that the copy documents filed as Annexes to the Memorial of the United States in the *Elettronica Sicula S.p.A. (ELSI)* case were not certified to be true copies, that a number of them are translations from Italian originals, and that such originals have not been filed. I therefore requested you to let me have a certificate that the Annexes to the Memorial are true copies of the original documents (or of the original translations as the case may be), and a set of certified copies of the original documents of which translations are annexed to the Memorial.

I note with regret that I have not received these documents, or indeed a reply to my letter. You will appreciate that both the Members of the Chamber and the other Party are entitled to be assured of the correctness of copies and translations of documents relied on by the United States, and that the other Party might reasonably claim to be hampered in the preparation of its Counter-Memorial so long as these requirements of the Rules of Court are not complied with, contrary to the principle of equality of the Parties. I therefore trust you will be able to furnish the required documents at an early date.

[1] A communication in the same terms was sent to the Agent of the United States of America.

18. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

24 July 1987.

I have the honor to refer to your letters of 15 May and 7 July 1987 concerning the certification of documents in the Annexes to the United States Memorial in the *ELSI* case. We will provide these materials very shortly.

We have been in regular contact with the Italian Government in these matters and, so far as we are aware, all is proceeding to our mutual satisfaction. Regarding the original official Italian documents, I note that at our meeting with the President of the Court on 20 February 1987, the Agent of the Government of Italy kindly undertook to provide the necessary certification, since the originals are in the possession of Italian authorities. The translations which we have provided have been certified as to their accuracy; this certification appears on each such document. Please advise us if you desire this certification to be in a different form.

I appreciate your continued assistance in the conduct of this case.

19. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

12 August 1987.

I acknowledge receipt by the Registry of the International Court of Justice of eight copies of the volume entitled "Copies of Selected Annexes to the Memorial: Italian Language Documents"[1] submitted by the United States of America in the case concerning *Elettronica Sicula S.p.A. (ELSI)* (United States of America *v.* Italy) as announced in your letter of 24 July 1987, receipt of which I also wish to acknowledge hereby. One of the eight copies has been transmitted to the Agent of Italy.

The provision of copies of the Italian original texts of the documents which, translated into English, were filed in the two volumes of Annexes previously deposited with the Court partly satisfies the requirement laid down in Article 51 (3) of the Rules of Court. As you state in your letter of 24 July, certification of the accuracy of the translations was supplied when they were filed. However, in some instances the certification is not by an organ of your Government, but by what appears to be a private translation concern, and this does not suffice for the purposes of Article 51 (3). The documents whose translation into English still require official certification by the United States are the following: Annexes Nos. 31, 32, 46, 59, 60, 62 and 65. For all of these seven documents, a single official certification of the accuracy of the translation will suffice. With regard to Annex No. 76 I note that, as reproduced in the new volume of "Copies of Selected Annexes to the Memorial" (No. 40), it contains one further Italian document, untranslated, which was not included, either in English or Italian, as part of Annex 76 in the volume of Annexes previously deposited. Nevertheless, that further Italian document appears to be identical with the original Italian of Annex 33 as submitted under No. 6 in the new volume of "Copies of Selected Annexes to the Memorial", the English translation of which had already been certified as accurate.

[1] Not reproduced.

Quite apart from the certification of translations as accurate versions of the original texts, there remains the question of certifying all the documents annexed to the Memorial in such a way as to fulfil the distinct requirement contained in Article 50 (1) of the Rules of Court that "certified copies of any relevant documents adduced in support of the contentions contained in the pleading" be annexed to the original of every pleading. What is required by this provision of the Rules is a certification, which can be global, that all the annexed texts are true copies of the adduced original documents (or original translations, as the case may be). Under the Rules of Court, it is the responsibility of the party which files documents in support of a pleading to itself certify that they are true copies in the sense and not the responsibility of any other party, even if such party is in actual possession of the originals. However, as I pointed out in my letters of 15 May and 7 July, the copy documents contained in the two volumes of Annexes to the Memorial have not been certified to be true copies; such a certification was and is still required.

I hope the above sufficiently elucidates the points at issue, and look forward to receiving the missing certifications at your earliest convenience.

20. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

29 September 1987.

I have the honor to refer to your letter of 12 August 1987.

Enclosed please find a further certification[1] which confirms that the original certifications of certain translations which you have identified in the second paragraph of your letter were done by an official agent of the United States and therefore constitute certifications by the United States. I trust this is satisfactory.

In response to the third paragraph of your letter, I understand your concern to be with the Government of Italy's certifying certain official Italian documents. As I noted in my letter of 24 July, the respective Agents and President Singh discussed and, I understood, agreed to this at our 20 February meeting. We had considered this to be acceptable under the Rules of Court because Article 50 unlike, for example, Article 51 (2), does not explicitly require certification "by the party submitting it". I also note that Article 101 provides for modification of certain of the rules by agreement, including Article 50. However, I would appreciate your further views on this question. We will of course be happy to provide a further certification if required.

21. THE AGENT OF THE UNITED STATES OF AMERICA TO THE PRINCIPAL LEGAL SECRETARY

12 October 1987.

This is in response to your letter of July 1, 1987, pursuant to Article 53 (1) of the Rules of the Court, seeking the views of the United States on a request by the Government of the Republic of Nicaragua for copies of the pleadings and

[1] Not reproduced.

documents annexed in the case concerning *Elettronica Sicula S.p.A. (ELSI)* (United States of America *v.* Italy).

In the view of the United States, it would not be desirable for Nicaragua to be provided at this time with the pleadings in this case. The general practice of confidentiality of the proceedings, as reflected in Article 53, serves the important function of avoiding premature argument of the case in public debate and other unrelated contexts, thus preserving the integrity of the Court's own deliberations. Such practice should be followed unless special circumstances suggest departing from it. In the present case, there seems to be no special interest of Nicaragua in the dispute between the United States and Italy, nor would the release of the pleadings to Nicaragua assist in the just and expeditious resolution of the case. We are advised that the Government of Italy concurs in the position of the United States in this matter.

Therefore, the United States believes that, in the interest of the most effective administration of international justice, the pleadings and documentation should be kept confidential among the Parties and the Court in this case and should not be released in response to the request from the Government of Nicaragua.

22. THE AGENT OF ITALY TO THE PRINCIPAL LEGAL SECRETARY

12 October 1987.

This is in response to your letter of July 1, 1987 pursuant to Article 53 (1) of the Rules of the Court, seeking the views of Italy on a request by the Government of the Republic of Nicaragua for copies of the pleadings and documents annexed in the case concerning *Elettronica Sicula S.p.A. (ELSI)* (United States of America *v.* Italy).

In the view of the Government of Italy, it would not be desirable for Nicaragua to be provided at this time with the pleadings in this case. The general practice of confidentiality of proceedings, as reflected in Article 53, serves the important function of avoiding premature argument of the case in public debate and other unrelated contexts, thus preserving the integrity of the Court's own deliberations. Such practice should be followed unless special circumstances suggest departing therefrom.

In the present proceedings, there seems to be no special interest of Nicaragua in the dispute between the United States and Italy nor would the release of the pleadings to Nicaragua assist in the just and expeditious resolution of this case.

Therefore, the Government of Italy believes that, in the interest of the most effective administration of international justice, the pleadings and documentation should be kept confidential among the Parties and the Court in this case and should not be released in response to the request from the Government of Nicaragua.

(Signed) Luigi FERRARI BRAVO.

23. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

26 October 1987.

I have the honour to refer to your letter of 29 September 1987, received in the Registry on 12 October 1987, and to acknowledge receipt with thanks of your

certification of the English translations of documents in Italian annexed to the Memorial of the United States in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, a copy of which has been transmitted to the other Party

So far as concerns the question of the pending certification of the Annexes to the Memorial under Article 50, paragraph 1, of the Rules of Court, the solution would be for you to let me have a further certificate, as you were good enough to offer to do in your letter under reply. This could be very brief, simply to the effect that the various photocopies of documents filed as Annexes to the United States Memorial are certified by you to be true copies of the originals.

The certification required by Article 50, paragraph 1, of the Rules might be regarded as being something of a formality, since it is to be presumed that a State which supplies copy documents as annexes to a pleading will not do so without carefully checking the accuracy of copies. Nevertheless, the requirement does exist in the Rules, and I have to point out that more than five months after the filing by the United States of its Memorial and shortly before the date fixed for the filing by Italy of its Counter-Memorial, none of the copies (whether or not from Italian originals) of documents annexed to its Memorial by the United States have yet been certified as being true copies despite the clear provision of Article 50 (1) of the Rules. It is also a fact that many of the Annexes to the United States Memorial reproduce documents the originals of which are clearly in the possession of the United States and not of Italy: suffice it to mention, among others, Annexes 86, 87, 91, 92, 93 and 94.

In concluding, may I draw your attention to the fact that the Agent of Italy, to whom I transmitted a copy of your letter of 24 July 1987, has not given me any formal indication of his understanding of the outcome of the meeting of 20 February 1987 on this point, i.e., whether it was or is his intention to supply to you certified copies of such documents as are found to be in the possession of the Italian authorities.

24. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA [1]

26 October 1987.

I have the honour to refer to the Order made by the Court on 2 March 1987 in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, whereby *(inter alia)* it fixed 16 November 1987 as the time-limit for the filing of the Counter-Memorial of the Republic of Italy, and reserved the subsequent procedure for further decision. Once the Counter-Memorial has been filed, it will thus be necessary for the Chamber to consider the further procedure, and it will be the duty of the President of the Chamber to summon the Agents of the Parties for a meeting, in order to ascertain their views, pursuant to Article 31 of the Rules of Court.

In order to avoid delays, the President considers that the simplest course would be to hold such a meeting immediately after the filing of the Counter-Memorial. On the assumption that this will be effected on Monday, 16 November 1987, may I therefore ask you to hold yourself in readiness to attend such a meeting in the afternoon of that day.

[1] A communication in the same terms was sent to the Agent of Italy.

25. THE REGISTRAR TO THE AGENT OF ITALY[1]

27 October 1987.

I have the honour to inform Your Excellency that the Chamber formed by the Court to deal with the case concerning *Elettronica Sicula S.p.A. (ELSI)* will hold an inaugural public sitting on Tuesday 17 November 1987 at 12 noon in the Great Hall of Justice of the Peace Palace, The Hague.

26. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

9 November 1987.

Thank you for your letter of October 26, 1987 regarding the desire of the President to meet with the Agents of the Parties in the case concerning *Elettronica Sicula S.p.A. (ELSI)*.

I regret that I will be unable to attend the meeting on November 16. However, Timothy Ramish, currently our Agent at the Iran-U.S. Claims Tribunal, has been designated as our Deputy Agent in this case. Mr. Ramish is prepared to meet with the President on this case on the afternoon of November 16, as well as to attend the inaugural public sitting of the Chamber on November 17.

I plan to meet with the Italian Agent, Professor Ferrari Bravo, during the week preceding the November 16 meeting to discuss outstanding issues and the scheduling of further proceedings. Mr. Ramish will be prepared to advise you on how we propose to proceed on these matters.

27. THE AGENT OF ITALY TO THE REGISTRAR

16 November 1987.

I have the honour to inform you that in the case concerning *Elettronica Sicula S.p.A. (ELSI)* it is the intention of my Government to raise in its Counter-Memorial an objection to the admissibility of the Application filed by the United States of America on the grounds that local remedies have not been exhausted.

However, the Italian Government, in order not to hinder the rapid administration of international justice, would favour the conclusion of an agreement between the Parties that this objection should be heard and determined within the framework of the Merits.

It is our understanding that the Applicant is in agreement with this point of view.

28. THE AGENT OF ITALY TO THE REGISTRAR

16 November 1987.

I have the honour, in accordance with Article 43, paragraphs 2 and 4, of the Statute of the Court, to communicate to you herewith:

[1] A communication in the same terms was sent to the Agent of the United States of America.

- the original Counter-Memorial[1] submitted by Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)* referred to a Chamber of the Court and the four volumes of Documents by which it is accompanied;
- a certified copy of the above-mentioned Counter-Memorial and of the said volumes of Documents;
- one hundred and twenty-five uncertified copies of the above-mentioned production.

29. THE REGISTRAR TO THE AGENT OF ITALY

16 November 1987.

I have the honour to acknowledge the receipt of the original and one certified copy of the Counter-Memorial of the Republic of Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)* which was duly filed in the Registry of the Court today.

The certified copy was immediately transmitted to the Deputy-Agent of the United States of America.

I further acknowledge the receipt of 125 unsigned copies of the Counter-Memorial.

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

16 November 1987.

I have the honour to transmit herewith a certified copy of the Counter-Memorial of the Republic of Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, together with the Annexes thereto.

The Counter-Memorial was filed today in the Registry of the Court by the Agent of Italy.

Further, unsigned copies of the Counter-Memorial are also being provided to the Government of the United States of America.

31. THE AGENT OF ITALY TO THE REGISTRAR

16 November 1987.

I certify that all the documents contained in the four volumes of Annexes to the Counter-Memorial filed by the Government of Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, as filed today by my Government, constitute true copies of documents adduced in support of the contentions contained in the pleading.

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[1] **II**, pp. 3-360.

32. THE AGENT OF ITALY TO THE REGISTRAR

16 November 1987.

I hereby confirm that the photocopies, supplied by the United States of America, of the documents listed below, translations of which were filed as Annexes to the Memorial of the United States, constitute true copies of the originals in the possession of the Government of Italy.

These documents, in the numbering used in Volumes I and II of the Annexes to the Memorial of the United States, are Nos. 3, 4, 33, 34, 35, 41, 44, 46, 64, 76, 77, 78, 80, 81, 82, 85, 89, 90, 95.

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

16 November 1987.

I acknowledge receipt of a copy of the Counter-Memorial of the Government of Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, together with four volumes of Annexes thereto.

I note that an objection to the admissibility of the Application is contained in pages 2-3 of the Counter-Memorial[1] and is also presented as the first submission of the Italian Government on page 123[1].

I am in a position to inform the Chamber dealing with the case that my Government is willing for this objection to be heard and determined within the framework of the merits of the case, as has been proposed by the Italian Government.

(Signed) Timothy E. RAMISH.

34. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

17 November 1987.

I have the honour to transmit to you herewith a copy of a letter addressed to me yesterday in which the Agent of Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)* advises me of his Government's intention to raise in its Counter-Memorial an objection to the admissibility of the Application.

You are apprised of the contents of the Counter-Memorial, of which I transmitted to you a certified copy immediately upon its filing.

35. THE REGISTRAR TO THE AGENT OF ITALY

18 November 1987.

I have the honour to acknowledge receipt of two letters dated 16 November 1987 whereby you have, respectively, certified that all the documents in the

[1] **II**, p. 3 and p. 50, respectively

Annexes to the Counter-Memorial in the case concerning *Elettronica Sicula S.p.A. (ELSI)* constitute true copies of documents adduced in support of the contentions contained in the pleading and confirmed that the photocopies supplied by the Applicant of certain enumerated documents annexed to the Memorial constitute true copies of originals in the possession of your Government.

A copy of each of these letters has been transmitted for information to the Agent of the United States.

36. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA [1]

18 November 1987.

I have the honour to inform you that by an Order [2] dated 17 November 1987, the official sealed copy of which is enclosed, the Chamber formed to deal with the case concerning *Elettronica Sicula S.p.A. (ELSI)* decided to authorize the filing of a Reply by the United States of America and a Rejoinder by the Republic of Italy in this case, and fixed time-limits of 18 March 1988 and 18 July 1988 respectively for these pleadings.

37. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES DES PAYS-BAS

19 novembre 1987.

Me référant au paragraphe V des principes généraux de l'accord du 26 juin 1946 entre le Gouvernement des Pays-Bas et la Cour internationale de Justice, j'ai l'honneur de porter à votre connaissance qu'en l'affaire de l'*Elettronica Sicula S.p.A. (ELSI)* le Gouvernement des Etats-Unis a désigné M. Timothy Ramish comme agent adjoint.

38. THE REGISTRAR TO THE AGENT OF ITALY [3]

26 November 1987.

With reference to Your Excellency's letter of 12 October 1987 giving the views of the Government of Italy on the request by the Government of Nicaragua to be furnished with copies of the pleadings and annexed documents in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, pursuant to Article 53, paragraph 1, of the Rules of Court, I have the honour to inform you that the Chamber, having considered the views expressed by the Parties, has decided not to make available the pleadings and annexed documents to the Government of Nicaragua.

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[1] A communication in the same terms was sent to the Agent of Italy.

[2] *I.C.J. Reports 1987*, p. 185.

[3] A communication in the same terms was sent to the Agent of the United States of America.

39. THE REGISTRAR TO THE AGENT OF NICARAGUA IN THE CASE CONCERNING *MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA v. UNITED STATES OF AMERICA)*

1 December 1987.

I have the honour to refer to Your Excellency's letter of 29 June 1987 whereby, in your capacity as Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, you requested that your Government be provided with copies of the pleadings and annexed documents presented in the case concerning *Elettronica Sicula S.p.A. (ELSI)*.

In accordance with Article 53, paragraph 1, of the Rules of Court, the views of the Parties to the latter case were requested; both Parties stated that it was their belief that, in the interest of the most effective administration of international justice, the pleadings and documentation should be kept confidential among the Parties and the Court in this case. Taking these views into account, the Chamber has, after careful consideration, decided not to accede to the request of the Government of Nicaragua for copies of the pleadings and annexed documents.

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

13 January 1988.

Pursuant to your request, I certify that all the documents contained in the two volumes of Annexes to the Memorial filed by the Government of the United States in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, as filed May 15, 1987 by my Government, constitute true copies of documents adduced in support of the contentions contained in the pleading.

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

13 January 1988.

In the case concerning *Elettronica Sicula S.p.A. (ELSI)*, the Government of Italy asserts on page 20[1] of its Counter-Memorial that one of the exhibits to the Memorial of the United States Government "has been altered". As this letter demonstrates, Italy's accusation is unfounded. Because of the gravity of the accusation, the United States would like to dispose of the issue prior to the filing of its Reply.

Exhibit B to Annex 15 of the United States Memorial consists of typed minutes of a meeting held on February 20, 1968, between several Raytheon officials and the President of the Sicilian Regional Government. These typed minutes were prepared the day following the meeting, utilizing the handwritten notes of one of the Raytheon officials present at the meeting. The typed minutes summarize, rather than literally transcribe, the handwritten notes in a limited number of instances. The United States has certified that Annex 15, Exhibit B is a true copy

[1] II, p. 9.

of the document adduced in support of the contentions contained in its Memorial, and hereby confirms that certification.

When Raytheon assisted in the preparation of its original claim presented to the Government of Italy in 1974, the Raytheon personnel working on the claim, being unaware of the previously typed minutes of the meeting, had the handwritten notes of the meeting retyped. The retyped version is attached as Exhibit II-15 to the original claim. These minutes contain substantial typographical errors due to the inability of the typist to interpret the handwriting and abbreviations of the original notes.

Thus, no document has been altered. Two typed summaries of the same meeting exist. That the summary typed in 1968 was not submitted in 1974 was merely an oversight in the preparation of the original claim. For the Court's reference, a copy of the original handwritten notes[1] is attached to this letter. The United States will respond to the merits of Italy's argument with respect to this meeting in its Reply.

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

13 January 1988.

I have the honour to acknowledge receipt of your letter of 13 January 1988 concerning a statement made on page 20[2] of the Counter-Memorial of Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)* and Exhibit B to Annex 15 to the United States Memorial, and enclosing a copy of four pages of handwritten notes[1] of a meeting held on 20 February 1968. A copy of your letter and of its enclosure has been transmitted to the Agent of Italy.

Due note has been taken of the fact that the United States will respond to the merits of Italy's argument with respect to the meeting of 20 February 1968 in its Reply. Should the exact wording, or the authenticity, of the handwritten notes of the meeting be likely to be in issue, you may wish at that stage to deposit the original notes in the Registry for consultation, since the photocopy enclosed with your letter is not easily legible.

(Signed) Bernard NOBLE.

43. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

17 March 1988.

Pursuant to the Order of the Court dated 17 November 1987, I am enclosing the Reply[3] of the United States of America in the case concerning *Elettronica Sicula S.p.A.*

[1] Not reproduced.
[2] II, p. 9.
[3] II, pp. 363-414.

I certify that all the documents annexed to this Reply constitute true copies of documents adduced in support of the contentions contained in the pleading.

44. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

18 March 1988.

I have the honour to acknowledge receipt of your letter of 17 March 1988 enclosing the Reply of the United States of America in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, and certifying that the documents annexed thereto are true copies of the documents adduced in support of the contentions contained in the pleading. I have the honour further to confirm that the Reply has been duly filed within the time-limit fixed by the Order made on 17 November 1987 by the Chamber formed to deal with this case.

45. THE REGISTRAR TO THE AGENT OF ITALY

18 March 1988.

I have the honour to transmit to Your Excellency herewith a certified copy of the Reply filed by the United States of America in the case concerning *Elettronica Sicula S.p.A. (ELSI)*. This pleading was filed within the time-limit prescribed by the Order made on 17 November 1987 by the Chamber formed to deal with this case.

Additional, uncertified, copies will also be provided for your use.

46. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA [1]

14 June 1988.

I have the honour to inform you that, pursuant to Article 18, paragraph 3, and Article 54, paragraphs 1 and 3, of the Rules of Court, the President of the Chamber formed to deal with the case concerning *Elettronica Sicula S.p.A. (ELSI)* has fixed Monday, 13 February 1989, as the date for the opening of the oral proceedings in that case.

47. THE DEPUTY-REGISTRAR TO THE AGENT OF ITALY

18 July 1988.

I have the honour to acknowledge receipt of the Rejoinder [2] of the Government of Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, and the volume

[1] A communication in the same terms was sent to the Agent of Italy.
[2] **II**, pp. 417-509.

of documents annexed thereto, filed in the Registry today, together with the certified copy for communication to the other Party in accordance with Article 52, paragraph 1, of the Rules of Court, and 125 further plain copies. The Rejoinder has thus been filed within the time-limit fixed therefor by the Order made on 17 November 1987 by the Chamber formed to deal with the case.

The certified copy of the Rejoinder and Annexes is today being forwarded to the Agent of the United States of America.

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

18 July 1988.

I have the honour to transmit to you herewith the certified copy, required by Article 52 of the Rules of Court, of the Rejoinder of the Government of Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, and of the volume of documents annexed to that pleading. The Rejoinder and Annexes were filed in the Registry today, within the time-limit fixed therefor by the Order made on 17 November 1987 by the Chamber formed to deal with the case.

Further plain copies of the Rejoinder and Annexes are being sent to you under separate cover.

49. THE AGENT OF ITALY TO THE REGISTRAR

18 July 1988.

I the undersigned, Prof. Luigi Ferrari Bravo, Agent of the Italian Government in the case *Elettronica Sicula S.p.A. (ELSI)* (United States *v.* Italy) do hereby appoint as Deputy-Agent for Italy in the above-mentioned case, Mr. Ruggero Vozzi, First Counsellor of the Italian Embassy in The Hague.

50. LE GREFFIER À L'AGENT DE L'ITALIE[1]

(*Télex*)

7 décembre 1988.

Me référant notamment aux articles 18, paragraphe 3, et 31 du Règlement de la Cour, j'ai l'honneur de vous faire connaître que le president de la Chambre saisie de l'affaire de l'*Elettronica Sicula S.p.A. (ELSI)* recevra les agents des parties le mercredi 14 decembre 1988 à 17 heures aux fins de se renseigner auprès d'eux sur des questions de procédure en l'affaire et, en particulier, sur l'organisation de la procédure orale qui s'ouvrira le lundi 13 février 1989.

[1] La même communication a été adressée à l'agent des Etats-Unis d'Amérique.

51. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA[1]

21 December 1988.

I have the honour to confirm the information already conveyed to the Deputy-Agent by telephone, that the Court yesterday elected its President, Judge Ruda, to fill the vacancy in the Chamber formed to deal with the case concerning *Elettronica Sicula S.p.A. (ELSI)*, resulting from the death of Judge Nagendra Singh. In accordance with Article 18, paragraph 2, of the Rules of Court, President Ruda automatically becomes President of the Chamber. The sealed copy of the Order[2] made by the Court recording the election is enclosed, together with three plain copies thereof.

I have the honour further to inform you that at a meeting of the Chamber held today, it was decided that the date for the opening of the oral proceedings should be Monday, 13 February 1989, at 10 a.m., as already provisionally fixed. For reasons already explained to you, the hearings will have to be concluded not later than Friday, 3 March 1989.

52. THE AGENT OF ITALY TO THE REGISTRAR

19 January 1989.

In the course of preparing for the oral arguments in the case concerning *Elettronica Sicula S.p.A. (ELSI)* (United States *v.* Italy), two additional major discrepancies in the accuracy of critically important evidence introduced by the United States in this case have come to the attention of Italy. Inasmuch as these proceedings have been brought without the agreement of Italy, the United States being the Applicant in proceedings instituted by application and not merely one party to a special agreement, it is highly appropriate for the Respondent to question these discrepancies in the evidence advanced by Applicant as promptly as possible after they have come to its attention, and to draw the attention of the Registrar and the Chamber to them, in order that the matter be resolved or clarified, if possible, prior to the commencement of oral proceedings in the case.

Background

It will be convenient and perhaps helpful here to review the relevant background facts and the history of the earlier dispute concerning a portion of this evidence.

At page 20[3] of the Counter-Memorial of Italy the statement was made that the text of the minutes of the 20 February 1968 meeting among President Carollo and Messrs. Adams, Clare, Hillyer and Profumo, transcribed in typescript and submitted as Exhibit B to Annex 15 of the United States Memorial, had been "altered" from the original text and that significant words that appeared in the original text (as well as in another typed transcript of those same minutes submitted with the original claim in 1974) had been replaced by "insignificant words". *(The words that were omitted, and the words that replaced them, are set*

[1] A similar communication was sent to the Agent of Italy.
[2] *I.C.J. Reports 1988*, p. 158.
[3] II, p. 9.

forth in section (A) below; the substance of the replacement will be considered in that section, attention being given only to the development and background of the controversy.)

On 13 January 1988 the Deputy-Agent of the United States responded by a letter stating that "Italy's accusation is unfounded", adding that "(b)ecause of the gravity of the accusation, the United States would like to dispose of the issue prior to the filing of its Reply". The letter pointed out that Exhibit B to Annex 15 of the United States Memorial consisted of typed minutes of the 20 February 1968 meeting that were "prepared (on) the day following the meeting, utilizing the handwritten notes of one of the Raytheon officials present at the meeting". The letter asserted that "The typed minutes *summarize, rather than literally transcribe*, the handwritten notes in a limited number of instances" (emphasis added).

The letter also explained that a different "retyped version" of the original handwritten notes of the meeting had been prepared in 1974, without knowledge that there already existed a typewritten transcription of the handwritten notes made in 1968; the later version had been prepared for, and attached as, Exhibit II-15 to the original claim. The letter from the Deputy-Agent concluded that:

> "*Thus, no document has been altered. Two typed summaries of the same meeting exist.* That the summary typed in 1968 was not submitted in 1974 was merely an oversight in the preparation of the original claim. For the Court's reference, a copy of the original handwritten notes is attached to this letter." (Emphasis added.)

The letter from the Deputy-Agent then stated flatly that "The United States will respond to the merits of Italy's argument with respect to this meeting in its Reply." Yet the only argumentation in the Reply on this subject is a parenthetical statement in a footnote (note 15, page 13 [1]) of the Reply that "(the alleged discrepancies in the minutes to *(sic)* this meeting are refuted in the letter from Timothy E. Ramish, Deputy-Agent of the United States, to the Registrar of the Court, dated 13 Jan. 1988)".

On its part, Italy in its Rejoinder noted in footnote 56, on pages 59-60 [2], that

> "The Italian Government prefers to refrain from making any comment on this explanation (given in the letter of 13 January 1988), but wishes to point out that the photocopy of the manuscript version (of the minutes) fully confirms the accuracy of the quoted passage. The president of ELSI really drew his 'precise time chart' over a month before the requisition decree. If this fact was suppressed in a later version of the minutes the only conceivable reason is that whoever altered the text of the minutes . . . thought that it could be embarrassing for Raytheon."

New Developments

This is where matters stood as at the close of the written pleadings in this case. During preparation for oral argument, however, members of the Italian team have had occasion to review further the two typewritten versions of the minutes of the meeting of 20 February 1968 against the handwritten notes upon which such typewritten versions were ostensibly based and which were supplied with

[1] **II**, p. 367, fn. 1.
[2] **II**, p. 436, fn. 1.

the Deputy-Agent's letter of 13 January 1988. In addition, further consideration has been given to the substance of the letter of 13 January in the context of such further review.

Two more deletions or discrepancies have now been found in the 1968 typescript submitted as Exhibit B to Annex 15 of the United States Memorial. One of these also relates to the 1974 typescript.

The letter of the Deputy-Agent contained a statement that "the United States has certified that Annex 15, Exhibit B is a true copy of the document adduced in support of the contentions contained in its Memorial, and hereby confirms that certification". In the Affidavit of John D. Clare (Annex 15 to the Memorial of the United States) at paragraph 27, page 8[1], the statement is also made that:

> "minutes of two of our meetings with the President of the Sicilian Region are appended to this affidavit as exhibits A and B. *I have reviewed these minutes and they are an accurate statement of the events which transpired at the meetings*" (emphasis added).

In the light of this certification and representation, an explanation or clarification as to the veracity and correctness of the 1968 version submitted as Exhibit B to Annex 15 of the United States Memorial is appropriate and necessary before the commencement of oral proceedings in this case, particularly because the issue of accuracy and completeness relates to a document and statements of peculiar significance to the claim of the United States and because the attempt to explain the one discrepancy heretofore noted in the letter from the Deputy-Agent dated 13 January 1988 is obviously incomplete on its face, as will be shown below.

Specifically, we have noted the following from a careful study of the handwritten notes (including verification in the Registry of words that were difficult to read).

The Original Deletion

(A) The first deletion of material passages from the handwritten notes had been the point originally noted in the Italian Counter-Memorial at page 20[2]. As you will recall, the deletion was present in the version submitted as Exhibit B to Annex 15 to the United States Memorial (the "1968 typescript"), but was *not* present in the version submitted with the claim in 1974 ("the 1974 typescript"). It was the following language that was wholly omitted:

> "CFA *stressed that ELSI cannot survive without immediate cash help, which Raytheon cannot provide.* JDC *drew a precise time chart showing:*
>
> *(a) Feb. 23 — Board Meeting*
> *(b) Feb. 26 to 29 — inevitable bank crisis*
> *(c) Mar. 8 — we run out of money and shut the plant.*" (Emphasis added.)

This passage was deleted in its entirety from the version submitted with the United States Memorial and replaced without other signification by a sentence reading, "*Both C.F.A. and J.D.C. stressed again the urgency of the situation.*" (Emphasis added.) In an attempt to explain this original discrepancy, the letter of the Deputy-Agent of 13 January 1988 stated that "the typed minutes *summarize*, rather than *literally transcribe*, the handwritten notes in a limited number of instances". (Emphasis added.)

[1] I, p. 167.
[2] II, p. 9.

However the language that was inserted can in no way properly be characterized as a "summarization" of the language that was deleted. The Italian Government therefore finds the explanation by the Deputy-Agent of the United States to be inadequate and incomplete, and requests that further clarification be given concerning this significant emendation of a document supporting an affidavit submitted as evidence. This is particularly appropriate because of the critical nature of these discrepancies in respect of the evidence now before the Chamber and their importance to the case advanced by the United States.

The Two Additional Deletions

The two additional points that have not been noted before also require a straightforward explanation. They have not been previously noted in the written pleadings nor discussed in the letter from the Deputy-Agent dated 13 January 1988.

They are as follows:

(B) On the third page of the handwritten minutes (XIX, 7), and on page 3 of the 1974 typescript [1], before the five questions posed by Mr. Clare, there is also reported the statement by Mr. Adams that:

> "While we can continue to provide ELSI with management and technology, *we cannot provide money, without which ELSI will shortly disappear.*" (Emphasis added.)

In the 1968 typescript submitted as Exhibit B to Annex 15 of the United States Memorial, the words italicized above are also completely omitted and the relevant sentence merely reads:

> "While we can continue to provide ELSI with the management and technology, *he reaffirmed the Raytheon intention of not investing further money in Raytheon ELSI.*" (Emphasis added.)

This is obviously a "summarization" of the original expression, "we cannot provide money", but surely it cannot be a summarization of the statement of opinion that "ELSI will shortly disappear" unless such money is provided. Moreover, the omission of this language has not been flagged by ellipsis or otherwise.

(C) Another material passage from the original handwritten minutes is also missing from the 1968 typescript submitted as Exhibit B to Annex 15 of the United States Memorial. This has also not been previously noted in the written pleadings, nor discussed in the letter from the Deputy-Agent dated 13 January 1988. Moreover, this omission was made in both typescript versions: the 1974 version as well as the 1968 version. The omission has not been flagged by an ellipsis or otherwise.

The language is contained in a parenthetical sentence that follows immediately after the third element of Mr. Clare's timetable "*(c) Mar. 8 — we run out of money and shut the plant*". It can be found toward the bottom of page 3 (XIX, 6) of the handwritten minutes[1] and reads: "(This date of Mar. 8 was stressed repeatedly as the absolute limit for a shutdown due to total financial crisis.)." (Emphasis added.)

[1] See **II**, p. 497, Doc. 19.

Conclusion

Both typewritten versions — and in particular the 1968 typescript submitted as Exhibit B to Annex 15 of the United States Memorial — contained omissions of material facts that were set forth clearly in the handwritten minutes of the meeting. Neither version can remotely be characterized as a "summary", since the balance of each version is in fact a word for word, slavish, transcription, of the handwritten minutes. The omissions in each document were neither summarized nor flagged by asterisk or ellipsis.

The explanation offered in the letter of the United States Deputy-Agent is therefore inadequate. The key issue is not whether "the summary typed in 1968 was not submitted in 1974 was . . . an oversight", nor is it whether the 1968 version is preferable to or more accurate than the 1974 version; nor is it whether there exist two typewritten transcripts rather than one: the issue is why the language omitted from either or both of the typed versions of 1968 and 1974 fails to reflect in significant and highly material respects the actual content and tenor of the meeting of 20 February 1968, and in particular the discussion that took place amongst the most senior officers of Raytheon responsible for the condition and future of ELSI.

It is doubtless the case that the answer to this question lies with Raytheon, but it is considered essential to the orderly conduct of oral presentation of Respondent's case that the United States give the Chamber a fully satisfying explanation as to why the documents have been submitted by or for Raytheon that contain significant and unmarked deletions of highly material information without providing any indication that such deletion has been made, or any summarization or paraphrase of the material that was deleted.

In the absence of any such explanation, Respondent will have no choice other than to disregard the probative value of any evidence produced in connection with Mr. Clare's affidavit and the exhibits thereto (Annex 15 and Exhibits to the United States Memorial), and construe such a lack of explanation as an admission by the United States that the state of mind of those participating in the 20 February 1968 meeting, and other facts not accurately reflected in the typescript version of those minutes submitted with Mr. Clare's affidavit, were correctly reflected in the handwritten minutes supplied with the letter of the Deputy-Agent on 13 January 1988.

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

20 January 1989.

Pursuant to Article 56 of the Rules of the Court, the United States submits the attached certified copies of four documents so that they may be referred to at the hearing in the case concerning *Elettronica Sicula S.p.A. (ELSI)*. Since two of these documents are not in one of the official languages of the Court, they are accompanied by translations into English certified as accurate by the United States. Nineteen copies of each document, as well as nineteen copies of the two translations, are enclosed.

Enclosures:

1. Certification of the documents[1].
2. Italian aide-mémoire No. 141/696 of June 13, 1978[2] (certified translation attached).
3. US diplomatic note No. 194 of April 18, 1979.
4. US letter of December 6, 1979.
5. Government of Italy letter of April 18, 1980[2] (certified translation attached).

(Translation)

MINISTRY OF FOREIGN AFFAIRS
No. 141/696

Rome.
June 13, 1978.

AIDE-MÉMOIRE

The purpose of the claim filed by the Embassy of the United States of America in connection with the case of the Italian joint-stock company Raytheon-Elsi is to protect, through diplomatic action, the interests of the American shareholders of the Company and the claim is based on the assertion that the damages they have suffered are ascribable to the behaviour of Italian governmental bodies.

1. The facts may be assumed as they have been expounded by claimant. Since it was founded in 1956, Raytheon-Elsi attained a progressive development until 1967, with continuous increases of capital always furnished by American shareholders. In 1967, a plan was launched for the reorganization of activities and this plan provided, *inter alia*, for a substantial reduction of labor. For various reasons, the aforesaid reorganization could not be implemented and, around the first months of 1968, the impossibility of stopping the continuous impairment of the Company's financial situation was ascertained; the board of directors therefore decided (on March 16, 1968) that "there was no other alternative than to discontinue the Company's activity". (*See documents II-18 and II-19 attached to the* claim.)

As a result of the Company's decision to close the factory, the Mayor of Palermo, by decision of April 1, 1968, ordered the seizure of the factory and related equipment belonging to Raytheon-Elsi. Subsequently, on April 26, 1968, the board of directors filed a petition in bankruptcy (enclosure III-16 to claim), and the Tribunal of Palermo adjudged Raytheon-Elsi bankrupt by judgment of May 16, 1968 (enclosure III-17). The order of seizure issued by the Mayor was recognized as being unlawful by the competent Italian Authorities.

In this connection one should only add that the competent authorities having jurisdiction in the bankruptcy instituted proceedings against the Ministry of Interior in order to ascertain the liabilities deriving from the aforesaid unlawful act. By decision of the Court of Appeal of Palermo, confirmed by the Court of Cassation, although rejecting

[1] Not reproduced.
[2] Italian text not reproduced.

> "the relation of cause and effect between the order of seizure and the Company's bankruptcy, since it has been established with certainty that the state of insolvency can be traced back with certainty to a date preceding that of the seizure",

the argument of the trustee in bankruptcy, according to which the unavailability of the factory resulting from the seizure had caused damage to the administration of the estate in bankruptcy, was accepted, and the damages were liquidated in the amount of Lire 114 million.

2. This having been stated, it should be pointed out that the US claim, even though dwelling on various ways in which both the Italian Government and the Regional Government behaved, which, in the United States' opinion, lay open much criticism, uses as a legal basis of the claim for compensation the order of seizure of equipment issued on April 1, 1968, by the Mayor of Palermo. In the claim filed by the American Embassy, the fact that the American companies, Raytheon and Machlett, are "shareholders of the Italian Elsi Company" is invoked (page 30[1]*, par. B) in support of the diplomatic action taken against the Italian Government. According to the exact words used in the United States' note (page 53[2]), the claim is filed "in their interest owing to their shareholdings in Elsi's capital".

Lastly, from the United States' side it is assumed that the damage suffered by the aforesaid shareholders allegedly derived from the fact that it had not been possible, owing to the seizure and consequent bankruptcy, to proceed with an orderly liquidation of the Company's assets that had already been scheduled, but could not be carried out by the Company's administrative bodies.

3. The claim for damages seems to be groundless inasmuch as the records show that the order of seizure, even though unlawful, did not cause damage to the shareholders. At the time of the seizure, they had already completely lost the Company's capital stock, and actually, the Company's indebtedness was by far in excess of its total assets. This situation, according to Italy's bankruptcy law, not only brought about the obligation to declare the Company's bankruptcy, but entailed as a consequence forfeiture of the directors' capacity to continue to exercise managerial functions and their replacement by the trustee in bankruptcy, in the first place for the protection of the creditors.

The trustee in bankruptcy is required to distribute among them[3], in accordance with the principle of *par condicio*, that is, in an amount proportionate to the respective credit claims, the assets remaining as a result of liquidation. When the indebtedness exceeds the proceeds deriving from the liquidation of the Company's property to the extent that it does in this case, shareholders are not entitled to receive anything; nor, obviously, can the damage affect them[3], as such, to an extent greater than the loss of the Company's capital stock.

4. The situation does not change if one considers the claim put forth by the American Companies, i.e., owners of shares in Raytheon-Elsi, from the point of view of the damage they allegedly suffered as a result of the seizure, as creditors of the Italian Company in connection with direct financing or as guarantors. Without dwelling too long on the fact that the claim would thus be groundless since it is based on the protection of shareholders as such, it should be noted that a shareholder, in his capacity as financing party or guarantor of financing, cannot demand, in a bankruptcy proceeding, a greater protection than that to

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[1] II, p. 251.
[2] II, p. 264.
[3] Footnote added in translation: "them" in the first case refers to creditors; in the second case, to shareholders.

which all the other creditors of the Company are entitled. As it has already been said, the damage suffered by the creditors of the Company (not by the shareholders) owing to the unavailability of the factory [1] has already been liquidated by the judicial authorities in favor of the trustee in bankruptcy, i.e., in trust for all the creditors, so that no special claim can be asserted in this connection by the foreign creditor. He, in accordance with domestic law, to which no exception is made under international law, is subject to the bankruptcy rule of "participation of claimants" in the sense that all creditors must participate, within the limits permitted by the bankruptcy assets, in the settlement of their respective claims. In other words, each one of them [2] must bear a loss commensurate with the assets remaining as a result of the bankruptcy liquidation *(par condicio creditorum)*.

5. In conclusion, the claim is juridically groundless, both from the international and domestic point of view. Nor is there a possibility of reaching an agreement which, apart from juridical reasons, would take into account the financial and political aspects set forth in the claim, inasmuch as any agreement for an amicable settlement would not be valid unless it is ratified by an act of Parliament in accordance with Art. 80 of the Constitution. And it is unlikely that Parliament will approve any agreement which, being an exception to the *par condicio creditorum* rule, would run contrary to the constitutional principle (Art. 3) of equal treatment, to the prejudice of Italian creditors who would continue, instead, to be subject to the losses involved in the bankruptcy.

No. 194

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 refer to the Ministry's aide-mémoire of June, 13, 1978, in reply to the espoused claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Inc.

Although the Ministry's aide-mémoire assumes agreement with the facts in the espoused claim, the Government of the United States believes that it is desirable to review the salient points of the espoused claim:

(a) In the view of the United States, the requisition of the ELSI assets by the Government of Italy on April 1, 1968, was contrary to international laws. It violated specific treaty provisions. It also violated applicable provisions of customary international law.
(b) The requisition has been held illegal under the law of Italy by the Consiglio di Stato.
(c) The unlawful requisition prevented ELSI stockholders from effecting an orderly liquidation of the corporation and precipitated its bankruptcy.
(d) The Government of Italy has controlled the ELSI assets from the date of the requisition as set forth at pages 35 through 60 [3] of Volume I of the espoused claim.
(e) The unlawful requisition and other breaches of international law directly caused the damage set forth in the espoused claim (Volume I, pages 61-69 [3]).

[1] Footnote added in translation: This refers to unavailability following the seizure.
[2] Footnote added in translation: "them" refers to the creditors.
[3] Not reproduced.

(*f*) The United States is entitled to the payment of prompt, adequate and effective compensation for such damage.

The United States notes with regret that the Ministry's aide-mémoire does not respond to the legal principles upon which the claim of the Government of the United States is based. The claim is based upon violations of principles of international law. However, the aide-mémoire endeavors to respond to the espoused claim on the basis of Italian municipal law. Moreover, certain of the propositions of Italian municipal law relied upon do not seem correct or in accord with the best authority. In this connection, the United States authorities particularly question the following propositions regarding Italian municipal law advanced in the Ministry's aide-mémoire.

I. Italian Law Prohibited the ELSI Stockholders from Undertaking an Orderly Liquidation

Under the law of Italy, stockholders are not only permitted to effect the winding up of the affairs of a faltering corporation, but they are encouraged to do so. The laws of Italy, as do the laws of most countries, encourage the settlement of matters privately by agreement of the parties rather than through court procedures. The law of bankruptcy is no exception to this rule. The practice of liquidating corporations with full agreement of the stockholders and creditors is common in Italy and has widespread acceptance elsewhere. Particularly where the corporation is a subsidiary of other viable corporations, bankruptcy is the rare exception.

Moreover, when the equity capital of an Italian corporation is reduced by losses to less than the statutory minimum capital, Italian law prescribes that unless the shareholders reconstitute the capital, the corporation is dissolved and put into liquidation *ope legis* (Article 2448, paragraph 4 and Article 2447 of the Italian Civil Code). Thus, orderly liquidation — and not bankruptcy — is not only a right afforded to the shareholders under Italian law, but becomes compulsory when a corporation's capital is completely lost and is not reconstituted. Thus it appears that the Ministry's aide-mémoire misstates Italian law in suggesting that the loss of the company's capital brought about the obligation to declare the company's bankruptcy.

Bankruptcy under Italian law is caused by the inability to pay debts as they fall due in the usual course of business, and not by loss of capital (Article 5, Royal Decree of March 16, 1942, N. 267. The Italian Bankruptcy Act). The inability to pay debts leading to the bankruptcy of ELSI was caused by the illegal requisition of the ELSI assets by the Italian Government, not by the loss of ELSI's equity capital. The illegal requisition made the orderly liquidation impossible and was responsible for ELSI's bankruptcy.

II. The ELSI Stock Did Not Have Any Value at the Time of the Requisition because ELSI's Indebtedness Exceeded Its Assets

Even though the indebtedness exceeded the assets, an orderly liquidation would have permitted the realization of maximum value from the assets. Under this approach, the bankruptcy would have been avoided. The creditors and stockholders both would have been placed in a significantly better financial position than that which resulted from the bankruptcy. The unlawful requisition and resulting bankruptcy took away the stockholders' right to liquidate ELSI in an orderly fashion. It made the stock worthless. The value of the stock must be, as the

espoused claim states, based upon a value premised upon an orderly liquidation, and not the value resulting from bankruptcy.

III. A Denial of the Espoused Claim Is Justified by the Italian Municipal Bankruptcy Proceeding, Provisions of the Italian Constitution and Municipal Law Relating to Equal Treatment

The United States cannot accept the arguments that Italian bankruptcy proceedings, the Italian Constitution or Italian municipal law prevent a recognition of the validity of the claim. Under clearly settled principles of international law, local law does not prevail over international law. Italy may not defend against an international claim by showing that its courts and laws afforded aliens the same treatment as Italian nationals.

It is well established and universally recognized by eminent Italian authorities in international law that a state may not set up its constitution or other domestic law to justify its failure to carry out its obligations under international law.

Professor Giuliano writes in his *Diritto internazionale,* Vol. 1 (1974), pp. 284 and 285:

> ". . . [U]no Stato non puo invocare il proprio diritto interno per giustificare l'inadempimento di un proprio obbligo internazionale . . . '[U]no Stato non puo invocare nei confronti di un altro Stato la propria costituzione per sottrarsi agli obblighi che per esso discendono dal diritto internazionale o dai trattati in vigore.'" (Citing the Advisory Opinion of the Permanent Court of International Justice on Treatment of Polish Nationals in Danzig (1932) *P.C.I.J., Ser. A/B, No. 44*, p. 24.)

Such quotation, in translation, states as follows:

> "[A] State cannot invoke its own internal law to justify the nonperformance of its international obligation. '[A] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.'"

This principle is universally confirmed by other writers, including other Italian authorities on international law. Among others confirming this well-known principle are: (1) Professor Monaco in *Manuale di diritto internazionale pubblico* (1960), p. 129; (2) Judge Anzilotti (*Opere di Dionisio Anzilotti,* Vol. 1 (1955), p. 56); and (3) Professor Perassi in "La Costituzione italiana e l'ordinamento internazionale" in his *Scritti giuridici*, Vol. 1 (1958), p. 447.

It is equally well established that a state may not invoke equality of treatment in its law or constitution as a reason to avoid its international obligations. As long ago as 1930, the Italian and United States delegations to the Hague Codification of 1930 joined with others to vote down a Chinese proposal to limit the standard of treatment of foreigners to the standard accorded by a state to its own nationals.

Again, Italian authorities have uniformly recognized this principle which forms the very basis of the international law relating to treatment to be accorded to foreign citizens, as follows:

> ". . . [G]li Stati sono internazionalmente obbligati a garantire agli stranieri un certo insieme di diritti e quindi sono tenuti a concedere agli stranieri tali diritti minimi, nel caso eccezionale in cui il loro ordinamento faccia ai cittadini un trattamento che rimanga al disotto di tale minimo."

Such quotation, in translation, states as follows:

> ". . . States are internationally obliged to guarantee to foreign citizens a certain quantity of rights and are therefore required to accord to foreigners these minimum rights even in the exceptional case in which their system would treat their own citizens below that minimum." (R. Monaco, *Manuale di diritto internazionale pubblico* (1960), p. 308. Also see R. Quadri, *Diritto internazionale pubblico* (5th ed. 1968), at p.757.)

The International Law Commission has approved the following Article 4, entitled "Characterization of an act of a State as internationally wrongful" as one of its "Draft articles on State responsibility":

> "An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law." (Report of the International Law Commission on the Work of its Twenty-Seventh Session (5 May-25 July 1975), at 28, UN Doc. A/10010 (1975).)

The article was based on a text presented by Professor Roberto Ago, a representative of the Government of Italy, an Italian national, and the Special Rapporteur on the subject.

In conclusion, the United States submits that the Ministry's aide-mémoire of June 13, 1978, is not consistent with well-recognized principles of international law and is not responsive to the espoused claim of the Government of the United States.

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 takes this opportunity to renew to the Ministry of Foreign Affairs the assurances of its highest consideration.

EMBASSY OF THE UNITED STATES OF AMERICA,
Rome, April 18, 1979.

Rome, 6 December 1979.

Dear Mr. Ambassador:

I very much enjoyed our talk last Friday and the opportunity it gave me to have your views on subjects of mutual interest. I hope there will be frequent occasions for similar informal meetings.

When we discussed the long-standing Raytheon-Elsi case, you suggested that I send you a note outlining our proposal which may be considered as a follow-up to Foreign Minister Forlani's comment on May 28 to Secretary Vance that legal experts get together to study the case. In brief, we would propose to have the record of the case examined by three international legal experts, chosen by the parties, with authority to make a recommendation for settlement. One expert would be chosen by each side with the third chosen by the first two. We have consulted the Raytheon Co. and it is in full agreement with this proposed approach.

I am hopeful that this initiative will serve to overcome the impasse in which we now find ourselves and will lead to a mutually satisfactory settlement. I look forward to hearing from you on this matter.

Sincerely,

(Signed) RICHARD N. GARDNER.

Ambassador Francesco Malfatti di Montetretto,
Secretary General,
Italian Ministry of Foreign Affairs,
"La Farnesina", 00100 Rome.

(Translation)

MINISTRY OF FOREIGN AFFAIRS
The Secretary General

Rome, April 18, 1980.

Dear Ambassador:

With reference to your letter of December 6, 1979, concerning the firm of Raytheon-Elsi, I wish to assure you that our Foreign Affairs Legal Department has carefully reexamined all the aspects of the question in order to be able to give your proposal a positive answer.

Unfortunately, I have to inform you that the result of this reexamination does not fulfill our common hopes.

As the confidential juridical memorandum delivered to the US Embassy on August 3, 1978, already pointed out, and according to the conclusions confirmed during the meeting between Secretary of State Vance and Minister Forlani on May 28, 1979, it is juridically impossible for the Italian Government to grant Raytheon-Elsi a compensation, since it would not be justified by and would in fact be at odds with specific provisions of law.

Therefore, Minister Forlani's willingness to accept the proposal of a meeting between experts of both parties in order to investigate the question thoroughly must be considered as acceptance of a meeting of legal experts solely in order to make it clear that for the Italian Government it is impossible *a priori* to open actual negotiations. Therefore, the board of experts would have no arbitral character and no power to make recommendations for the solution of the matter.

However, I have asked the Chief of the Foreign Affairs Legal Department, State Councillor Arnaldo Squillante, to be at your disposal for any further detailed information on the matter.

Sincerely,

[Signature illegible]

His Excellency Richard N. Gardner,
Ambassador of the United States,
Via V. Veneto 119, Rome.

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

30 January 1989.

I am in receipt of the copy of the letter dated 19 January 1989 from the Agent of Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)*.

In my letter of 13 January 1988, the United States explained that there had been no alteration of any documents submitted to the Chamber. Attached to that letter are the handwritten notes taken during the meeting of 20 February 1968 between several Raytheon officials and the President of the Sicilian Regional Government. A typed version of these minutes prepared the day following the meeting appears as Exhibit B to Annex 15 of the Memorial. A typed version of these minutes prepared for use in the 1974 diplomatic claim appears as Exhibit II-15 to that diplomatic claim, and was submitted by the Respondent in its Unnumbered Documents attached to the Counter-Memorial.

Any differences among these documents were fully explained in my letter of 13 January 1988. The documents speak for themselves and may all be referred to by either party and the Chamber in determining the discussion that occurred at the 20 February 1968 meeting. Additional explanation is not necessary to establish the credibility of this or any other evidence introduced by the United States.

Further, the Respondent's statement that these proceedings have been brought without the agreement of the Respondent is incorrect. While these proceedings were instituted by means of a unilateral application by the United States, this was done pursuant to agreement reached between the two parties.

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

2 February 1989.

Pursuant to Article 57 of the Rules of the Court, the following is a list of witnesses and experts whom the United States may call in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, with indications in general terms of the points to which their evidence would be directed. A copy of this communication is furnished for transmission to the Respondent.

Witnesses

Mr. Charles Adams, a United States citizen residing in the Commonwealth of Massachusetts. Mr. Adams' evidence will concern Raytheon and Machlett's investment in ELSI and the decision to place ELSI through an orderly liquidation.

Mr. John Clare, a United Kingdom citizen residing near Geneva, Switzerland. Mr. Clare's evidence will concern the details of the ELSI orderly liquidation plan.

Expert

Mr. Timothy Lawrence, a United Kingdom citizen residing in London. Mr. Lawrence's evidence will concern the value of ELSI's assets at the time of the requisition of April 1, 1968.

56. THE DEPUTY REGISTRAR TO THE DEPUTY-AGENT OF THE *UNITED STATES OF AMERICA*

2 February 1989.

I have the honour to acknowledge receipt of your letter of 2 February 1989 listing the witnesses and expert whom the United States of America may call in the case concerning *Elettronica Sicula S.p.A. (ELSI)*. The copy of your communication stated to be furnished, pursuant to Article 57 of the Rules of Court, for transmission to the other Party was not in fact enclosed; to avoid delay, I have today sent the Agent of Italy a photocopy of your letter.

57. THE DEPUTY-REGISTRAR TO THE AGENT OF ITALY[1]

6 February 1989.

I have the honour to draw Your Excellency's attention to Article 53, paragraph 2, of the Rules of Court, which provides that "The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings".

In order that the Chamber formed to deal with the case concerning *Elettronica Sicula S.p.A. (ELSI)*, may be able to consider whether to take such a decision in that case, I shall be obliged if Your Excellency would inform me as soon as possible of the views of the Government of Italy in that respect.

58. THE AGENT OF THE UNITED STATES OF AMERICA TO THE PRESIDENT

6 February 1989.

I wish to inform you that in the case of the United States against Italy concerning *Elettronica Sicula S.p.A.*, Mr. Michael Matheson, Deputy Legal Adviser of the United States Department of State, will serve as co-agent.

59. THE AGENT OF ITALY TO THE REGISTRAR

6 February 1989.

I have the honour to inform you that the Italian delegation for the oral pleadings in the case concerning *Elettronica Sicula S.p.A. (ELSI)* will be composed as follows:

[See I.C.J. Reports 1989, *pp. 16-17, and Nos. 63 and 65,* infra.*]*

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[1] A communication in the same terms was sent to the Agent of the United States of America.

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

7 February 1989.

The United States delegation in the case concerning *Elettronica Sicula S.p.A. (ELSI)* will consist of the following individuals:

[See I.C.J. Reports 1989, *p. 16.]*

61. THE DEPUTY-REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA [1]

8 February 1989.

I have the honour to draw your attention to the following provisions of Article 71 of the Rules of Court:

> "1. A verbatim record shall be made by the Registrar of every hearing, in the official language of the Court which has been used . . ."
> 4. Copies of the transcript shall be circulated to judges sitting in the case, and to the parties. The latter may, under the supervision of the Court, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the sense and bearing thereof . . ."

The transcript of the oral proceedings in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, opening on Monday, 13 February 1989, will be circulated to the Parties as follows: the transcript of a hearing held from 10 a.m. to 1 p.m. will be available in the evening of the same day, and that of a hearing held from 3 to 6 p.m. will be available during the morning of the following day.

In order to facilitate any supervision which the Chamber may feel it proper to exercise, I shall be obliged if you will hand your corrections to the Registrar's secretary as soon as possible after the circulation of each transcript, and in any event not later than 6 p.m. on the day following such circulation.

62. THE AGENT OF ITALY TO THE DEPUTY-REGISTRAR

8 February 1989.

With reference to your letter of 6 February last, I have the honour to inform you that, as to the application of Article 53, paragraph 2, of the Rules of the Court, the Government of Italy has no objections to the fact that copies of the pleadings and documents annexed by the Parties in the case concerning *Elettronica Sicula S.p.A. (ELSI)* be made accessible to the public on the very opening of the oral proceedings.

[1] A communication in the same terms was sent to the Agent of Italy.

63. THE AGENT OF ITALY TO THE REGISTRAR

8 February 1989.

With reference to my letter of 6 February last, I have the honour to inform you that the Italian delegation for the oral pleadings in the case concerning *Elettronica Sicula S.p.A. (ELSI)* has been integrated as follows:

Mr. Pier Giusto Jaeger, Professor of Commercial Law at the University of Milan,

as Adviser.

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

9 February 1989.

I have the honor to refer to your letter of 6 February 1989 in the case concerning *Elettronica Sicula S.p.A. (ELSI)*. The United States accepts any decision by the Court as to when the copies of the pleadings and annexed documents shall be made accessible to the public.

65. THE AGENT OF ITALY TO THE REGISTRAR

14 February 1989.

With reference to my letter of 6 February last, I have the honour to inform you that the following name is to be added to the list of the Italian delegation for the oral pleadings in the case concerning *Elettronica Sicula S.p.A. (ELSI)*:

Mr. Alan Derek Hayward, Fellow of the Institute of Chartered Accountants in England and Wales,

as Adviser.

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

15 February 1989.

Pursuant to the agreement of the parties of yesterday, the United States submits the attached copies of two documents in the case concerning *Elettronica Sicula S.p.A. (ELSI)*. I certify that these documents are true copies of the original documents. These documents are not in one of the official languages of the Court. Therefore the final brief of the Solicitor General is accompanied by a translation into English of the paragraphs referred to by the United States. The decision of the Court of Rome is accompanied by an uncertified translation; a certified translation will be provided as soon as possible[1]. Copies have been provided to the Respondent.

(Signed) Michael J. MATHESON.

[1] For the certified translation, see No. 73, *infra*.

Enclosures:

1. Final Brief, Office of the Solicitor General, in Case No. 32266/83 before the Court of Rome[1].
2. Certified English translation of paragraphs 5 and 6 of (1).
3. Decision, Civil Court of Rome, certified February 19, 1988[1].
4. English translation of (3)[2].

(Translation)

Cont. [Ref. No.] 9269/83

OFFICE OF THE SOLICITOR GENERAL

COURT OF ROME

R.G. [Committal] No. 32266/83 — Hearing en Banc, November 20, 1987

FINAL STATEMENT OF THE CASE

for

the OFFICE OF THE CHAIRMAN OF THE COUNCIL OF MINISTERS, in the person of the Chairman pro tempore, and for the MINISTRIES of FINANCE, of the TREASURY, and of FOREIGN AFFAIRS, in the persons of the Ministers pro tempore, defended and represented by the Office of the Solicitor General,

versus

Pier Francesco Talenti, engineer, defended and represented by Mario Savoldi, attorney,

and involving

the MUNICIPALITY OF ROME, in the person of the Mayor pro tempore, defended and represented by Attorney Lo Mastro

* * * * * * *

5.
Plaintiff cites three specific international treaty provisions (and this is the only specific part of the complaint): namely, Article V, paragraph 2 of the Treaty of Friendship, Commerce, and Navigation between the United States of America and Italy of February 2, 1948, and paragraph 1 of the associated protocol of signature, which Treaty and Protocol were put into force in Italy by Law No. 385 of June 18, 1949 (in *Lex*, 1949, 1039), and Article I of the Agreement of September 25, 1981, Supplementing the aforesaid Treaty, which was put into force in Italy by Law No. 910 of August 1, 1960 (in *Lex*, 1960, 1225).

[1] Not reproduced.
[2] Uncertified translation not reproduced (see footnote 1, p. 424, *supra*).

The cited Art. V, par. 2 contains provisions relating to the setting ("just and effective payment [i.e., compensation]") and the payment ("prompt") of compensation for the expropriation of "property of nationals, corporations, and associations of either High Contracting Party", and to the conversion of the available currency resulting therefrom. As has already been concluded in the Reply, the state agencies in question assuredly *have not expropriated any of Plaintiff's property*. In any case, Plaintiff does not indicate specific facts of expropriation, nor does he cite identifiable violations of the principles of "due process of law" and of "prompt payment of just and effective compensation", brought about by Italian authorities; this defense is therefore unable to perform its mandate (Art. 24 of the [Italian] Constitution), because the *causa petendi* [cause of action] — i.e., the concrete and specific facts — has remained undefined. The onus of "alleging" (before proving) the facts *is on Plaintiff*; Talenti *has not alleged* the specific juridically relevant facts; *this alone suffices for dismissal* of the complaint.

With this background, we need not add that the state agencies in question have not even expropriated anything from companies — *which incidentally are not even named in the complaint* — in which Talenti claims to have some interest; in any case, as stated above, we are dealing with Italian (and not US) companies, which as such are not covered at all by the Treaty in question. We point out in this connection that Article II, paragraph 2 of the same Treaty, in defining the nationality of corporations, implicitly invokes the criterion (cf. also Arts. 2505 and following of the Civil Code) of the legal system under which they were constituted ("created or organized under the applicable laws and regulations within the territories of either High Contracting Party").

Therefore, since *in fact* there were no expropriations or violations of the principles of Art. V, par. 2, the reference to said provision is groundless. Nor can it be maintained that changes in zoning designations that are a legitimate result of planning orders ("piani regolatori") can be described as expropriations: the general rule is that they are not, and this rule cannot suffer exception only when US nationals are affected by the changes. The Italian legal system cannot admit two different concepts of expropriation (for the public good). Furthermore, the Treaty in question draws continual inspiration from the criterion of equality of treatment between nationals of one country and those of the other High Contracting Party: the preamble says, ". . . based . . . upon the principles of national . . . treatment"; Art. I, par. 2 establishes that "in conformity with the applicable laws and regulations, . . . upon terms no less favorable than those . . . accorded to nationals of such other High Contracting Party", the nationals of the one and the other Contracting Parties may "acquire, own, erect . . . appropriate buildings"; Art. II, par. 3 states that corporations of one Party may operate in the other "in conformity with the applicable laws and regulations" and "upon terms no less favorable than those . . . accorded to nationals of such other High Contracting Party".

Paragraph 1 of the protocol of signature (*Lex*, 1949, 1061) adds a simple clarification to Art. V, par. 2, examined above, putting the expropriation of "interests . . . in property" on an equal footing with the expropriation of "property". The clarification might even seem superfluous, at least according to our customary hermeneutic criteria.

The Supplementing Agreement of September 26, 1951, contains a group of provisions intended to favor and protect *capital investments in enterprises*, with capital originating in one High Contracting Party and invested in the other High Contracting Party (at the time, in practice, the US investments in Italy were under consideration, while nowadays reciprocity is in effect). The preamble says, in fact, "desirous of giving added encouragement to investments . . . in useful

undertakings". It is clear, then, that the case of Talenti, who did not make any investment from the USA in Italy (the contrary, if anything), does not come under the purview of said Agreement.

This is confirmed if we read Article I of the Agreement, an article cited by Plaintiff. It speaks of "enterprises which the (for example US nationals) have been permitted to *establish* or *acquire*" (for example, in Italy) and of "investments which they have made . . . *in the form of funds . . ., materials, equipment . . .*". The meaning of the provision is unequivocal: it calls for a flow across the Atlantic of capital intended for use in enterprises to be "established" (the term is also used in the EEC Treaty when it calls for the "right to establish") or "acquired" or expanded and strengthened by means of "contributions". In the case at hand, nothing of the kind has occurred. Plaintiff Talenti inherited property in Italy as an Italian national and has not sent anything to Italy from the USA since his change of citizenship. Therefore, he cannot invoke the Agreement of September 26, 1951, and incidentally could not even invoke — and in fact does not mention — the Italian Law No. 43 of February 7, 1956, on foreign investments in Italy.

Only *ad abundantiam* [for the sake of completeness] do we add that in the case at hand there has not been any "arbitrary or discriminatory" measure taken by authorities of the Italian state to Talenti's detriment, and still less has any measure been taken intended to "prevent" the effective control and administration of the enterprises or to "impair" rights or interests belonging to Talenti. Once more, it can be seen that Plaintiff is simply *copying* the text of the aforesaid Art. I, but does not indicate specific facts (aside from a newspaper clipping, which assuredly was not made by a public authority), nor does he demonstrate causal connections. Once more, we observe that if Talenti considered it prudent to stay away from Italy in 1975 (a circumstance — we repeat — neither demonstrated nor demonstrable), this was the "consequence" of his personal judgments (he knows himself and his own behavior better than any Criminal Judge could) and not the "consequence" of "measures" that were never taken, and even less so of "arbitrary or discriminatory measures".

The writ of complaint also mentions, "insofar as they may be necessary" (but even here Plaintiff would have the onus of making a specific allegation), the Convention for the Protection of Human Rights of November 4, 1950, put into force by Law No. 848 of August 4, 1955 (in *Lex*, 1955, 1450), and the International Pact of December 16, 1966, on Economic, Social, and Cultural Rights, put into force by Law No. 881 of October 25, 1977 (in *Raccolta ufficiale leggi e decreti* ["Official Collection of Laws and Decrees"], 1977, 1895).

With regard to the Convention of November 4, 1950, it suffices to observe that it has been agreed upon among the members of the Council of Europe, and not with the USA. Talenti, because he proclaims himself a US citizen, has no right to invoke it (except as it relates to issues of procedure in the present civil hearing).

As to the Pact of December 16, 1966, which for its part was adopted within the UN, we observe first that it was put into force in Italy three years after the allegedly injurious events occurred, and that as of late 1977 it had not been signed by the USA (we have doubts as to whether it was ever signed subsequently by the USA). In any case, none of the provisions of this Pact can affect the present case.

Before concluding this overview of international treaty norms, we wish to point out that both Article XXVI of the Treaty of Friendship, Commerce, and Navigation and Article VIII of the Supplementing Agreement call for procedures of international law for the settlement of disputes between the High Contracting Parties as to the interpretation or application of the terms of those documents.

Talenti, who has proclaimed himself in writing an "indefatigable supporter" of the Republican Party of the United States of America, has attempted to involve the governmental authorities of the two Contracting Parties in support of his peculiar and enormous claims. The frailty, or more rightly inconsistency, of these claims, however, is so obvious that the governmental authorities acted responsibly in giving them their just dimensions (as confirmed by the note of March 7, 1983, attached by Plaintiff), placing full faith in the impartial justice of this most Illustrious Court.

6. Plaintiff has proposed an action he himself qualifies as "ex art. 2043 Civil Code" i.e., for compensation of the damages from a "tortious act". A complaint thus formulated undoubtedly introduces a dispute over an "alleged" personal right (over jurisdiction and other things); this, however, does not mean that the "alleged" right actually exists. A personal right ex art. 2043 CC presupposes violation of a previous and different personal right (the "justice" of the damage), e.g., of a right to property.

Plaintiff Talenti leaves this point nebulous in the complaint; he even tries to introduce elements of confusion asserting that "inviolable personal rights . . . receive juridic protection by the norms . . ." of the international accords examined in the preceding paragraph. The norms of these agreements, however, are at best an indirect and additional guarantee of the international relationships between nations, a juridic situation which, according to the internal legal system of the one of the two Contracting Parties, is *per se* already endowed with the nature and consistency of a personal right; it cannot be used to confer the quality of personal rights on situations that are not such in the sense of the aforementioned legal system.

In this case Talenti alleges, albeit quite vaguely, to have suffered losses to certain practical interests (unclear as to whether "his" or of other companies), which (interests), however, do not have the quality of a personal right within the Italian legal system. This is not true for the interest a property owner might have in a "more profitable" urban zoning; this type of interest would have legitimate recourse only to the competent administrative court contesting a wrongful zoning, and is qualifiable as a "legal interest", if and when the tort has been effectively recognized by the administrative court (conversely, if and when the tort fails to advance, neither is there a legal interest).

There are only two possibilities: either the authorities have issued a legal urban zoning plan and thus no recognized juridic situation has been injured; or the *authorities have issued an urban zoning plan that was found illegal and struck* down by the administrative court, but even in this case no juridic situation has been injured; therefore, our code justly excludes compensation for damages to a legal interest, rectius the injury of a legal interest. In neither case can there be the injury of a personal right, nor can there be "injustice" of the damage, nor can there be personal right with subsequent compensation ex art. 2043 CC.

There is no third possibility, e.g., a purely practical interest, perhaps protected as legal interest and then promoted to personal right by effect of the norms of the international agreements examined above. Nor do we believe in a "juridic short circuit", whereby the general right of landed property, if owned by a US national or company, is upgraded by said norm — discriminating in favor of said national or company and to the detriment of Italian nationals or companies — so that there are now two different rights of landed property, the one normally in compliance with (or subject to) the urban planning authority, and the other instead "sovereign" or superior to it.

All this has been pointed out by adversary's counsel (in the US the urban planning authority operates as it does here, perhaps with even more powers of

discretion and with less incisive juridic control); adversary counsel has, in effect, attempted to "leap" all the obstacles using the expedient of an undefined and magmatic *causa petendi.* However, the "leap" is disallowed by the very existence of the fundamental principles set forth in Articles 3, 24 and 42 of our Constitution.

67. THE REGISTRAR TO THE AGENT OF ITALY

15 February 1989.

I have the honor to inform Your Excellency that the Co-Agent of the United States in the case concerning *Elettronica Sicula S.p.A. (ELSI)* has this morning supplied the Chamber with copies of the following documents, referred to at yesterday's hearing (pp. 75 and 76-79, *supra*):

1. Final Brief, Office of the Solicitor General, in Case No. 32266/83 before the Court of Rome;
2. Certified English translation of paragraphs 5 and 6 of (1);
3. Decision, Civil Court of Rome, certified February 19, 1988;
4. English translation of (3).

The Co-Agent informs me that a certified translation of document number 3 will be provided as soon as possible; and that he has also supplied you with copies of these documents.

It is my understanding from what was said by Your Excellency in Court yesterday that the Italian Government does not object to the submission of these documents under Article 56 of the Rules of Court.

68. TABLES ILLUSTRATING MR. LAWRENCE'S EVIDENCE GIVEN ON 16 FEBRUARY 1989[1], AS COMMUNICATED BY THE DELEGATION OF THE UNITED STATES OF AMERICA TO THE REGISTRY ON THE SAME DAY

ELSI: ASSETS AT 31 MARCH 1968

	Book value
Tangible assets	
Fixed assets	5,764.4
Inventories	6,534.6
Accounts receivable	2,412.4
Other assets	621.0
	15,332.4
Intangible assets	1,721.1
	17,053.5

[1] See p. 122, *supra.*

ELSI: FIXED ASSETS

	Book value	Puglisi valuation
Land and buildings	962.5	1,716.9
Machinery and equipment	4,154.2	2,843.6
	5,116.7	4,560.5
Construction in process	184.1	
	5,300.8	
Taxed reserve	463.6	
	5,764.4	

ELSI: INVENTORIES OF MATERIALS AND WORK IN PROCESS

Book value	6,534.6
Less: Taxed reserve	(1,015.0)
	5,519.6
Less: Further provision	(294.4)
	5,225.2

ELSI: ACCOUNTS RECEIVABLE

	Book value	Realizable value
Customers	2,150.8	
Less: Reserve for bad debts	(80.6)	
	2,070.2	2,070.2
Affiliates	106.0	106.0
Other	236.2	200.0
	2,412.4	2,376.2

ELSI: OTHER ASSETS

		Book value	Realizable value
Investments		119.2	0.0
Cash and bank balances	21.3		
Notes receivable	128.1		
Accrued receivables and prepayables	352.4		
		501.8	430.5
		621.0	430.5
Mezzogiorno grants			300.0
			730.5

ELSI: ASSETS AT 31 MARCH 1968

	Book value	Realizable value
Tangible assets		
Fixed assets	5,764.4	5,300.8
Inventories	6,534.6	5,225.2
Accounts receivable	2,412.4	2.376.2
Other assets	621.0	730.5
	15,332.4	13,632.7
Intangible assets	1,721.1	3,500.0
	17,053.5	17,132.7

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

17 February 1989.

Enclosed is the answer to a question posed by Judge Schwebel to the United States during the February 16 session of the Court[1] in the case concerning *Elettronica Sicula S.p.A. (ELSI)*. A copy of this letter and attachment has been provided to the Respondent.

The United States case is based solely and exclusively upon violations of the Treaty of Friendship, Commerce, and Navigation, and its Protocol and Supplement. The United States has never argued and does not now argue that the acts and omissions of the Respondent that violated the Treaty amount to a "conspiracy". That characterization is not found in any of the written or oral pleadings of the United States. It is the Respondent that describes the US claims as based upon a "diabolical plot hatched by the Italian public authorities . . ." (Rejoinder, p. 3[2]).

The relief sought in this case is based on the acts and omissions of the Respondent's agents and officials at the federal and local levels (including IRI), without any allegation that these officials were working in conspiracy. The United States does not speculate as to why these agents and officials of the Respondent acted in the manner they did.

70. THE REGISTRAR TO THE AGENT OF ITALY

17 February 1989.

I have the honour to transmit to Your Excellency herewith a copy of a letter of today's date from the Agent of the United States in the case concerning

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[1] See p. 145, *supra*.
[2] II, p. 417.

Elettronica Sicula S.p.A. (ELSI), enclosing the reply of the United States to the question put by Judge Schwebel at the hearing of 16 February 1989.

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

17 February 1989.

As requested by the Court at yesterday's session[1] in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, enclosed is a copy of the Report on the Financial Statements of Raytheon-ELSI, S.p.A. of September 30, 1967. This Report was prepared by Raytheon Company's Italian auditors, Fidital-Istituto Fiduciaro Italiano S.p.A. of Milan, Italy, an affiliate of Coopers & Lybrand. This report reflects the balance sheet values on both an Italian basis and a Raytheon-US basis.

For the convenience of the Court, also enclosed is a copy of Raytheon Company's Financial Accounting Policy D-3031 applicable in 1968 which explains the purpose of the separate valuations.

The major difference between the Italian and Raytheon US bases is the item of Deferred Charges, which for the most part represented the cost of developing new lines and improving product quality. This asset is carried on the Italian books but is routinely written off by Raytheon Company.

I certify that these documents constitute true copies of documents adduced in support of the contentions contained in the US pleadings. Copies of these documents have been provided to the Respondent.

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[1] See p. 131, *supra*.

Report on the Financial Statements at September 30, 1967

Coopers & Lybrand A.G.
Rappresentata da
Fidital-Istituto Fiduciario Italiano S.p.A.

To: Coopers & Lybrand
Boston, Massachusetts, USA.

March 22, 1968

Raytheon-Elsi S.p.A.

We have examined the balance sheet of Raytheon-Elsi S.p.A. ("the company") at September 30, 1967 and the related statement of income and accumulated losses for the year then ended which have been adjusted from the books of account and are set out on pages 3 to 5[1].

2. Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances with the following exceptions:

(a) No evidence was available in support of an agreement which, we understand, has been reached between the company and the relevant Military Authorities on the basis of which the company has accrued a credit of Lit. 251.6 million (US$405.8 thousand) for price adjustments on the supply of Klystrons.

(b) In the absence of the final results of a physical inventory of fixed assets we were not able to determine whether amounts appearing as fixed assets in the company's books are (apart from the matter mentioned below) fully represented by specific items of physical property.

3. The adjustments made by the company in preparing the above-mentioned balance sheet and statement of income and accumulated losses have not, at the date of this report, been recorded in the books, essentially for tax reasons. Accordingly, the accompanying financial statements are not in agreement with the company's books of account.

4. Inventories appearing in the accompanying balance sheet at Lit. 5,455.8 million (US$8,799.7 thousand), net of a reserve of Lit. 1,717.2 million (US$2,769.7 thousand), are in our opinion stated at approximately Lit. 453.3 million (US$731.1 thousand) in excess of net realizable value. Fixed assets stated in the balance sheet at Lit. 5,954.1 million (US$9,603.4 thousand), net of depreciation, include amounts totalling approximately Lit. 463.6 million (US$747.7 thousand) which do not relate to specific fixed assets but consist of revenue expenditure disallowed by the Italian Revenue Authorities for tax purposes and reinstated by the company in the books.

5. In our opinion, subject to the matters mentioned above in paragraph 2 under points *(a)* and *(b)* and with the exception of the matters mentioned in paragraph 4, the accompanying balance sheet and statement of income and accumulated losses, in their adjusted form, present fairly the financial position of the company at September 30, 1967 and the results of its operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

[1] Pp. 433-438, *infra*.

Raytheon-ELSI S.p.A.

BALANCE SHEET AT SEPTEMBER 30, 1987

(Expressed in millions of Italian lire and thousands of US dollars)

	Book figures	*Company's adjustments*	*Adjusted figures*	
	Lit.	Lit.	Lit.	$
CURRENT ASSETS				
Cash	28.1	–	28.1	45.3
Notes and accounts receivable:				
Notes	124.6	–	124.6	201.0
Trade	2,592.1	–	2,592.1	4,180.8
Subsidiary companies (Note 1)	106.2	–	106.2	171.3
Accrued	404.7	–	404.7	652.7
Other	272.2	–	272.2	439.0
	3,499.8	–	3,499.8	5,644.8
Less: Reserve for doubtful accounts	(80.6)	–	(80.6)	(130.0)
	3,419.2	–	3,419.2	5,514.8
Inventories (Notes 2 and 3)	7,173.0	–	7,173.0	11,569.4
Less: Reserve for inventories	(407.8)	(1,309.4)	(1,717.2)	(2,769.7)
	6,765.2	(1,309.4)	5,455.8	8,799.7
Prepaid expenses	17.5	–	17.5	28.2
Total Current Assets	10,230.0	(1,309.4)	8,920.6	14,388.0
INVESTMENTS IN SUBSIDIARY COMPANIES (Note 4)	119.2	(100.0)	19.2	31.0
FIXED ASSETS, at cost (Note 5)	8,465.5	(1,239.0)	7,226.5	11,655.6
Less: Reserve for depreciation	(2,511.4)	1,239.0	(1,272.4)	(2,052.2)
	5,954.1	–	5,954.1	9,603.4
DEFERRED COSTS	1,653.0	(1,653.0)	–	–
	Lit. 17,956.3	Lit. (3,062.4)	Lit. 14,893.9	$24,022.4

CURRENT LIABILITIES				
Bank overdrafts	8,208.4	–	8,208.4	13,239.4
Notes and accounts payable:				
Notes	138.4	–	138.4	223.2
Trade	200.9	–	200.9	324.0
Raytheon Company and affiliates (Note 6)	960.0	–	960.0	1,548.4
Other	254.9	–	254.9	411.1
	1,554.2	–	1,554.2	2,506.7
Accrued liabilities	558.2	–	558.2	900.3
Total Current Liabilities	10,320.8	–	10,320.8	16,645.4
RESERVE FOR SEVERANCE PAY	538.9	–	538.9	869.2
SECURED LONG TERM LOANS (Note 7)	4,915.5	–	4,915.5	7,928.2
TAXED RESERVE	862.4	(862.4)	–	–
STOCKHOLDERS' EQUITY (DEFICIT) (Notes 8 to 10)				
Capital stock, authorized, issued and fully paid — 1,500,000 registered shares of Lit. 1,000 each	1,500.0	–	1,500.0	2,419.3
Capital reserve	1.5	–	1.5	2.4
Stockholders subscription account	2,500.0	–	2,500.0	4,032.2
Less: Accumulated (losses)	(2,682.8)	(2,200.0)	(4,882.8)	(7,875.3)
	1,318.7	(2,200.0)	(881.3)	(1,421.4)
	Lit. 17,956.3	Lit. (3,062.4)	Lit. 14,893.9	$24,022.4

Statement of Income and Accumulated (Losses) for the Year Ended September 30, 1967

(As prepared by the company and expressed in millions of Italian lire and thousands of US dollars)

	Lit.	$
Net Sales	7,263.2	11,714.8
Variable Costs	4,903.8	7,909.3
Variable Margin	2,359.4	3,805.5
Assignable Costs	3,335.7	5,380.1
Product Line Contribution	(976.3)	(1,574.6)
Less:		
Other Deductions		
Other manufacturing expenses	241.1	388.8
General engineering	73.6	118.7
Other marketing expenses	251.0	404.8
Administration expenses	508.5	820.2
Interest expenses	960.9	1,549.8
Taxes	6.7	10.8
Other	162.1	261.5
	2,203.9	3,554.6
Plus:		
Other Income		
Interest	36.9	59.5
Other	125.3	202.1
	162.2	261.6
Less:		
Adjustment from Standard Cost to Actual	335.2	540.5
(Loss) for the year ended September 30, 1967 as per books	(2,682.8)	(4,327.0)
Company's Adjustments	(2,200.0)	(3,548.3)
Adjusted Accumulated (Losses) at September 30, 1967	(4,882.8)	(7,875.3)
Losses at October 1, 1966, brought forward	2,500.0	–
Deduct:		
Written off against capital stock (Note 8)	2,500.0	–
	–	–
Adjusted Accumulated (Losses) at September 30, 1967	Lit. (4,882.8)	$(7,875.3)

Notes to Financial Statements

Accounts Receivable — Subsidiary Companies

1. The balance of Lit. 106.2 million is made up as follows:

	Lit.
Raytheon-Elsi AG, Zurich	65.0
Raytheon-Elsi AB, Stockholm	41.2
	Lit. 106.2 million

Inventories

2. The inventories are as follows:

	Amounts	*Basis of valuation*
	Lit.	
Raw material	950.4	At most recent cost of acquisition
Material in transit	113.0	
Repair material	131.0	
Semifinished parts	838.6	Standard cost, made up of materials and labour only
Work in process	408.1	
Finished goods	2,145.6	
Material to be recovered	35.6	Estimated realizable value
Deferred development costs of "NADGE" program	73.0	Standard cost, made up of labour only
Fixed overheads	2,477.7	
	7,173.0	
Less: Reserve for obsolete and slow-moving items	1,717.2	
Total inventories	Lit. 5,455.8 million	

3. The fixed overheads consist of overhead expenses calculated in respect of each product line, taking into account the overheads included in the opening inventories. The basis of calculation is consistent with that adopted at September 30, 1966.

Investments in Subsidiary Companies

4. Investments consist of the following:

	Lit.
Raytheon-Elsi AB, Stockholm	48.0
Raytheon-Elsi AG, Zurich	71.2
	119.2
Less: Adjustments in consideration of losses sustained by subsidiary companies	100.0
	Lit. 19.2 million

Fixed Assets

5. Fixed assets include equipment of the lamp LAS Department amounting after depreciation to Lit. 126.6 million (US$204.2 thousand). This equipment has been idle for approximately two years but is considered disposable at amounts greater than current book value.

Accounts Payable — Raytheon Company and Affiliates

6. The balance of Lit. 960.0 million is due to Raytheon Company, Lexington.

Secured Long-Term Loans

7. These are as follows:

	Amounts outstanding	*Final repayment date*
	Lit.	
IRFIS, 5.5%	44.7	December[1]
IRFIS, 4%	178.1	December[1]
IRFIS, 4%	118.8	December[1]
IRFIS, 4%	1,000.0	June 1977
IRFIS, 4%	500.0	June 1977
IRFIS, 4%	500.0	June 1977
The Chase Manhattan Bank, 5.5%	998.2	December[1]
Banco di Sicilia, 4%	75.7	December[1]
Banco di Sicilia, 4%	1,500.0	December[1]
	Lit. 4,915.5 million	

With the exception of the Chase Manhattan Bank, all the above loans are secured by charges on the company's fixed assets.

Accumulated Losses at September 30, 1966

8. The accumulated book losses at September 30, 1966 amounting to Lit. 2,500.0 million (US$4,032.2 thousand) were written off against the capital stock in accordance with a Stockholders' resolution passed at a meeting held on March 31, 1967. As a result of this operation the capital stock was reduced from Lit. 4,000.0 million (US$6,451.5 thousand) to Lit. 1,500.0 million (US$2,419.3 thousand).

Stockholders Subscription Account

9. It was resolved in the Stockholders' meeting referred to in Note 8 to increase the capital stock from Lit. 1,500.0 million (US$2,419.3 thousand) to Lit. 4,000.0 million (US$6,451.5 thousand). Although the necessary amounts have been paid in, the increase cannot become legally effective until the necessary government consent has been obtained. Accordingly, since such consent had not been obtained at September 30, 1967, the amounts paid in were credited temporarily to a Stockholders subscription account.

Stockholders' Deficit at September 30, 1967

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

[1] Year illegible. *[Note by the Registry.]*

Contingent Liabilities

11. At September 30, 1967 there were contingent liabilities as follows:

(a) for notes receivable amounting to Lit. 630.3 million (US$1,016.6 thousand) discounted with banks and not yet matured;
(b) for Italian income taxes which may be assessed by the Revenue Authorities on the results of accounting periods not yet agreed. The possible amount of any such taxes cannot at present be determined.

Currency Conversion

12. In the accompanying financial statements Italian lire have been converted into US dollars at the rate of Lit. 620 to the $.

To: J. H. Creamer.
From: A. V. Schene.
Subject: Raytheon-Elsi.

Classification
Memo No.: 384-AVS-63.
Date: April 17, 1963.

After a review of the circumstances surrounding our recent additional investment in Raytheon-Elsi, it was agreed that we had not acquired control of this company at September 30, 1962. Therefore, the operating results for Raytheon-Elsi and Subsidiaries for the quarter ended December 31, 1962 were not reflected in the reported results for Raytheon Company for the first quarter of 1963.

We now feel that control of Raytheon-Elsi was acquired at the end of December, 1962, and it is essential that we have a satisfactorily adjusted balance sheet for Raytheon-Elsi and Subsidiaries at December 31, 1962. We must compute goodwill based on Raytheon accounting standards as of that date. It will also be necessary that we have a March 31, 1963 balance sheet adjusted to Raytheon standards. If there has been no change in the capital structure of the company, the difference in equity between the two balance sheets should reflect the operating profit or loss on Raytheon standards for the first quarter of 1963, which we will report in the second quarter of 1963. In addition to providing us with adjusted balance sheets, we would also like to receive an adjusted condensed income statement for the first quarter of 1963.

We are attaching a copy of Finance Manual Policy D-3031 in which the format of the statements and the valuation principles are described. If there are any points which require further clarification, please let us know.

The changes in valuation of assets at September 30, 1962 which you covered in your letter of April 4, 1963 should be discussed with Coopers & Lybrand so that they can confirm the adjusted balances at either date if requested to do so by Lybrand, Ross Bros. & Montgomery.

The enclosed accounting policy indicates that the adjusted balance sheets and income statement should be forwarded to us within sixty days of the close of the period. If there is any reason why you feel that we will not have the necessary data on or about June 1, please advise us promptly. It is essential that we receive this data in ample time to enable us to review it adequately before the second quarter closing.

(Signed) Arthur V. SCHENE.

Attachment
cc: C. A. Calosi, G. Ingram, Jr., R. L. Seaman.

RAYTHEON: Finance Policies and Procedures

Foreign Financial Policies, D-3031

I. General

A. Raytheon Company is required to furnish its stockholders with financial reports every three months. These reports include the financial status and results from investments in foreign and US companies. Operating losses from foreign companies in which Raytheon has a majority interest are included by Raytheon at full value while profits from these foreign companies are reflected in Raytheon's statements after reduction for US Income Tax impact.

B. In order to assure comparability of the financial information reported from abroad, set forth below are guides to assist foreign subsidiary company Controllers in the development of financial position information which is required at the end of each calendar quarter by Raytheon US. It is emphasized that no implications need be drawn relative to the modification of, or revision to, accounting practices that are normal and acceptable to the country in which the foreign subsidiary or affiliate operates, either for financial or tax purposes. Rather, these guides are for use when transforming such initial financial information into a reporting structure useable by Raytheon US. It should be noted, however, that the principles discussed here are entirely consistent with the development of *(a)* reliable management control information, and *(b)* foundation data for overall business and economic evaluation.

C. The financial statements from foreign Companies in which Raytheon has invested are due 60 calendar days after the close of each calendar quarter.

D. The format of balance sheets or statements of financial position is arranged to report assets, liabilities and net worth in columns, as follows:

As Recorded on the Books of Accounts	*Adjustments*	*American Accounting Basis*

E. The format for income or operating statements from foreign companies is similar to the balance sheet presentation except that it includes columns for the reversal of prior period adjustments, as follows:

As Recorded on the Books of Accounts	*Reversals*	*Adjustments*	*American Accounting Basis*

F. Foreign subsidiary or affiliated companies may use the percentage of completion basis of accounting on fixed price contracts where it provides a better measure of operations than shipment basis accounting would afford. Under the percentage of completion method, costs and estimated profits are included in sales as work is performed. If estimates of total contract costs indicate a loss, provision is made for the total loss anticipated on the contract.

II. Applicability and Responsibility

This policy applies to all companies, situated outside the United States, in which Raytheon Company maintains an investment. The subsidiary/affiliate company Controller or other cognizant Controller is responsible for assuring compliance with the provisions of this policy.

III. Valuation Guidelines

In reporting fianncial results to Raytheon Company, uniformity in the basis of valuing assets and liabilities is required. Some major guidelines are provided below by type of account.

A. Accounts receivable

1. It is the policy of the Company to employ a reserve account for doubtful accounts and to apply specific write-offs to the reserve at the time that the asset is determined to have no value. The reserve must be adequate to cover all anticipated losses and should be based on a thorough review (at least every three months) of the accounts receivable with particular emphasis on old, slowly liquidating accounts. The evaluation should include consideration of that Company's experience with similar accounts over the last three years.

2. No reserves would normally be established for amounts receivable from Government agencies under bona fide contracts. However, invoices over one year in age, that do not have a confirmation by the Government agency as to the estimated pay date, will be reserved for either in the full amount of the receivable, or for the portion that is assumed to be under disagreement.

3. Receivable balances are adjusted for any significant decline in value due to returns and allowances or losses on foreign exchange that have occurred or may be expected to occur in the near future.

4. Receivables normally collectible within one year, are reported as Current Assets. Longer term receivables are reported as Non-Current Assets.

5. Inter-company notes and advances are stated separately on the balance sheet.

B. Inventories

1. Inventories are reported at the lower of cost or market value. Cost is defined as direct material, direct labor, and applicable total manufacturing overhead, and market is defined as expected revenue less the selling costs associated with the generation of the revenue. Costs are developed on a first in, first out, or average cost basis.

2. Accurate reporting of inventories requires the physical verification of inventories at least once a year. Adjustments between book inventory and the physical counts are developed and recorded promptly after completion of the physical inventory.

3. Raw material items on hand for more than one year, or that have had no use for the past year, should be reported at minimum scrap value except for standard items with ready marketability as raw material.

4. Finished goods or work in process inventory items on hand, in excess of expected requirements for the next twelve months based on conservative sales forecasts, are reduced to minimum scrap values. Excepted are items for use under firm long term contracts which may be continued at full cost.

5. Once the value of an inventory item or group of items has been reduced to a market value below cost, it is not revalued upward until it is withdrawn from stores for production use or for sale.

C. Fixed assets

1. Fixed or capital assets or facilities are reported at cost, reduced by appropriate reserves for depreciation.

2. No item that costs less than the approximate equivalent of $100 in US currency is to be capitalized.

3. Jigs, fixtures, and special tooling are reported by either of these methods:

(a) Charge directly to expense.

(b) Charge to a capital account and amortize over the life of the product line or 24 months, whichever is the lesser period.

4. The cost of a fixed or capital asset is its purchase or manufactured cost together with any expenditures necessary to make the asset usable. These associated expenditures include transportation and installation costs, costs of establishing title, etc. Land costs are capitalized. The cost of fixed or capital assets fabricated by the Company includes charges for labor, material and overhead, but does not include general and administrative expense.

5. Depreciation will be charged to operations in each accounting period on at least a straight-line basis.

6. The maximum economically useful lives for accounting depreciation purposes are as follows:

Category of Asset	*Lives for Depreciation in Years*
Land	-
Land improvements	20
Brick Buildings	40
Frame Buildings	20
Building Improvements	Remaining life of building or life of asset, whichever is less.
Machinery and Equipment	10
Semiconductor Machinery	4
Office Equipment	10
Aircraft	6
Automobiles	3
Light Trucks (Under 13,000 lbs.)	4
Heavy Trucks (13,000 lbs. and over)	6
Vessels	18

These are the maximum lives to be used for depreciation — special circumstances may require lesser lives. Particular attention should be accorded useful lives of buildings.

D. Intangibles

Costs associated with (but not limited to) the following types of items will not be capitalized.

General research
Product or process development
Trademarks
Patents
Start-up or launching costs
Planning expansion of business
Formation costs
Goodwill

When recovery of these costs are specifically provided for in contracts, they may be included in work-in-process inventory.

E. Current liabilities

An up-to-date reflection is required of trade accounts payable, short-term loans, bank overdrafts, advances, and like current liabilities. This requirement is effective on a monthly accounting basis.

F. Provision for leaving indemnity

It is the policy of the Company to handle social costs of this type on a current basis. Procedures should, therefore, be established to be assured that proper liabilities are expressed no less often than each quarter.

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

17 February 1989.

I have the honour to acknowledge receipt of your two letters of today's date enclosing, respectively, the written reply of the United States of America to the question put by Judge Schwebel at the sitting of 16 February 1989 in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, and the Report on the Financial Statements of Raytheon-Elsi S.p.A. of 30 September 1967, together with a copy of Raytheon Company's Financial Accounting Policy D-3031, supplied in response to the request made by the Chamber at that sitting.

I note that copies of these letters and attachments have been provided by you to the Agent of Italy.

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

17 February 1989.

Enclosed are two certified translations of a decision of the Court of Rome in the case of *Talenti* v. *Rome City Government*, No. 32266 of February 19, 1988 for filing in the case concerning *Elettronica Sicula S.p.A. (ELSI)*. The original Italian language documents were filed with the Registry by letter of February 15, 1989. Copies of this certified translation have been provided to the Respondent.

Enclosures: As stated.

ITALIAN REPUBLIC
IN THE NAME OF THE ITALIAN PEOPLE
THE CIVIL COURT OF ROME
FIRST SECTION

thus composed:

Dr. Filippo Verde	*president*
Dr. Paolo Zucchini	*judge*
Dr. Aida Campolongo	*judge*

convened in council chambers, has delivered the following

DECISION

in the civil lawsuit, first instance, registered under nr. 32266 of the general register for the legal matters for the year 1988 offered for deliberation at the collegial hearings of Nov. 20, 1987

between

Talenti, Pier Francesco,
res. in Rome, v. Cola di Rienzo II
care of attorney Mario Savoldi who, together with attorney R. Gamberini Mongenet represents and defends him by power of attorney and annotation of the summons:

PLAINTIFF

and

Rome City Government, represented by the Mayor pro tem.
resident in Rome, v. del Tempio di Giove 21
care of the office of attorney G. Marchetti who represents and defends it by the power of attorney [registered with] Notary Sirolli Mendaro of 9/10/82 list 71098

DEFENDANT

and

The Prime Minister's Office rep. by the Prime Minister in office, *as well as the Ministry of Finances, Ministry of the Treasury and Ministry of Foreign Affairs* rep. by the respective Ministers in Counsel's, res. in office, Rome, v. dei Fortoghesi 12, care of the State's General Counsel's MATTER AT SUIT:

Compensation for damages.

CONCLUSIONS

At the clarification hearings of 10/22/1986.
The attorneys of the parties concluded thus:

For the plaintiff: *as per brief attached to the minutes of the hearing of 10/22/1986.*
For the City Government; as per the minutes of the hearing of 10/22/1986.
For the other defendants; as per answering brief and the minutes of the hearing of 10/22/1986.

LAWSUIT PROCEEDINGS

With a Summons served on 9/22/83, Pier Francesco Talenti sued the Rome City Government, the Prime Minister's Office, the Ministry of Finances, the

Ministry of Treasury and the Ministry of Foreign Affairs and, stating that he was a US citizen and that he resided in the US, he requested the generic condemnation after requesting a provisional payment of fifty billion lire of all the defendants, jointly responsible, to compensation for all the property and emotional damages suffered by him through the discriminatory and persecutory actions of the Italian State and Public Administration in his regard; these actions, in violation not only of art. 2043 of the Civil Code, but also of the Italy-USA Treaty of Friendship and of the associated protocols and exchanges of notes, as well as the International Pact of New York and the European Convention on Human Rights, has deprived him of huge assets owned by him and companies belonging to him, without paying the just and effective compensation corresponding to the above-mentioned property losses.

In their argument, the defendants challenged the claim, stating that it was unpropoundable, inadmissible and, in secondary order, unfounded. With its order of 5/2/86, the Investigating Magistrate decided to forward the lawsuit to the Panel of Judges in order to reach a decision on the objections raised by the defendants.

Then, after the clarification of the conclusions as attached, the lawsuit was accepted for decision at the collegial hearing on 11/20/87.

Reasons for the Decision

The Court begins by observing that the plaintiff, both in his introductory action, in the following pleadings, and in the final conclusions expressly specified during the hearings in the case, has requested the determination of the responsibility for illicit action committed to his detriment and to the detriment of Companies with assets "owned" by him — some also indirectly — by the Italian State, the Public Administration and the Rome City government, with resulting condemnation of the above-mentioned parties, jointly responsible, to make compensation for the damages caused to him.

Now, according to the principles ruling the Italian juridical order, legal action for compensation for damages as per Aquilian responsibility — as sought by the plaintiff — postulates as a necessary assumption that the subjects bound to pay the compensation have committed, intentionally or not, specific illicit acts that injure an interest of the private citizen and, as such, are the cause of unjust damage.

But, in this case the plaintiff has in no way specified, in any of his pleadings, the individual and specific illicit acts committed by each of the accused Authorities, limiting himself to generic complaints and complaining about equally vague persecutory actions to his detriment on the part of the Italian State.

Consequently, as the individual defendants have been charged with no specific and clearly discernible illicit acts injuring valid interests, and as our juridical order does not contemplate a responsibility of the State *per se*, since it operates through the various individual Administrations [involved], the request is rejected.

The cost is borne by the losing party.

THEREFORE:

The Court, passing conclusive judgment, in the litigation of the parties, rejects the claim filed by Pier Francesco Talenti against the City Government of Rome, the Office of the Prime Minister, the Ministry of Finances, the Ministry of

Treasury and the Ministry of Foreign Affairs; sentences the plaintiff to the repayment of the expenses sustained by the defendants for this judgment, as follows: *(a)* for the City of Rome government; Lire 25,000,000 of which L. 200,000 for expenses and L. 1,377,000 for fees; *(b)* for the other defending administrations L. 45,000,000, of which L. 250,000 for expenses and L. 1,093,000 for fees, in addition to previously charged expenses.

Thus decided in Rome, in the council chamber of the first civil section of the Court, 12/11/1987.

(Signed) Filippo Verde
Aida Campolongo.

Section Director,
(Signed) Paola Podrini

Registered in Clerk of Court's Office,
Rome, Feb. 3, 1988.

The Section Director,
(Signed) Paola Podrini

Certified Copy,
Feb. 19, 1988.

[Translated and reviewed by Department of State Language Services.]

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

20 February 1989.

I have the honour to acknowledge receipt of your letter of 17 February 1989 enclosing certified translations of a decision of the Court of Rome in the case concerning *Talenti* v. *Rome City Government*, referred to by counsel for the United States during the oral proceedings in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, the original and uncertified translation of which were submitted to the Court with your letter of 15 February 1989.

75. THE REGISTRAR TO THE AGENT OF ITALY

20 February 1989.

I have the honour to transmit to Your Excellency herewith a copy of a certified translation of a decision of the Court of Rome in the case concerning *Talenti* v. *Rome City Government*, referred to by counsel for the United States during the oral proceedings in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, which was transmitted to the Court by the Co-Agent of the United States by a letter dated 17 February 1989. The original and an uncertified translation were submitted to the Court, and copy supplied to you, on 15th February 1989.

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

21 February 1989.

I have the honour to transmit to you herewith copies of the following documents[1], supplied to me by the Agent of Italy in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, to which reference was made in the course of oral arguments at yesterday's sitting[2] of the Chamber.

1. Italian *Corte di Cassazione*, decision of 28 July 1986, No. 4811 (in Italian).
2. Certified English translation of No. 1.
3. Treaty of Friendship, Commerce and Navigation between the Italian Republic and the Federal Republic of Germany, signed in Rome on 21 November 1957 (in Italian and German).
4. Certified English translation of Article 6 of No. 3.

77. SUPPLEMENT TO THE ORAL REPLY GIVEN BY PROFESSOR BONELL TO A QUESTION PUT BY JUDGE SCHWEBEL AT THE SITTING OF 21 FEBRUARY 1989, COMMUNICATED BY THE AGENT OF ITALY TO THE REGISTRY ON 22 FEBRUARY 1989

The Italian Delegation is honoured to state the following:

1. In July 1967 ELSI took the decision to dismiss 300 workers.

2. To avoid those dismissals, the Regional Government entrusted ESPI (Ente Siciliano per la Promozione Industriale) with the task of finding a solution.

3. As a result, an agreement was reached, in terms of which ELSI's workers were merely suspended, and not dismissed, and in August 1967 they began a retraining programme, their payment taking the form of a daily allowance, made by the Region (cf. Unnumbered Document annexed to Counter-Memorial, Vol. I, p. 20/21[1]).

4. In March 1968 the situation became critical. ELSI decided to close the plant and dismiss the major part of its workforce. The Italian Government — meeting of 29 March 1968 (cf. Memorial, Annex 15, Exhibit G) — offered to have the Region pay the salaries (by means of *ad hoc* regional legislation) if the dismissal letters were not sent out.

Requisition was not a formal condition for the assumption of the payment of wages by the Region.

The requisition kept the factory open.

For the payment of salaries the Region enacted regional legislation.

By Regional Laws n. 12 of 13 May 1968 (cf. Document 37 annexed to Counter-Memorial), n. 23 of 6 August 1968 (cf. Document 38 annexed to Counter-Memorial) and n. 31 of 23 November 1968 (cf. Document 39 annexed to Counter-Memorial), the payment of extraordinary monthly allowances equal to the actual monthly wages was borne by the Region until 15 October 1968.

Law n. 12 of 13 May 1968 (quoted above) also covered the wages of March 1968 which had not been paid by ELSI.

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[1] Not reproduced.
[2] See p. 163, *supra*.

78. TABLES ILLUSTRATING MR. HAYWARD'S EVIDENCE GIVEN ON 22 FEBRUARY 1989[1], AS COMMUNICATED BY THE DELEGATION OF ITALY TO THE REGISTRY ON THE SAME DAY

Explanatory Key to Exhibits

Exhibit A: Copy of chart appearing on page 151[2] of the Memorial.

Exhibit B: Copy of Schedule B1 of Mr. A. Schene's Affidavit appearing as Annex 13[3] to the Memorial.

Exhibit C: Copy of the Assets[4] side of the audited Balance Sheet of ELSI as at September 30, 1967.

Exhibit D: Originally prepared Summary of Adjustments.

Exhibit E: Copy of page 9[5] of the audited accounts of ELSI as at September 30, 1967.

EXHIBIT D.

Adjustments to the Book Value of ELSI as at March 31, 1968

	Millions of Lire	
Book value of assets claimed by United States Delegation		17,053.5
Adjustments arising from audit of September 30, 1967 and also applying to March 31, 1968 financial position	3,062.4	
Qualifications of the auditors:		
re Inventories	453.3	
re Fixed assets	463.6	
Doubts expressed by the auditors:		
re Price adjustments	251.6	
		4,230.9
Adjusted book value		12,822.6

79. FINAL SUBMISSIONS OF ITALY, DATED 23 FEBRUARY 1989, COMMUNICATED BY THE AGENT OF ITALY TO THE REGISTRAR

[See pp. 275 and 381-382, supra.*]*

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[1] See p. 239, *supra.*
[2] I, p. 108.
[3] I, pp. 135-136.
[4] See No. 71, *supra.*
[5] *Ibid.*

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

27 February 1989.

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

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

Copies of this document have been provided to the Respondent.

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

27 February 1989

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

Enclosure: As stated.

Applicant's Answers to Questions of 27 February 1989

Question of Judge Schwebel[2]

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

Question of Judge Oda[3]

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

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

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

Answer

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

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

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

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

Question of Judge Schwebel[1]

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

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

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

Answer

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

Question of Judge Schwebel[1]

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

Answer

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

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

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

Question of Judge Schwebel[3]

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

Answer

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

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

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

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

Question of Judge Ruda[1]

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

Answer

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

Question of Judge Ruda[2]

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

Answer

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

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

Question of Judge Jennings[3]

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

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

Answer

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

Question of Judge Schwebel[1]

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

Answer

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

Question of Judge Schwebel[2]

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

Answer

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

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

Applicant's Answers to Questions of 23 February 1989

Question from Judge Oda[1]

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

Answer

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

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

Question from Judge Schwebel[2]

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

Answer

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

Yet with the requisition in place, there was no opportunity to show the plant to prospective buyers after 1 April and no ability to negotiate any deals for the immediate disposition of the plant and assets. Under this hypothetical scenario, compensation would have to be based on the extent to which Raytheon and Machlett would have been able to sell ELSI's assets in the time available to them before the bankruptcy occurred. In so far as Raytheon had made the commitment to advance all funds necessary to maintain ELSI's liquidity, this would have been a substantial amount of time and might have resulted in a recovery close to ELSI's book value.

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

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

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

Question from President Ruda[1]

If it was decided not to provide new capital but to put the company into liquidation, would it be possible in Italian law, to conduct the liquidation without becoming bankrupt; and, if so, under precisely what conditions could bankruptcy be avoided?

Answer

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

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

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

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

Question from Judge Ruda[1]

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

Answer

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

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

82. THE REGISTRAR TO THE AGENT OF ITALY

27 February 1989

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

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

27 February 1989.

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

Enclosure: As stated.

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

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

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

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

(Signed) Michael J. MATHESON.

84. THE REGISTRAR TO THE AGENT OF ITALY

27 February 1989.

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

85. THE AGENT OF ITALY TO THE REGISTRAR

2 March 1989.

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

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[1] With two documents attached.

Questions by Judge Oda

A. Question to both Parties

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

The answer is no.

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

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

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

B. Questions to Italy

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

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

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

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

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

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

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

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

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

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

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

Questions by Judge Schwebel

A. Question to both Parties

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

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

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

B. Questions to Italy

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

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

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

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

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

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

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

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

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

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

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

and that

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

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

Were those purposes achieved?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Prefect expressly stated as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

First, Article 217 of the Bankruptcy law states:

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

Second, Article 218 of the Bankruptcy law states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Questions asked by President Ruda

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

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

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

The answer is as follows.

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

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

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

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

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

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

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

The Judge would then appoint a judicial commissioner (see Art. 163 of the Bankruptcy Law). The creditors are called to vote, reaching decisions by a majority representing at least ⅔ of the credits (see Art. 177 of the Bankruptcy Law). If the judge holds the proposal to be inadmissible or if the required majority is not obtained (see Art. 179, Bankruptcy Law), the judge will declare the debtor's bankruptcy as his own initiative (see Art. 162 (2) of the Bankruptcy Law).

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

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

The answer to this question is as follows.

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

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

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

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

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

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

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

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

But the accountants' adjustments were even greater:

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

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

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

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

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

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

[*See p. 460,* supra.]

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

CONFIDENTIAL

Palermo, 9 May 1968.

Dear General Mancini,

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

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

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

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

1. Seizure and operational plan

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Contracts in course

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

[1] Not reproduced.

3. Equipment, materials and personnel

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

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

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

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

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

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

(Signed) BEVILACQUA.

86. THE AGENT OF ITALY TO THE REGISTRAR

13 March 1989.

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

Our comments are as follows:

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

* * * *

[1] Not provided.

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

[3] See pp. 449-456, *supra*.

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

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

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

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

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

* * * *

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

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

87. THE REGISTRAR TO THE AGENT OF ITALY

13 March 1989.

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

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

13 March 1989.

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

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

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

Questions from Judge Oda

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

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

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

Questions from Judge Schwebel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "[T]he Raytheon-Elsi plant represents a concrete reality in the economic life of our province and of the entire Sicilian Region. This reality consists in equipment, facilities, highly skilled labour, a management staff, domestic and foreign commercial relationships, all witnessing a social and economic potential of substantial bearing . . ." (P. 469, *supra*.)
>
> "[The] company [has] . . . an economic value composed not solely of corporate investments but also of the skill and co-operation of the personnel and relating human element . . ." *(Ibid.)*

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

> ". . . an area naturally preferable to any other industrial area because of the presence on the spot of a complete plant and skilled engineering and labour forces" *(ibid.)*.

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

> "As a matter of fact, there are definite indications that foreign groups, with which negotiations are well under way, will very likely participate in this new company." (P. 468, *supra*.)

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

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

Questions from President Ruda

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

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

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

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

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

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

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

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

Per Italian Books *Adjustments* *American Accounting Basis*

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

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

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

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

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

14 March 1989.

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

90. THE REGISTRAR TO THE AGENT OF ITALY

14 March 1989.

I have the honour to transmit to Your Excellency herewith a copy of a letter dated 13 March 1989 from the Deputy-Agent of the United States in the case concerning *Elettronica Sicula S.p.A. (ELSI)*, setting out the comments of the United States on the written replies of Italy to questions put by Members of the Chamber during the oral proceedings in that case.

91. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

14 April 1989.

I have the honour to refer to the request made by the President of the Chamber formed to deal with the case concerning *Elettronica Sicula S.p.A. (ELSI)*, at the close of the last hearing in that case (2 March 1989, p. 383, *supra*), that the Agents of the Parties should "remain at the disposal of the Chamber for any further assistance it may require". Pursuant to this request, and with reference to Article 49 of the Statute of the Court, President Ruda, in his individual capacity as a member of the Chamber, wishes to put the following question to the Agent of the United States:

> "The minutes of the meeting of shareholders of ELSI held on 28 March 1968, filed in English translation as Annex 32 to the United States Memorial, refer to a number of documents as being 'enclosed hereto' under identifying letters, but those documents do not form part of the Annex.
>
> 1. Are the 'financial statements (Balance Sheet and Revenue Statement)' referred to under identifying letter C identical with those attached to the Co-Agent's letter to the Registrar of 17 February 1989? If not, can a copy and (if appropriate) translation of these be supplied, please?
>
> 2. Can copies and translations of the other documents (identifying letters A, B, D and E) be supplied, please?"

I am transmitting a copy of this letter to the Agent of Italy for his information.

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

19 May 1989.

In response to your letter of 14 April 1989, enclosed are twenty copies of Attachments A through E[1] to Annex 32 to the United States Memorial in the case concerning *Elettronica Sicula S.p.A. (ELSI)* and an original and nineteen copies of certified English translations. I certify that the enclosed documents

[1] In Italian. Not reproduced.

constitute true copies of documents adduced in support of the contentions contained in the United States pleadings.

In response to President Ruda's questions:

1. The financial statements referred to under identifying letter C to Annex 32 are enclosed. They are not identical in form with those attached to the United States letter of 17 February 1989. However, the content of the financial statements referred to under identifying letter C is in agreement with and is the source of the balances per books reflected in the Coopers & Lybrand Report on the Financial Statements of Raytheon-ELSI, S.p.A. for the period ended 30 September 1967 that was attached to the 17 February letter.

2. Copies and translations of Attachments A, B, D and E are enclosed. I note that reference to "trimestre" in Italian (translated literally as "trimester") at Attachment D, p. 2[1] is synonymous with "quarter" for accounting purposes. Reference to "legge del terzo" in the Italian (translated literally as "law of the third party") at Attachment D, p. 3[2] appears to be a reference to the so-called "30% law" which required 30 per cent of government agency supply and job contracts to be made from companies located in the Mezzogiorno region.

The documents requested by the Court were not in United States Government files. Accordingly, upon receipt of your letter, the United States forwarded the request to the Raytheon Company which requested a search of the files of Studio Legale Bisconti, Raytheon's counsel in Rome. As soon as the documents were identified, they were sent by courier to the United States and certified English translations were made. I hope that the unavoidable delay in locating and translating the requested documents has not caused the Court any unnecessary inconvenience.

Enclosures: As stated.

(Translation)

ENCLOSURE [A]

Report of the Board of Directors to the Regular and Special Stockholders' Meeting

Dear Stockholders:

We wish first of all to inform you that within a few days after the Board's drafting of this report and before the current meeting, at which this report is submitted to you, the increase in stock capital from 1,500,000,000 lire to 4,000,000,000 lire, decided on by the Special Meeting of March 31, 1967, will be effectuated on the formal level as well, by means of subscription and total payment for 2,500,000 newly issued shares: namely, 1,250,000 common shares marked with the letter "A" and 1,250,000 preferred shares marked with the letter "B". The *de facto* effectuation will be performed by means of payment of 2.5 thousand million lire on the part of the Raytheon Company partner before the approval of the fiscal year which ended on September 30, 1967.

Before explaining to you the economic and asset-related results of the balance

[1] P. 483, *infra*.

[1] See *I.C.J Reports 1989*, p. 15.

sheet made out on September 30, 1967, we wish to briefly tell about the main events that marked our operations.

During the fiscal year, the executive organs decided:

- to carry out new corporate policies with a view to reorganizing the company's structure more effectively and increasing the efficiency of its means of production;
- to study the introduction of new products to augment sales;
- to put in effect a cost-reduction program, particularly in the area of overhead costs.

The benefits of the programs described above, which were realized only in part in the past fiscal year, should produce their effects in future operations.

The fiscal year ended with an operating loss of 1.410 thousand million lire, owing in large part to the heavy impact of financial charges (926.5 million lire), to the competition's continuous pressure on selling prices, and to the sagging of sales. This operating loss includes writedowns of 573.4 million lire [Lmil. 573.4].

The total loss for the fiscal year is 2,683,460,080 lire, which includes the following non-operating items: 1. Shrinkage of inventory (Lmil. 478), 2. Depreciation of inventory (Lmil. 242), 3. Provisions for obsolescence of inventory (Lmil. 192), 4. Returns inwards (Lmil. 214), 5. Inventory clearance (Lmil. 32), 6. Set-asides for accrued liability (Lmil. 84), 7. Other items (Lmil. 32). Pursuant to Art. 2446 of the Civil Code, it is necessary to convene the Special Meeting to take the appropriate measures. In this Meeting, and in the relevant Report of the Board of Directors, the events and causes will be explained which defined the current statement of assets and liabilities.

The enclosed statement of assets and liabilities shows total assets on 9-30-1967 of 22,041,757,580 lire.

The most significant changes were recorded:

in *Assets*

- from a decrease in plant by — Lmil. 507.9, primarily owing to the writeoff of fully depreciated items;
- from an increase in the inventory on hand and the products in process, by — Lmil. 490;
- from a decrease in debt by — Lmil. 489.1.

in *Liabilities*

- from a decrease in writedown reserve by — Lmil. 668.9 (see note regarding decrease in plant, above);
- from an increase in various reserves by — Lmil. 972.1.;
- from a decrease in notes payable by — Lmil. 733.1;
- from a decrease in mortgage loans by — Lmil. 439.4;
- from an increase in debts owed to banks, suppliers, and accrued liability by — Lmil. 550.6.

For the Board of Directors,

(Signed) John D. Clare.

(Translation)

Raytheon-ELSI S.p.A. [B]

Report of the Board of Auditors on the Balance Sheet Made Out on September 30, 1967

Dear Stockholders:

We confirm to you, first of all, that the increase in stock capital decided on by the Special Meeting of March 31, 1967, has been effectuated. On February 24, 1968, in fact, 2,500,000 newly issued shares were subscribed and paid for at a total face value of L. 2,500,000,000 [lire].

The balance sheet made out on September 30, 1967, which the Board of Directors submits for your examination and deliberation, can be summarized in the following figures:

– Assets	L. 19,358,297,500
– Liabilities	L. 22,041,757,580
– Loss for the fiscal year	L. 2,683,460,080
– *The suspense accounts are balanced by*	L. *1,151,637,706*

The above result finds confirmation in the economic account, which shows:

– Costs and opening inventory	L. 15,870,584,079
– Revenue and final inventory	L. 13,187,123,999
– Net loss	L. 2,683,460,080

We attest that the values recorded in the balance sheet are in conformity with the results of the regularly maintained account books. The valuations used in the balance sheet were obtained in conformity with the legal regulations; in particular, we can inform you that the accrued items and the audits were calculated in compliance with the provisions contained in Art. 2426 of the Civil Code.

The depreciations were performed pursuant to the legal regulations, and the personnel old-age pension fund covers the total owed by the Company under this heading.

Your Board of Directors has explained to you the changes that occurred in the Company's assets in connection with activity performed in the past fiscal year, and therefore, in accordance with Art. 2432, par. 2 of the Civil Code, we express an opinion favorable to the approval of the present balance sheet, as it is presented to you.

The Board of Auditors,
[Signature, illegible.]
[Signature, illegible.]

(Translation)

ENCLOSURE

Balance Sheet as of 9/30/1967

Statement of Assets and Liabilities

Assets

Land and buildings	1,082,636,651
Plant, machinery, and equipment	5,793,172,263

Furniture, fixtures, and motor vehicles	210,471,488
Construction in progress	138,170,315
Studies in progress	303,031,500
Items to be amortized	1,423,001,220
Materials and work in progress	6,579,127,637
Materials in testing	113,029,019
Cash, banks, and postal checking account	28,072,903
Notes in hand	124,628,337
Investments and holdings	119,209,490
Credits	3,013,109,521
Accrued assets and deferred charges	430,637,156
Loss for the fiscal year	2,683,460,080
Total	22,041,757,580
Order accounts	1,151,637,706

Liabilities

Stock capital:	
– Shares of group A	750,000,000
– Shares of group B	750,000,000
Partners/capital increase account	2,500,000,000
Ordinary reserve	1,514,377
Reserve for depreciation	1,270,292,640
Reserve for employee severance pay	538,939,772
Reserve for writedown of credits	80,574,054 [?]
Taxed reserve	862,331,226
Notes payable	1,188,325,170
Mortgage loans	3,917,335,259
Miscellaneous debts	8,611,910,227
Debts owed to the parent company	1,004,020,481
Accrued liabilities	566,514,374
Total	22,041,757,580
Order accounts	1,151,637,706

Profit-and-Loss Account

Costs

Opening inventory	6,029,305,429
Purchases	4,230,699,830
Personnel costs	2,616,874,247
Miscellaneous costs	480,924,476
Consumption	379,751,143
Amount of depreciation	573,391,898
Set-asides or costs made good	108,629,523
Sales expenses	432,713,818
Finance charges	926,503,392
Miscellaneous charges	85,144,048
Direct taxes	6,646,275
Total	15,870,584,079
[Total costs:	15,870,584,079]

Revenue

Sales	7,143,407,437
Self-produced plant and studies	372,206,598
Financing receipts	800,091
Miscellaneous receipts	106,582,236
Final inventory	5,564,127,637
Loss for the fiscal year	2,683,460,080
Total	15,870,584,079

We declare that the above balance sheet is in conformity with the facts.

The President,
(Signed) John D. CLARE.

The Managing Director,
(Signed) Ing. A. PROFUMO.

The Board of Auditors,
[Three signatures, illegible.]

[D]

March 18, 1968.

Report of the Board of Directors to the Regular and Special Stockholders' Meeting of March 28, 1968

Special Section

Dear Stockholders:

We have convened you in a special meeting to deliberate on the following

AGENDA

1. Losses of the fiscal year which ended on September 30, 1967, and relevant measures taken.
2. Any other business.

The fiscal year ended with an operating loss of 1.410 thousand million lire, owing in large part to the impact of financial charges (926.5 million lire), to the competition's continuous pressure on selling prices, and to the sagging of sales. The total loss for the fiscal year is 2,683,460,080 lire, which includes the following non-operating items: 1. Shrinkage of inventory (Lmil. 478 [million lire]), 2. Depreciation of inventory (Lmil. 242), 3. Provisions for obsolescence of inventory (Lmil. 192), 4. Returns inwards (Lmil. 214), 5. Inventory clearance (Lmil. 32), 6. Set-asides for accrued liability (Lmil. 84), 7. Other items (Lmil. 32). Pursuant to Art. 2446 of the Civil Code, it was necessary to convene the Special Meeting to take the appropriate measures.

The rate of loss for the first quarter of the 1967-68 fiscal year, which closed on December 31, 1967, continued to be high despite some signs of improvement in the company's trading position, owing mainly to the seasonal demand for television tubes. The losses for the first trimester of the current fiscal year amount to about 411 million lire. However, there is solid reason for believing that the rate of loss since December 31, 1967, became even greater because of interruptions of corporate activities owing to earthquakes and intermittent strikes.

Before reviewing the causes of the worsening in the company's situation since the end of the fiscal year which closed on September 30, 1967, it is important to recapitulate the corporate policies and the measures taken by the Board during the past fiscal year in conformity with the interpretation given by the Board itself to the wishes of the stockholders. In early 1967, the Board's corporate policy was initiated along the lines of the following measures taken by the stockholders about a year ago:

1. Acquisition from La Centrale Finanziaria Generale of the remaining 20 per cent of the ELSI block of stock for 300 million lire. This gave the Board the control necessary for the purpose of instituting appropriate programs for improving the situation of Raytheon-ELSI and for seeking a strong Italian partner.
2. Addition of a further 2.5 thousand million lire to the company's capital.
3. Contribution of a further 1.5 thousand million lire in bank sureties necessary to provide the company with the means with which to continue operating.
4. Deferral of collection by the Raytheon Company of sums owed by Raytheon-ELSI for previous sales and services rendered to it, which still amount to about 1.1 thousand million lire.

After these measures taken by the stockholders, the Board inaugurated a recovery program which can be summarized as follows:

(a) strengthening of ELSI's management with a skilled group of persons chosen from among the staff for the Raytheon Company;

(b) a search for new products for ELSI, particularly via attempts to have the Government apply the so-called "law of the third party" in ELSI's favor, and also via obtaining new products from Raytheon in America;

(c) a search for an influential Italian partner, preferably among the companies with governmental participation, in a position not only to make a financial contribution to ELSI, but also to introduce new products into the company from Italian sources, to help it obtain the benefits that are due to companies of the Mezzogiorno [Southern Italy, including Sicily], and finally to ensure ELSI's future within the framework of the national five-year plan.

The last twelve months have seen a significant operating advance, but it has not been possible to achieve the inclusion of a suitable Italian partner in the company, just as it has not been possible to obtain new products and markets from public-sector sources. All the activity performed to obtain the aforesaid advance and the aforesaid products and markets has been documented in detail elsewhere. Three reports were presented to the Ente Siciliano per la Produzione Industriale [Sicilian Agency for Industrial Production]; documented proposals were made to the Central Government, emphasizing the need to obtain new products and identifying these products; substantial improvements were also obtained in the operating results. The energetic negotiating work conducted with all the key ministers and ministries concerned with the question, on both the central and the regional government levels, has not produced any result up to now. It has been constantly emphasized in all our reports and during all our negotiations that a strong and suitable Italian partner is indispensable for an economically healthy long-term future for Raytheon-ELSI. In the current circumstances, an electronics company entirely owned by foreigners cannot easily compete in a market all but dominated by orders and jobs that come from the public sector.

During the first months of this year, some events took place which caused a rapid deterioration in the company's position. The earthquakes in Sicily last January caused disruptions in production and negatively influenced not only the loss position but also the company's liquidity. These were followed by strikes of

an intermittent nature in the cathode-ray tube division, which produced negative effects larger than what the loss of working hours would suggest. This was inevitable once one considers the completely automated manufacturing process for this line of products. It was necessary to close the cathode-ray tube production department in order to negotiate conditions more in keeping with industrial and commercial needs with the unions. It also became necessary to announce the plan to reduce the staff by about 175. These events resulted in a total strike of the factory beginning on March 4 of this year, which has continued without interruption and shows no signs of being resolved in the immediate future. These events have seriously and perhaps irrevocably damaged the company's market position. There have been other events of a critical nature. We were informed by the President of the Sicilian Region that we did not succeed in obtaining the approval of the Central Government for an electronics plan in Sicily, and that it was also not possible to obtain the participation of IRI [Istituto per la Ricostruzione Industriale = Institute for the Reconstruction of Industry] in Raytheon-ELSI. At the same time, the stockholders, once informed of the losses of the past fiscal year, and therefore of the need for a recapitalization or writedown, have formally communicated their firm intent not to contribute further financial investments to Raytheon-ELSI.

Without a restructuring of company activities in conjunction with a suitable partner, as was continually emphasized during the last twelve months, with a normal rate of operating losses of about 120 million lire per month, with the present strike situation and the resulting harm to the company's market position, the Board of Directors is of the opinion that not only is it not possible to recover the losses in the course of the current fiscal year, but it would not be prudent to continue corporate activities by means of a simple writedown of corporate capital.

These circumstances, therefore, constrained the Board to adopt unanimously the following resolution at the Board meeting of March 16, 1968:

> "After extensive discussion, the Board unanimously resolves upon the cessation of corporate activities, to be carried out in the following ways:
>
> 1. the cessation of production will be effectuated immediately;
> 2. the cessation of commercial activities and the dismissal of employees will be effectuated on March 29, 1968.
>
> The Partners' Meeting called for March 28, 1968, will formally make the resolutions needed.
>
> The Board directs the Managing Directors to explain the company's situation and the events which have led to the Board's resolutions to the unions and the representatives of the employees and to all the competent authorities."

Therefore, the Board submits this resolution to the attention of the stockholders for their ratification, and to receive any other directive which the stockholders may consider suitable to the circumstances of the case.

The Board of Directors.

(Translation)

[E]

Report of the Board of Auditors to the Special Meeting of March 28, 1968

[Translator's note: "February" is typewritten and crossed out; "March" is written in by hand.]

Dear Stockholders:

As can be seen from the balance sheet of September 30, 1967, which was already presented for your approval, the fiscal year closed with a loss of 2,683,460,080 lire, which exceeds one third of the corporate capital, and therefore, in accordance with Art. 2446 of the Civil Code, you have been convened in a special meeting to take the appropriate measures.

The Board of Directors has explained to you the causes which brought about the aforesaid loss, and has also informed you that without new financial contributions and without an expansion of markets, the loss itself not only cannot be recovered during the current fiscal year, but is destined to increase.

Moreover, since the conditions indicated for solving the Company's crisis have not come about, the Board of Directors has decided upon the cessation of corporate activities, and submits this decision for your approval.

The Board of Auditors.

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

26 May 1989.

I have the honour to acknowledge receipt of the letter which you addressed to the Registrar on 19 May 1989 together with twenty copies of your Government's response to the questions put by the President of the Chamber at the close of the hearing in the case concerning *Elettronica Sicula S.p.A. (ELSI)*.

Copies of the letter and its enclosure have been transmitted to the Agent of Italy, who has further been informed, with reference to Article 72 of the Rules of Court, that any comments he may wish to make should be received in the Registry not later than 9 June 1989.

94. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

3 July 1989.

I have the honour to inform Your Excellency that the Chamber of the Court constituted in the case concerning *Elettronica Sicula S.p.A. (ELSI)* will hold a public sitting at the Peace Palace at 10.00 a.m. on Thursday, 20 July 1989, for the purpose of delivering its Judgment.

95. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

20 July 1989.

Pursuant to Article 95, paragraph 3, of the Rules of Court, I have the honour to transmit to Your Excellency herewith a copy of the Judgment [1] given today in the case concerning *Elettronica Sicula S.p.A. (ELSI)* by the Chamber formed to deal with that case. Further printed copies of the Judgment will be sent to you in due course.

96. LE GREFFIER ADJOINT AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN [2]

22 août 1989.

Le Greffier adjoint de la Cour internationale de Justice a l'honneur de transmettre ci-joint un exemplaire de l'arrêt rendu le 20 juillet 1989 par la Chambre constituée par la Cour internationale de Justice pour connaître de l'affaire de l'*Elettronica Sicula S.p.A. (ELSI)*.

D'autres exemplaires suivront par la voie habituelle.

[1] See *I.C.J Reports 1989*, p. 15.

[2] Une communication analogue a été addressée aux autres Erats admis à ester devant la Cour.

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