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Mr. A. Thomas TAYLOR
Chairman
Deltec International Limitedd
135 South LaSalle Street
Chicago, Illinois 60603

1/12/72

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~~Sandy Heaton 2221~~
Mrs. Mallardi

January 12, 1972

Dear Mr. Taylor:

I want to thank you for your letter of December 17, 1971, and for the enclosures concerning the difficulties Deltec has been having in Argentina. I have not had time to examine these documents personally, but a member of our staff has gone over them. I am informed that Deltec appears to have a strong case from the standpoint of equity, and I appreciate your calling this matter to my attention. I agree that it would be in the best interests of any developing country to accord the full protection of the law to foreign investors and provide the kind of treatment that would encourage the inflow of capital from abroad. I have made this point in discussions with business leaders and officials of the developing countries in the past, and I shall continue to do so in the future.

Sincerely yours,

Arthur F. Burns

Mr. A. Thomas Taylor
Chairman
Deltec International Limited
135 South La Salle Street
Chicago, Illinois 60603

RJI:sc
cc: Mrs. Mallardi (2)

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B5-4

December 27, 1971

Dear Mr. Taylor:

Thank you for your letter of December 17th which has been received in Dr. Burns' absence from the office. I shall bring it to his attention upon his return.

Sincerely yours,

Concetta M. Nobilio
Secretary

Mr. A. Thomas Taylor
Chairman
Deltec International Limited
135 South LaSalle Street
Chicago, Illinois 60603

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#1042

DELTEC INTERNATIONAL LIMITED
135 South La Salle Street
Chicago, Illinois 60603
U. S. A.

A. THOMAS TAYLOR
CHAIRMAN

December 17, 1971

Dr. Arthur F. Burns
Chairman
Board of Governors of the
Federal Reserve System
Federal Reserve Building
Washington, D. C. 20551

Dear Dr. Burns:

It is hard to conceive that the talented and richly endowed country of Argentina will not resolve its political and economic problems and attain a position as prosperous as its past.

The inequitable treatment and harrassment of Deltec in Argentina will have a serious impact on the future of the country and you who have interests in that country and are interested in its future might well study the attached three documents which I enclose:

1) A brief summary history of the last two years of what has actually taken place in Argentina in the matter of Swift de la Plata.
2) Judge Lozada's opinion in which he overruled the 86% favorable vote of the Swift de la Plata creditors, throwing Swift de la Plata into liquidation on the basis of political and economic philosophy rather than economic viability. (our translation)
3) Brief of appeal by Allende & Brea, Buenos Aires, on behalf of Swift de la Plata. The brief gives the entire history and all the pertinent factual data of the case. (our translation)

This subject and its consequences are so vital to anyone doing business in or who has interest in Argentina and the hemisphere that you might wish to understand what is happening in this case and take steps to help stem the possible expansion of this trend to other fields.

Anything that you might be able to do to guide Argentina into the proper channels would be tremendously beneficial for that country.

Sincerely,

A Thomas Taylor

A. Thomas Taylor

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Enclosures (3)

OCT 12 1971

Dear Mr. Taylor:

Thank you very much for your letter of September 22, 1971, and for the copy of the statement Deltec issued to the press two days earlier regarding the problems of Swift de la Plata. I appreciate your thoughtfulness in informing me of these developments.

Sincerely yours,

Arthur F. Burns

Mr. A. Thomas Taylor
Chairman
Deltec International Limited
Deltec House
Cumberland and Marlborough Streets
PAS 29
Nassau, Bahamas

TM:sc
10-8-71
Ref. #268

cc: Mrs. Mallardi (2)

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We believe that a familiarity with the events of the last two years recited in the following Summary History prepared by us is of fundamental importance to an understanding of one of the major elements in Deltec's position in Argentina.

COMPAÑIA SWIFT DE LA PLATA

SUMMARY HISTORY

All peso amounts are in new Argentine pesos.

1. The price of cattle in November/December 1969 averaged about 0.69 pesos per kilo.

2. Swift bought less cattle in the Liniers auction market in January, February and March, 1970 because prices rose to about 0.82 pesos per kilo. Nevertheless, Swift's total slaughter was only modestly down in these three months.

3. In April, 1970, in order to improve Swift's management (Swift had been losing money every month for six months) and to begin Argentinizing the company, the management was changed and Enrique Holmberg replaced Raford Herbert as President.

4. At the same time, we extended to Mr. Holmberg an option to assemble a group of Argentine investors to acquire control of the company. When Mr. Holmberg found himself unable to form such a group, we gave options successively to a prominent industrialist on October 8, 1970; to the company's executives on February 9, 1971; and to another outside group on May 22, 1971. Finally we made a firm agreement to turn over 100% of the equity to Swift's executives on October 14, 1971, subject only to court approval of the creditors agreement that had been adopted on October 5.

5. Under the leadership of Mr. Holmberg and an all-Argentine management team, Swift made a dramatic recovery. In March and April, 1970 and previously, production by Swift of frozen cooked beef (the most remunerative meat product for Argentina to export) had been averaging 2,000,000 pounds per month. The new management succeeded in increasing this production to about 3,100,000 pounds in May, to 3,900,000 pounds in June and to 4,800,000 pounds in July, 1970. This was done while costs were being reduced by the equivalent of approximately $12 million per year.

6. Swift lost money in April but about broke even in May and made profits of approximately 1,230,000 pesos in June, 1,140,000 pesos in July and 895,000 pesos in August.

7. This increase in production and profits was achieved in spite of the price of cattle rising steadily throughout the period to 1.16 pesos per kilo in September and 1.34 pesos in October, 1970.

8. During these eight months Deltec, the principal stockholder of Swift, arranged substantial new credits for Swift to purchase seed and cattle. However, Deltec did not ever receive one centavo of its own money back in either this period or in any previous or subsequent periods. The total funds and

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resources that Swift obtained from abroad from the date that Deltec acquired the shares of Swift in March, 1969 to the date of the petition for a "convocatoria" on December 18, 1970, were over U. S. $10,000,000. These additional funds were arranged by Deltec.

9. At the end of September, 1970 the price of cattle at the Liniers market went up to 1.30 pesos per kilo while the rate of exchange remained unchanged, making exports of Argentine meat totally uneconomic and forcing Swift and almost all of the other export plants in Argentina to close down.

10. Thereafter, the Argentine Government took a number of measures to improve the situation, including making available credit through official banking institutions, which credit was limited, however, to companies more than 51% Argentine owned. The Government was at all times aware of Deltec's efforts to place the control of Swift in Argentine hands, and indeed one reason these efforts were unsuccessful was the fact that the potential investors were never able to ascertain that, upon their purchase of control, Swift de la Plata would be treated as an "Argentine company" for all purposes.

11. In this situation, the owners of a number of foreign owned plants settled the liabilities and one of them simply withdrew from the scene. For Swift, the largest unit in the industry, this course of action was not possible and the only alternative that presented itself was insolvency proceedings. On December 18, 1970, Swift de la Plata S. A. F. applied to the competent court of the Argentine Republic for "convocatoria", a proceeding which contemplates (1) an immediate cessation of payment on all non-secured and non-preferential debts; (2) the continuation of the business under its own management; (3) the appointment by the court of a referee to report on the business and the nature and amount of the assets and liabilities; (4) the proposal by the management of a creditors agreement for the orderly repayment of the debts; (5) a meeting of creditors to accept or reject the proposal; and finally (6) the approval or disapproval of the agreement by the court; the rejection of the agreement by the creditors or the disapproval by the court resulting automatically in bankruptcy. The case was in due course assigned to Judge Salvador E. Lozada of the Commercial Court, who in turn appointed the referee and scheduled October 4, 1971 as the date of the creditors meeting.

12. In the middle of January, 1971, Swift slowly began operations again, increasing them through the following months. By April, 1971 operations were once again back to normal.

13. During the following months, Swift made operating profits and effected substantial exports as per the following schedule:

	Profits Arg. Pesos	
May 1971	3,106,000	U. S. $ value of product exported from Swift plants during four months period: about U. S. $30,000,000
June 1971	5,104,000	
July 1971	4,100,000	
August 1971	4,785,000	

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14. The total operating profit for the four months May through August, 1971 of 17,000,000 pesos permitted the company to report at the end of August a small loss of 1,170,000 pesos for the eleven months. This was in spite of all its problems, having been substantially shut down throughout six months, with all local credit in Argentina cut off, and with the price of cattle constantly rising. The price of cattle in March was 1.50 pesos per kilo and reached above 2.00 pesos a kilo in August.

15. Furthermore, between April 30 and August 31, 1971 there was a net increase in current assets in the form of cash inventories and receivables of 17,000,000 pesos, less a modest amount spent on sanitary requirements and labor indemnifications.

16. During the early part of 1971 the Argentine industry made a contract with the European buying group to sell specified quantities of meat extract at a price between U.S. $3.60 and $3.80 per pound. By June, Swift had completed its contract and found itself in the unique position of having produced additional quantities while other producers were still delivering against their original contracts. After several months of negotiations, of which the Junta Nacional de Carne (National Meat Board) was kept currently informed, Swift succeeded in concluding a new contract with the buying group for 477 tons at a price of U.S. $3.30 per pound. When the Junta refused to approve this price as inadequate, the National Government, recognizing that Swift did not have the financial capacity to carry the extract inventory, expropriated the first 100 tons which had been produced and in due course paid Swift for it. It is interesting to note that on the day the Junta Nacional de Carne turned Swift down on the exportation in question at $3.30, it authorized another company to export extract at $3.00 per pound.

17. On September 22, less than two weeks before the scheduled creditors meeting, the judge intervened in Swift, replacing the Board of Directors by his own appointees.

18. In the report of the Referee appointed by the judge to report on the financial and economic situation of the company, he stated that an independent valuation made at his request by the Universidad Tecnológica Nacional (Argentine University of Technology), showed a "going concern" value of the total assets of 556,000,000 pesos (U.S. $111,200,000 at the rate of 5 pesos to the dollar) of which 483,000,000 pesos (U.S. $97,000,000) were the value of the fixed assets. Total indebtedness of the company, including Deltec Group claims, were about 175,000,000 pesos (U.S. $35,000,000). Thus the report attributed a going concern value to the equity of about U.S. $86,000,000.

19. On October 4, in spite of the Judge's disallowing all claims of Deltec and those of third parties which in any way bore Deltec's name or endorsement, the other creditors voted in favor of Swift's repayment plan by over 85% in both amount and numbers of creditors. Swift's plan provided for 100% payment of all creditors over four years with interest payable in the fifth and sixth years. Deltec agreed, as part of Swift's plan, to capitalize its claim in the amount of U.S. $9,150,000.

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20. The above shows the economic viability of the company and the repayment plan's excellent chances of success.

21. Suprisingly, on November 8, Judge Lozada rejected the creditor's agreement and decreed the bankruptcy of Swift de la Plata, on the grounds that by reason of its alleged conduct the company did not deserve to survive and that the national interest and dignity must supersede the free will of the creditors. He appointed as liquidator the National Government, which immediately appointed an interventor. The interventor was instructed to continue the operations and the official banks were instructed to make available to him all necessary credit. A few days later the Judge followed his decree with a ruling that Deltec's remaining assets in Argentina were to be available to satisfy the claims of any creditor remaining unpaid upon the liquidation of Swift.

22. Since the Argentine University of Technology report shows a value of net assets over liabilities of the equivalent of approximately U.S. $86,000,000. Thus it is clear that as long as Swift continues to operate one way or another as a going concern, the Argentine authorities' own valuation would far exceed the claims of all the creditors.

23. Swift de la Plata and Deltec both have appealed to the Court of Appeals all of the action taken by Judge Lozada as outlined above.

December 15, 1971

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In the Matter of

COMPAÑIA SWIFT DE LA PLATA S.A.F.

BRIEF ON APPEAL

Allende & Brea

November 16, 1971

Abbreviated Translation from the Original Spanish

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PETITION

To the Honorable Court:

I, Enrique Garrido, an attorney licensed to practice law under No. 12, 989, domiciled at Cerrito 836, 5th Floor, Law Offices of ALLENDE & BREA, representing the Appellant in the proceedings captioned: COMPAÑIA SWIFT DE LA PLATA S.A.F. Creditors' Meeting, respectfully state:

CHAPTER I

That I appear to submit the brief in support of the appeal filed at page 10,562, against the decision of November 8, 1971, in which the Judge decided not to confirm the arrangement between the insolvent and its creditors, and decreed the bankruptcy of my client.

I request the Honorable Court to revoke the appealed decree in all its parts, to reject also the objections found at page 10,006, and consequently to confirm the arrangement adopted at the Creditors' Meeting.

CHAPTER II

Prior to entering upon a detailed refutation of the Judge's decision, I deem it necessary to outline the main procedural steps of this case, as well as to evaluate the operative facts in the matter, in order to do justice to the magnitude of the interests involved and *the unlawfulness of the decision against which I appeal.*

* * * *

The Judge decided the case with a total disregard of the facts and without making an overall evaluation of the contents of the case.

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In addition, he has not taken into account the clear statements of my client, which he did not even mention in his opinion.

I wish to point out in this brief introduction that the decision being appealed violates the legal principles and rules of the general law and of the Bankruptcy Law and departs completely from the lucid rules on ratification of creditors' arrangements laid down by the Honorable Court.

Therefore, this decision is arbitrary in that it lacks a fundamental condition of validity since it is not a reasoned judgment under applicable law, with special reference to the proven facts of the case.

These questions will be examined in the following chapters of this brief.

Chapter III: *History of the case.*

Chapter IV: *Summary of the Grounds of the Decision.*

Chapter V: *Objection to the Arrangement.*

Chapter VI: *Terms of the Arrangement which are damaging to the general interest.*

Chapter VII: *Valuation of the Appellant.*

Chapter VIII: *Summary of the Brief.*

Chapter IX: *The Constitutional Issue.*

Chapter X: *Relief requested.*

* * * *

CHAPTER III

History of the Case

As pointed out in the writ of error appearing at pages 9969/76, my client instituted these proceedings on December 18, 1970. Its petition appears at pages 10/49 of the record and was supported by folders containing extensive and orderly documentation, divided into exhibits, all in strict compliance with the provisions of Article 10 of the Bankruptcy Law.

It was pointed out at that time that the company appearing before this Court is the largest meat packing and food industry in the Argentine Republic and one of the largest industrial companies in the country, measured in terms of volume of business, personnel employed, its industrial, business and administrative organization, its current assets and liabilities and especially of what it represents in the domestic and international markets in the conduct of its business.

It should also be pointed out that the company's diversified activities are carried out in a number of industrial plants, which at this time employ more than 11,000 workers and employees, thus representing a source of livelihood for more than 45,000 persons.

* * * *

The statement made by the Referee in his memorandum sent to the company is also significant, both with regard to the report and the findings of the survey made by the Universidad Tecnológica Nacional.

In this memorandum the Referee acknowledged the full cooperation received from my client in the fulfillment of his task . . .

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Finally, Universidad Tecnológica Nacional, appointed by the Judge at the request of the Referee, to the report of which we must revert below, also indicates that the appellant cooperated toward completion of the task which had been entrusted to it.

The findings of said Institution were submitted in five folders appended to the record in a separate binding. *I wish to point out to the Honorable Court that in the opinion of the Judge there does not appear a single reference, not even circumstantial, to the work done by Universidad Tecnológica Nacional. This omission is not accidental. The reason is that the findings of this survey, totally supported by the Referee, completely destroy the assertions of the Court below.*

Appendix 3 (page 1) of this survey reads verbatim as follows:

> "This technical group obtained most of the information requested from the Swift Company in order to form an opinion on the assignment entrusted to our expertise. *We wish to emphasize the absolute level of cooperation rendered by the company, in terms of both the quality of and the speed with which answers were produced to the various questions raised by the experts.*" (The italics are ours).

* * * *

We must emphasize that the Appellant's economic and social size and significance—the dimensions of the interests at stake—require a particularly meticulous and scrupulous evaluation of the facts.

This likewise has not occurred in our case. The Judge does not submit to the light of critical examination much relevant background and attitudes, such as those to which we have called the attention of the Court; rather, he focuses

his subjective decisional will on the search for or fabrication of elements unfavorable to my client.

It was thus that he arrived at two fundamental decisions: to remove my client's Board of Directors, and to disapprove the arrangement adopted by a large majority at the Meeting of Creditors.

Oddly enough, the Judge does not refer to the first of these decisions in the second, which is the subject of this appeal, and therefore we cannot refer to it here as a specific grievance. Undoubtedly, even at this late stage of the game, the Judge did not have the audacity to assert the presence of fraud and deceit (legal grounds for removal of Board). *If I refer here briefly to the earlier decision, it is because it was one of the unjust rulings that demonstrate the arbitrary approach of the Court below.*

In the writ of error brought by us in this Court to test the validity of the earlier decision, we brought out the grounds for this arbitrariness. We summarize hereunder the arguments of the writ:

a) That the Judge left the Appellant totally defenseless, thus violating the fundamental rules of due process and trampling upon express constitutional guarantees. The grounds for an ostensibly unappealable decision were established in ex parte proceedings, without a hearing for either the Appellant or the Referee: the inadmissible depositions were obtained without opportunity for cross examination or presentation of evidence by the party affected. Their invalidity is total and obvious.

b) None of the cited so-called facts, generated behind the back of the affected party, constitute fraud or deceit nor any other of the grounds contemplated by Article 20 of the Bankruptcy Law. Neither does

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this decision represent a reasoned application of the law.

These were the circumstances under which the Meeting of the Creditors took place on October 4, 1971. On that occasion, the creditors expressed themselves on the arrangement offered by my client, at page 1438/40, contemplating the payment of 100% of the principal of all debts, with interest at 12% per annum on outstanding balances. The principal of the general creditors' claims was to be paid in four consecutive annual installments of 10%, 20%, 30% and 40% respectively, and the interest in two equal consecutive annual installments in the fifth and sixth year respectively.

In addition, there was anticipated the possibility of accelerated repayment from the proceeds of sale of assets not required for the present industrial operation.

Moreover, the company offered to accept the appointment of a Creditors' Supervisory Commission which, with some amendments proposed in open meeting and to which we acceeded, was approved by the creditors.

The removal of the Board imposed a special burden on my client in view of the fact that the time for the agreed installments began to run from the day after the Creditors' Meeting. My client offered this so as to assure that any possible delay in the judicial confirmation of the arrangement would not redound to the disadvantage of the creditors.

The arrangement was adopted by the favorable vote of 1,205 creditors, or 86.81% of the general creditors present at the Meeting, who represented Arg. Ps. 105,851,071.15 out of total admitted claims entitled to vote of Arg. Ps. 116, 914, 813.31, or 85.64%.

This affirmative vote on the arrangement unquestionably represents a clear expression of confidence in the manage-

ment of the company and its future prospects, since without doubt the creditors, by their votes, passed judgment on the conduct of the debtor, the fairness of the proposed plan and the business outlook for the enterprise.

Specifically, it is worth pointing out that:

a) The affirmative votes included those of the federal and provincial banks, such as the Banco de la Nación Argentina, the Banco de la Provincia de Buenos Aires, the Banco de la Provincia de Entre Ríos and the Banco de la Provincia de Córdoba. This demonstrates the concurrence of the Government, which through its credit institutions offered its support to the Appellant. The private banks, both domestic and foreign, took the same position—more than 40 institutions with broad knowledge and experience in the matter.

b) Furthermore, the workers who were creditors voted in favor. They appeared at the Creditors' Meeting in person, spontaneously and in masse, to give their support to my client in the free expression of their opinion. This is the best demonstration that there never existed any manipulation, trickery, deception, coercion or pressure, as my client has always maintained and as the Referee confirmed (see page 1282).

c) The Creditors' Supervisory Commission was to have been made up of five creditors, of which three local banks, two private—Banco de Galicia y Buenos Aires and Banco Popular Argentino—and one official—the Banco de la Provincia de Entre Ríos. The other two creditors were to have been designated by the Judge from among the most important creditors in terms of the size of their claims and their institutional capacity, one to represent the cattle ranchers and the other the commercial suppliers.

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Similarly, the Judge was to designate two alternate members from among the same categories of creditors.

The Commission was to have the broad powers of audit and control conferred on it by the arrangement agreement.

d) It is worth emphasizing that the two-way majority called for by the law was amply exceeded, *despite the fact that the Judge did not recognize the claims of the principal shareholders of the company nor those of any company associated with it.*

These circumstances counsel "that one proceed with extreme circumspection in regard to the grounds for judicial rejection of an arrangement, and that for this purpose the opinion of the creditors must be accorded special weight since they, being the ones most directly affected, are in the best position to consider the various factors, the appropriateness of the arrangement and the chances of its being complied with." (Citations of several Court of Appeals cases omitted.)

Notwithstanding the foregoing, the Judge, whose approach in this case is directly opposed to this admonition, decided not to confirm my client's arrangement agreement.

As we will show in the following chapters, this decision has no basis in law. Its bases are ideological, political, perhaps moral within the private conception of the Judge, but not legal and much less statutory.

The Appellant cannot disguise its bitter disappointment, having achieved a legal and practical solution for its creditors, its personnel and all those for whom it represents the means of livelihood, after months of exhausting effort, to overcome the obstacles, not always natural or spontaneous, that blocked the path to its survival—after all this to find that the Court below was but another link

in the chain of political attacks to which it has been subjected.

My client respects all ideals and all ideologies, and recognizes that even judges have the inalienable right to think, to express their thoughts and to fight for their convictions—as citizens. But when their ideology and their political and socio-economic ideas go beyond these limits and affect the application of statutes to a particular case, they necessarily lead to arbitrariness and destroy those guarantees and rights, whose protection is the most sacred function of the Judicial Branch.

Even when faced with rulings as simply inexplicable as many to which it has been subjected in these proceedings, my client was always confident that, in the end, it would find in the Judge that guarantee of the right of defense and that impartial objective approach which are the pride and tradition of the Argentine courts. Thus, for example, my client, even when it disagreed with the manner in which the Judge disposed of certain aspects of the litigation, as when he removed the Board of Directors without any reason whatever, never withdrew its support for the work of the Court and continued to adhere to an approach of cooperation and procedural fidelity rare in this type of proceeding.

It is for this reason that one can only characterize as a bitter disappointment what my client was forced to realize in the end—*that it never had the slightest chance to receive justice, because, come what may, His Honor was determined to find it a noxious entity which he, with his authority as National Commercial Judge, wished and was bound to cause to disappear.*

Like any political decision, Dr. Lozada has already received the benefit of enthusiastic support from those who

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share his ideas, and violent criticism from those who think otherwise.

But those of us who are parties or participants in a judicial proceeding and as such must test whether the decision applies existing law, irrespective of conviction or political purpose, can arrive at only one conclusion: your Honorable Court is bound to reverse this decision because it would set a serious precedent of judicial arbitrariness and because, whether or not it is right in its ideological focus, the outcome puts the finishing touches on a picture of the complete defenselessness of participants in judicial proceedings and of judicial lawlessness, which, if affirmed, would violate fundamentally the guaranty of the process, the only suitable means for achieving the ends of the Judicial Branch.

CHAPTER IV

Summary of the Grounds for the Decision

There are two grounds propounded by the Judge for not confirming the arrangement approved at the Meeting of Creditors.

1) The approved arrangement, ". . . in that it implies the continuation of this business entity, is damaging to the public interest and must be disapproved." Later on, the Judge tests the continuation of the company from the viewpoint of the public good and in this context refers to ". . . conduct incompatible with the benefit of the arrangement solution and that an analysis of its conduct reveals that it does not deserve to continue to engage in business."

For the Judge, the following are the facts deemed to be incompatible with the continuation of the business:

a) The Appellant is an integral part of the "Deltec Group".

b) That it sought to acknowledge the disputed claims of other entities of the "Deltec Group", something the Judge characterized as an attitude of accommodation and helpfulness on the part of my client.

c) That the Appellant had merged with La Blanca, S.A. and Frigorífico Armour de la Plata, S.A. and that this also evidenced an accommodating attitude on the part of my client.

d) That the Appellant had made loans to Provita, S.A. which had recently been placed in default by the Judicial Administrators.

e) As arguments of supererogation, the Judge pointed out that the Appellant was involved in two criminal proceedings, in one of which a prima facie case of the existence of a violation had just been established.

f) Further, he indicated that the Appellant was the extension in Argentina of a multinational company, citing in this connection a pronouncement of His Holiness Paul VI which required him, as he says, to examine with greater thoroughness the chances of existence of this legal entity.

g) Finally, he refers to my client's behavior as exporter in which he observes a "tendency" to sell to "Deltec companies" at lower prices than to others. This must be put in context, according to the Judge in a rather disconcerting statement, of the recent expropriation of meat extract, the out-of-line price for which was supposed to have endangered the production of the country.

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By the same token he states that "the Judge must reject the arrangement solution when the debtor has acted in bad faith, because only those debtors whose economic troubles are due to causes beyond his control and ability may be permitted to continue to conduct their business . . ." arguments regarding which the Judge thereafter *maintains a significant silence. In the light of the seriousness of the charges hinted at but not spelled out nor PROVEN, this silence speaks for itself about the value as a judicial pronouncement of the decision being appealed.*

2) The second argument of the Judge refers to the objection found in page 10,006 of the record, alluding to various facts which in his opinion bring the case within the terms of paragraphs 2 and 5 of Article 38 of the Bankruptcy Law.

Even though logically it would have been proper for the Judge to have dealt with the objection referred to above in the first instance, as we propose to do in this brief, the Court below reverses the treatment of the questions presented. From this it would appear that the Judge, too, regards the objection as an *a fortiori* argument insufficient in and of itself as a basis for the decision of the Judge.

We cannot fail to emphasize that the Judge's refusal to confirm the arrangement becomes in the end an act of legislation, the Judge thus usurping powers which the law in no way confers upon him, when he purports to give instructions to the Executive about the management and eventual conveyance of title to the assets of the Appellant, in disregard of the principle of the separation of powers and in clearcut violation of his judicial obligation, forgetting that—in the words of your Honorable Court—"the enormous role of the judges in the development of the law

. . . does not extend to the power to establish the law itself . . . nor to assume the power of legislation which they do not have."

On the other hand, the Judge is persuaded of the excellence of my client's industrial plants and wishes to provide for the continuation of operations . . . "for the obvious social and economic reasons, considering that the Referee has highlighted at page 4161 the efficient productivity and appropriate technology of the industrial plants, particularly the one in Rosario."

For the Judge, social peace and the public good, the social and economic order, hold the highest priority. No doubt every citizen is concerned with these values. But in the process of totally ignoring the law and usurping legislative authority, it would appear that the Judge has left the creditors holding the bag. He carriers his protective instinct to the point of leaving exposed the very class of those who are the most directly concerned and for the defense of whose rights, as well as those of the debtor, the law was enacted. For how long is the liquidator's management to last? For 10, 15 or 20 years? Until the assets are liquidated? Until the creditors have collected? Does he really care what happens?

I maintain that in the case at bar there are no grounds for applying paragraphs 2 and 5 of Article 38 of the Bankruptcy Law; that the general interest has not been injured. The decision of the Court below violates express statutory provisions and is diametrically opposed to the uniform interpretation laid down in decided cases by all three panels of your Honorable Court.

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CHAPTER V

The Objection to the Arrangement

* * * *

The legitimate right of some creditors to sign powers of attorney in blank, a decision which as we have seen in no way lacked content but which rather tended to facilitate the execution of the will of the principals, is a solution completely accepted by the provisions of applicable law.

In fact, the law provides that even assuming that the signatory of a blank document should want to object to its contents, "evidence to that effect cannot be given by witnesses."

Moreover, there can be no invalidity when the issuance of a power of attorney, signed by the creditor and delivered to a third party to be completed *with the name* of the person who will act as representative at the meeting, constitutes a business transaction.

In fact, when one delivers a proxy to a person with the name in blank, it is because one entrusts to such person the selection of the representative as a measure of one's confidence in him. From the moment the power of attorney is filed in court, the relationship between creditor and representative at the Meeting is governed by the terms of the power and the grantor of the power may demand an accounting.

It should furthermore be pointed out that false is the opposite of true, and it is therefore inexplicable how the Judge can characterize the execution of powers of attorney as false when the witnesses for the intervenor themselves testified that they had acted freely, as confirmed by the testimony of the deposing notaries.

It should also be pointed that even under the hypothetical assumption that the representation of the three deponents were invalid, their votes were neither necessary nor determinative for the approval of the arrangement. In addition, even if an attempt were made to deny the validity of the 90 powers of attorney which Notary Fraccia declared to have certified and the 20 of Notary Rivas, such an invalidation also would not affect the percentage of creditor votes present required by the Bankruptcy Law.

In fact, the arrangement was approved by a majority of 1,205 creditors out of a total of 1,388, so that if 110 powers of attorney were deducted, assuming they were invalid, a favorable vote of 1,095 creditors out of a total of 1,388 creditors present would have been obtained, which represents 78.89%, that is to say a higher percentage than that required by law.

On the other hand, if these creditors, not identified individually in any way but rather only by the regions in which they reside, are eliminated in the computation of percentage of total indebtedness, the result would not have affected the majority required by the law. The reason for this is that the total amount owed to all creditors in these regions, not three, nor ninety nor one hundred ten, amounts approximately to Arg. Ps. 550,000. Obviously this total does not alter in the slightest the percentage obtained in the vote.

* * * *

It is incredible, Honorable Court, for the Lower Court to find alleged improper representation based on the testimony of nine persons, four witnesses for the intervenor and five witnesses for my client, all in total accord, and then, to find alleged fraudulent collusion, for the Judge to throw out the same testimony as *"highly debatable"*.

* * * *

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CHAPTER VI

Terms of the Arrangement Which Are Damaging to the General Interest

It is now appropriate to deal specifically with the argument invoked by the Judge below that the arrangement approved by the creditors is damaging to the general interest.

Article 40 of the Law in question provides that "Even though the arrangement may not be contested, the Judge shall deny confirmation in cases provided by Article 38 or when he deems that the terms accepted by the majority are manifestly damaging to the general interest."

It is true that the Judge has the power to deny confirmation on his own motion, but this power is not absolute and he may only exercise it under two assumptions:

a) When he ascertains any of the situations which would have allowed the creditors to object to the arrangement in accordance with article 38 of the Bankruptcy Law; or

b) If the terms of the arrangement offend against or affect the general interest.

The meaning and scope of the phrase: *"terms of the arrangement which are manifestly damaging to the general interest"* have been clearly established by repeated statements of the Honorable Court which constitute uniform case law of the Commercial Court, as will be demonstrated below.

The Judge applies the criterion of general interest to reject the arrangement in a manner that expressly contradicts these statements and without ever referring either to the terms of the arrangement or to the arrangement itself.

Furthermore, it should be noted that the Judge does not express any objections to the actual arrangement, nor to the effective possibility of its being fulfilled, nor does he contend that its terms are frivolous or lack serious bases.

Had he done so, he would have had to prove that one of the assumptions was infringed by the terms of the arrangement and not just in any manner, but in a damaging manner, *or more precisely, manifestly damaging.* And if *damaging* means burdensome, encumbering, limiting, diminishing or weakening, *manifestly* is an adverb meaning that the damage must be public and known by all, or in other words, that the offense must be evident, clearly outstanding. The Judge could not say any of this about my client's arrangement which had been evaluated and approved by the creditors; therefore he did not say it.

For the Judge then, the arrangement is damaging to the general interest "... since it implies continuation of this business entity."

It can be observed that this criterion not only contradicts the precedents of this Court, but it impairs to the roots the purposes of the Bankruptcy Law. This body of law allows the businessman who is in financial or economic difficulties to institute a proceeding to forestall bankruptcy for his own benefit, that of the creditors, and that of the business community in general. The specific and concrete purpose of the institution of the preventive creditors arrangement is clearly to enable the debtor to continue his activities, and therefore this purpose, specifically provided for by law, cannot as such constitute something that damages the general interest. The principle of the pre-

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servation of the company is implicit in Article 40 of the law in question. Therefore, the argument of the Judge lacks seriousness by failing to adhere to the standard set by the Supreme Court which has required that judicial decisions must have serious grounds, opining that the "obligation to justify a decision tends to document that the decision in the case is a reasoned derivation from applicable law and not from the individual will of the Judge."

1. *Teaching of the Commercial Court.*

We shall now examine the Honorable Court's teaching regarding the interpretation of the concept "manifestly damaging to the general interest" contained in Article 40.

1) In "Del Atlántico S.A./Bankruptcy" of June 2, 1966, the Court considered it as explicitly established that ". . . if there do not exist the operative facts (listed in Article 38), it is not in order to deny confirmation unless the second hypothesis applies, that is to say, if the terms of the arrangement offend against or affect the general interest, *meaning by this terms that render an arrangement frivolous; conversely, terms that would render the approved proposal presumptively impossible or very difficult to fulfill; or similar situations.*"

2) This same criterion has been repeatedly reiterated in the Honorable Court's decisions. In "Suffern Moine y Cademartori S.A./Bankruptcy", it was decided that ". . . *it is necessary to reach a firm conviction objectively based on actual data of the financial and economic situation of the debtor, as well as the opinion of the directly interested creditors, showing that the general interest of credit and commerce are perceptively affected; for example, when the arrangement appears to lack serious terms or it appears impossible or very difficult to fulfill or if it deceives the interest of the creditors, as well as when the debtor has demonstrated fraudulent conduct or bad faith in his business affairs or toward his creditors.*"

3) To continue with the chronological development of the Honorable Court's decisions, the *en banc* decision of the Court on June 10, 1970 (No. 18,030) re: "Dante Martiri S.A." should be mentioned.

In that decision, the Court lays down the following two criteria:

a) ". . . that the power of the court to deny confirmation on its own motion is not absolute, that is to say that judges may only exercise such power in cases in which they ascertain one or more of the situations which might have served as a basis for a creditor's attack under Article 38, or where the terms are contrary to general interest. . ."

b) That the sense expressed by the latter concept is that terms are to be understood as such, ". . . when they make for a frivolous arrangement or conversely would render the approved proposal presumptively impossible or very difficult to fulfill, etc. . . ."

4) After this, the Honorable Court reiterates this interpretative approach in "La Asturiana S.A./Bankruptcy" (10-15-70, Decision No. 152,257) and more recently in "Hot-Tur, Compañia de Hoteles y Turismo S.A./Bankruptcy" of May 24, 1971 (No. 153,872). In this latter decision, the Honorable Court states that according to the theory upheld by the Court ". . . in these situations, *it is always appropriate to favor preservation of the enterprise* in that it represents a definite source of work and credit and is therefore favorable to the intentions of the law."

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Finally in this decision the Court added that the declaration of bankrupty, a serious and extreme measure, is a "*. . . situation which is obviously not sought by the Law nor required, without more, by the general interest.*"

The departure in the decision of the Judge below from the clear, uniform and binding teaching of the Honorable Court renders the decision clearly void and arbitrary under the decisions of the Supreme Court.

2. *Accumulated Charges Claimed.*

We will proceed to analyze accumulation of the facts relied on by the Judge, which he described as behavior incompatible with the arrangement solution. . . .

Further on, I shall refer to the company as such, to its productive capacity, to its ability to overcome the current crisis in the meat industry, without precedent in our history, to the value and condition of its assets as analyzed by Universidad Tecnológica Nacional, to the capacity and skill of its personnel, all of which are fundamental factors in evaluating the desirability of its survival in the business world. First, however, before we consider the alleged charges, we must address ourselves to two serious insinuations by the Judge below: the bad faith of the debtor and absence of causes beyond the control and ability of the debtor, which, according to the Judge, prevent confirmation of an arrangement. Now in this connection it can be observed that the Judge does not specifically attribute bad faith to the Appellant, but he implies that Compañía Swift de la Plata is a bad faith debtor, even though such an assertion is not supported by any proof in the record. The Judge cannot even cite the "Referee of extraordinary diligence" in this connection, since he does not attribute bad faith to my client in the conduct

of its business. He attributes fault, but fault is not deceit, fraud nor, even less, bad faith. . . .

* * * *

The Judge overlooks the meat problem; the well-known historic debates in the National Cabinet concerning the matter; the sad and desperate situation of the export industry, of which Cia. Swift de la Plata is a vital part; the notorious fact that we have had for more than ten months a restriction on consumption to enable the export industry to generate foreign exchange for the country and thus strengthen the balance of payments; the fact that the three remaining large export packers are in an extremely serious economic situation, that Anglo has closed down and that its foreign stockholders have sold their participation to local stockholders; already the insolvency of FASA is widely known, and only the Banco Nacional de Desarollo and the famous law to channel official credit to Argentine-owned meat packers have so far prevented that firm from filing insolvency proceedings. As to the Corporación Argentina de Productores de Carnes (CAP), its losses for the last fiscal year amounting to 6,000,000,000 old pesos, that is to say, *four times as much* as the losses of Compañia Swift de la Plata . . .

We will now review the facts alleged by the Judge:

1) *That the Appellant forms an integral part of the "Deltec Group."*

It should first be pointed out that this is not the litigation in which to put on trial the principal stockholder of the Appellant, which has not at any time had the desire or intention to hide its position. On the contrary, the Appellant furnished this information in its petition. . . .

However, it would appear that the subjective characteristics of the majority stockholder have the strange effect

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of converting an arrangement approved by the creditors into something that might be contrary to the general interest. To this end, the Judge decided to apply the theory of penetration: he cited the report of the Referee and a well known definition of a business corporation by Chief Justice Marshall under *United States law* and added:

> "to assume that this task in the service of truth and justice may imply legal uncertainty or insecurity suggests a grave indulgence of bad faith, fraud and defenselessness of the public contracting with these companies."

Once again the Lower Court speaks of bad faith and fraud, but it does not say on what it bases such a statement, nor does it explain what it consists of. The Referee did not accuse my client of any fraudulent act, even though he acted with "extraordinary diligence", in the words of the Judge, nor did he consider that the creditors had been deceived.... The "equally alert" Judge rejects confirmation of the arrangement by applying the theory of penetration which in United States law is availed of to determine certain rights of the principal shareholders and not to judge actions of corporations in which they participate. It may be that an error in the documentation has led the Judge to act along these lines, inverting the problem and the theory. *What is being judged in these proceedings, as has been admitted by the Judge, is the business conduct of Cia. Swift de La Plata and not that of other companies.* The theory of penetration, as American authors have described and commented on it (see Fletcher on Corporations; Ballantine on Corporations; Stevens "Corporation Encyclopedia"; Cary William "Corporate Law")—as have also European and Argentine authors in their writings on the subject—this theory tends and is applied to *prevent fraud, punish*

crime and protect from deceit; see the famous holding of the Supreme Court of the United States in Sanbourg vs. Milwaukee Refrigerator Transit Co., 142 F. 247. Although the theory is not part of the Argentine legal structure, which establishes a clear distinction between a company and its shareholders in the event of bankruptcy, as has been clearly stated by the Honorable Court (Citation omitted), it behooves us to point out again that its presuppositions are not applicable to these proceedings.

To place the problem in its proper perspective, the following should be stated:

a) The theory of penetration is a creation of the Anglo-Saxon courts, where judges may create law, as shown by Cueto Rúa in his magnificent work on "The Common Law". Argentine judges are not permitted to do so; they must judge according to the law and not of the law.

b) Where applicable, the theory is applied in certain situations—based on deceit and fraud, which do not appear in these proceedings—but in no case is the nature or condition of the controlling company applied to evaluate the acts of the controlled company.

c) In these proceedings, it is the commercial activity of Cia. Swift La Plata which is being judged and not the activities of its shareholders. Therefore, there are no grounds for invoking said theory to judge my client.

d) *The dogmatic statement of the Judge regarding the noxious influence of Deltec on Swift is an individual evaluation, supported only by his own statement, and therefore constitutes an obvious fundamental ingredient of arbitrariness, according to the interpretation of the Supreme Court.*

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Thus, it appears that in the personal opinion of the Judge the existence of a shareholder owning 99% of the shares and is, in addition, a foreigner, is conclusive to prevent confirmation of an arrangement which has been approved by the creditors. It does not appear to matter that the debtor company had been organized long before and without having the participation of the shareholder in question. Deltec is a "bad" shareholder and "bad" shareholders, like the luck of King Midas, render noxious any company in which they participate. This, to put it bluntly, constitutes the theory of penetration as applied by the Lower Court.

The Judge establishes new rules in the field of corporations, new rules on stock ownership and new grounds for rejecting arrangements which have been approved by creditors.

Today he holds as contrary to the law and not entitled to the benefit of an arrangement a corporation whose shares are held by another to the extent of 99%. Tomorrow the ratio might be reduced to 90, to 80 or to 75%. Why not?

* * * *

Now then, the "accommodation" consists in certain creditors (the Deltec Group) attempting to prove claims, representing 40% of the total liabilities, which the Judge rules to be *non-existent*. This ruling is startling and I shall deal with it further below. But more noteworthy is that the sums owed by my client to the majority shareholder, the *entry of which was confirmed by the Referee,* only demonstrate that the party most injured by cessation of payments is the so-called "group", which has suffered a loss equal to almost 40% of my client's total liabilities. What were these funds used for? We will see that they were used for the common benefit of all the creditors.

* * * *

2) *That an attempt has been made by other companies of the "Deltec Group" to prove claims in the proceedings and that this constitutes an attitude of accommodation on the part of my client.*

Exhibit 9 annexed to the petition initiating these proceedings contains the list of creditors required by paragraph 2, Article 10. This Exhibit shows the liabilities to all creditors as recorded in my client's books, including among others the debts due to the so-called "Deltec Group".

In answer to the request of the Judge, page 51, for information on the Deltec loans, my client included with his presentation (pages 92/94) three additional folders, among them Exhibits "O" and "P" intended to satisfy said request. My client again referred to this matter in Chapter V of its brief at pages 1170/1236 (pages 104/261 of the objection).

The Referee recommended that these claims not be admitted, applying of the so-called "theory of penetration" for this specific purpose only. He does not characterize my client's acknowledgment of these claims as a wrongful act, much less one that is deceptive or having a tendency to prejudice the creditors.

* * * *

It is here relevant to point out that the *Referee confirmed the company's receipt of funds and that a substantial portion of the claims originated prior to the date on which Deltec International Limited became a stockholder of the company.* None of these claims was termed by the Referee as "non-existent" or falsified; in fact, he recognized the transactions, but the Judge, departing from applicable law, rejects the claims by application of the "penetration" doctrine.

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The general statement of the Judge, to the effect that the requests for verification "affect the objective justice, violate the ends of the legal entity, are based on a simulation of juridical acts repudiable under the legal order . . . contrary to morality and ethics", lacks all legal foundation. There exists no rule which prohibits a shareholder, or other affiliated companies, to make loans or render services. In fact, what more common transaction can there be than for a company to receive financial support from its shareholder? No one has shown why my client is incompetent to receive such financial assistance.

It should be noted that further on, the Judge states that Deltec withdrew its financial support and left my client to its own fate.

I really fail to understand, Honorable Court, how it is possible to label the performance of an act as repudiable under the legal order and contrary to so many principles, and immediately thereafter to criticize the non-performance of the same act. The logic of the Judge does not withstand analysis. It is self-contradictory, and an obvious form, if not the supreme form, of arbitrariness.

On the other hand, it should be pointed out that the loans were used by my client for the modernization of its industrial plants, both for reequipment and for sanitary improvements, as well as for working capital. More than US $30,000,000 were applied to these two purposes during the last five years, with the result that my client had the best and most efficient industrial plants in the Argentine Republic. There are only three industrial plants in the country authorized to export worldwide, of which two belong to my client and are located in Berisso and Rosario respectively.

* * * *

In fact, my client could not have acted in a manner different from the manner in which it acted because:

a) The liabilities appear in its books of account;

b) They have been entered in the corresponding balance sheets;

c) No state organ, neither the National Meat Board, nor the Inspección General de Personas Jurídicas (Office of the General Inspector of Corporations), has ever raised any objection to nor made any comment on this treatment.

d) My client was also bound to proceed in this manner because applicable law requires it, as do the regulations governing corporate financial statements and the corresponding tax laws.

e) No expert accountant formulated or could recommend anything other than what appears from the facts: a loan can only be accounted for as such.

f) The law grants to all creditors the right to initiate the procedure provided by Articles 27, 77 and parallel provisions of the Bankruptcy Law, only upon the conclusion of which can there be a final decision on disputed claims.

g) The majority shareholder in a further spirit of support offered to capitalize its claims, subject to the confirmation of an arrangement as can be seen at pages 4670/77. All rights are subordinated to the prior collection by the other creditors in that the shares to be issued cannot be redeemed or accrue dividends until after all of the other claims have been paid.

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3) *That the Appellant merged with La Blanca S.A. and Frigorífico Armour de la Plata S.A. and this also reveals the accommodating attitude of my client.*

The Judge states that the only reason for the merger was to avoid dissolution of the absorbed companies for loss of capital, to the prejudice of the creditors at the time of the merger; that the economic asphyxia of my client was in great measure voluntarily decided by Deltec in the interest of the group and without justifiable economic reason; and that this led to a weak capital structure to which the Deltec group later cut off its financial support.

* * * *

a) It is not true that the merger resulted in a reduction of the Appellant's liquidity or its capacity to meet its obligations by saddling it with increased indebtedness, nor an erosion of its assets resulting from the cancellation of its receivable from the absorbed companies or from receiving overvalued assets which it did not need. This was mathematically demonstrated by the merger balance sheet, the items in which were discussed in the above mentioned briefs and which actually show a favorable difference for my client of 1,815 million old Argentine Pesos.

As to the fixed assets, the argument of overevaluation was categorically squelched by the survey made by the Universidad Tecnológica Nacional of a large portion of my client's assets. In fact, the forced sale values attributed by this survey to the assets in question are considerably higher than the book values of total assets of the three merged companies.

b) . . .

* * * *

In the memorandum in which the Referee proposed the appointment of the Universidad Tecnológica Nacional, that

officer, after giving the reasons for his request and stating the nature of the institution, underscores his authority to comment on its report . . .

Upon submitting his Report, the Referee did not object to the appraisal made by said University; quite on the contrary, he completely accepted its conclusions as his own.

Now then, despite the foregoing, the Referee maintains that the value of the merged assets is irrelevant to his judgment on the merger. The position of the Referee is entirely inconsistent.

In fact, it should be noted first of all that, as pointed out by Universidad Technológica at page 51, Appendix 1 of its study, part of the Armour industrial installations were moved to the Swift plant, which was one of the reasons for the merger as amply explained in the record.

The decisive fact is that the study, as previously observed, shows much higher realizable values than the book values, *supposedly inflated through the accounting devices mentioned by the Referee. . . .*

But there is a still more decisive fact, which is the value of the Appellant's corporate assets compared with its liabilities.

The summary appearing on page — shows that the Referee values the assets of the company at 556,223,360 new Argentine Pesos and the liabilities, including contingent liabilities, at 143,480,787.25 new Argentine Pesos; that is to say, there is a 412,742,572.75 new Argentine Pesos difference between the assets and liabilities of my client.

In other words, according to the opinion of the Referee, my client's assets amount to four times its liabilities.

It should then be asked, how can there have been any prejudice to the Appellant's creditors when economically

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they were actually benefited by the merger and the consolidation of net worth.

* * * *

Nor can we fail to point up some of the other aspects that we consider of importance to the examination of the transactions in question. In fact, the merger of companies is a legitimate transaction, not only authorized but encouraged by applicable legislation as a means toward achieving greater productivity and a reduction in industrial costs.

The transaction was effected with all safeguards required by law, and was authorized by the Inspector General of Corporations, publicly registered and recorded in the Public Commercial Registry.

All of the elements of the proceedings called for by the law were completely documented with the data submitted upon the filing of the original petition.

In addition, even though the regulatory authority for corporations does not require the publication referred to in Law 11,867, my client nevertheless effected publication so that interested parties might be duly informed and raise objections if they so desired. *None of the creditors at the time of the merger raised an objection of any kind whatsoever, although there was the opportunity to do so, and for this reason, the Judge may not claim nonexistent prejudice which was never asserted nor suffered by any interested party.*

It is important to point out that the Referee did not make any charges of deceit, fraud, bad faith, nor even of negligence.

Nor did the Referee object to any of the legal formalities, but on the contrary he undertook to confirm that they had been strictly complied with.

4) *That the Appellant made loans to Provita S.A., which had recently been declared in default by the Judicial Administrators.*

Here again, the Judge draws the most unfavorable conclusions, without taking into account the total picture drawn by the Referee.

I must point out that the shares of Provita S.A. are owned by Ganados S.A., a company the outstanding shares of which belong to my client.

In his evaluation of this phase the Referee reports that as my client markets the products of the above mentioned companies, he believes that it is fair to point this out, "since it provides the explanation that by making the loans the company was protecting its own interests, an explanation with which this office does not agree."

I have also referred to this point in my objections to the Referee's report and it should be pointed out that these loans did not violate any legal rule that might have inhibited my client from acting as it did.

In addition, although one may not share the opinion of my client as a matter of business judgment, neither the Referee nor the Judge in his decision held that the loans amounted to deceit or fraud.

On the other hand, it is irrelevant that the Judicial Administrators have, as the Judge says, declared Provita S.A. in default, since such default is automatic as a matter of law.

Noone has said that the debt is uncollectible nor that somehow, including liquidation of the debtor company which in its last fiscal year showed earnings of 1,250,000 old Argentine Pesos, these advances could not be recovered, nor

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that the debtor might not, as it actually does, have valuable assets.

5) *It is furthermore appropriate to deal with the arguments of supererogation brought up in the appealed decision.*

a) The first of these arguments is that my client is involved in two criminal actions, one of them for monopoly and other violation of exchange regulations. The Judge does not make any further reference to the latter, since no decision has been rendered against my client in that action.

On the other hand, he says that in the monopoly action, there has been established a prima facie case of violation, consisting of restraining free competition in the Liniers market during the period 1965 to 1970.

I must point out to the Honorable Court, that in the initial pleadings, my client informed the Judge of the existence of this action based on the unilateral and voluntary decision of my client to buy less cattle during the months of February to April, 1970 (not the period referred to by the Judge).

At that time, since the action was pending, my client abstained from commenting on this matter, despite the fact that the Court of Appeals for Economic Crimes had already reversed the decision of the Lower Court, in an opinion dated December 10, 1970 and published in the April 13, 1971 edition of La Ley and subsequent issues.

Recently—there is no mention of this in these proceedings—the Judge in that action ordered a trial, which order was again appealed by my client. My client has good reasons to expect that this order, which in no way amounts

to a conviction, will again be reversed, but we will nevertheless maintain the same prudent attitude as we demonstrated at the beginning of these proceedings.

However, this has not been the attitude of the Judge, who inexplicably takes notice of the existence of a pending action in which only an interlocutory order has been issued, in which no final judgment has been rendered and in which the interlocutory order is being appealed.

It is unfortunate that the Judge should refer to this matter, albeit as superrogation, to prove that my client is not worthy of the benefits of an arrangement which, in addition to being a benefit, is a right granted by law.

* * * *

b) The Judge makes reference to multinational corporations, and for this purpose he a cites a papal document from which he infers that this condition requires a stricter evaluation of the chances of survival of a corporation of this nature when involved in insolvency.

We have said that the Judge's ideological convictions appear to us eminently respectable.

This is fine for the street or for the classroom; here, on the Bench, the Judge is called upon and obligated to decide in compliance with applicable law!

It is especially serious that the Judge should construct a new legal category of corporations which is not provided for by law, to the extent that they are supposed to be dealt with more strictly. Once again, he attempts to establish an absolute identity between my client and its majority shareholder, in violation of express legal rules (Citations omitted.)

Not even His Holiness has said that such a "type" of corporation is bad, nor does the Judge prove in these

proceedings that my client or its majority shareholder have committed acts of cultural, political and economic domination. Neither could he do so, in view of my client's insolvency, the prolix and detailed regulation of the meat industry, and the broad powers of the regulatory authorities.

c) The Judge's last argument refers to the fact that the Referee observed ". . . *a tendency* to sell merchandise at lower prices to other Deltec companies, to which it directs the major part of its production, than to buyers not forming part of the 'Deltec Group' ". The Judge adverts further to ". . . the recent expropriation of the Appellant's meat extract, which had been sold at out-of-line prices that would have endangered the production of the country."

Special attention must be given to this statement of the Judge.

* * * *

By virtue of the powers conferred by Decree Law No. 8509/56 and supplementary legislation, the National Meat Board inspects the entire commercial and industrial process and, in addition, the Department of Industry and Commerce (known today as Ministry of Commerce) establishes rules for the regulation of export prices in the national interest.

Once again, it should be of interest to mention at this point that the regulation of the industry, which is one of the most controlled in the country, applies fundamentally to the following:

1) *Purchase of Cattle:* For this purpose, one must submit to the National Meat Board detailed information including, among other things, the names of the sellers and corresponding prices.

2) *Control of Production Process:* For this purpose, it should suffice to indicate that in the plant located in La Plata alone, the regulatory authorities have more than 120 persons working full time on sanitary inspection.

Sanitary aspects are of prime importance in the meat products industry and are perhaps more rigorously observed by my client than by any other company.

3) *Cost Control and Departmental Accounting of the Entire Operation:* . . .

4) *Control of Export Sales:* The procedure established by current regulations is based on the construction of a system designed to protect our country's prices.

Therefore, unless the National Meat Board has previously authorized a respective sale, it cannot be concluded by the exporters.

The exporters are required to submit forms A 631 and A 989, called "export applications" or vulgarly "calzadas", copies of which were appended by my client as Exhibit IV to the document appearing at pages 194/261.

In other words, these export sales applications are submitted to the National Meat Board for approval. The latter, in turn, returns one of the copies with its approval to the exporter, who requires this document to effect the transaction. *In this manner, the State confirms, after prior approval by the competent body, the price agreed upon by the parties for the purchase and sale transaction.*

Further on I shall deal with the expropriation of meat extract in light of the evidence appearing in the record. But except for that case, none of the many transactions effected by my client have been rejected by the Board. This means that they were approved because they were made at prices satisfactory to the national interest.

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These circumstances have also been fully supported in the Report of the Referee, which states the following:

* * * *

"During this period, the Referee has paid particular attention to export sales and especially to the selling prices. In this respect the following is pointed out: 8.1. The examination of the sales price schedules pertaining to several shipments, which had been submitted for such purpose to the National Meat Board, were generally confirmed by the latter with respect to prices or they had previously authorized the corresponding shipments."

* * * *

My client has nothing further to add to this clear position, since *the tendency* alluded to by the Judge in the context of the expropriation of meat extract is inadmissible. Even should such a tendency exist, one must take into account a fact of life of business, that sales volume influences price, and larger volume sales will always be at a lower price than smaller volume sales.

It now behooves us to refer to the expropriation of meat extract referred to in the decision, to the firm attitude of my client and to the evidence adduced in the rcord, all of which the Judge ignores as if they were "non-existent".

On August 26, 1971, my client requested authorization from the National Meat Board, in accordance with normal procedure, to export 477 tons of first quality beef meat extract in the total sum of US$3,400,886, that is to say, a unit price of US$3.234 per pound.

In view of the fact that the Board normally issues the authorization within a short period of time, and since my client had not received an answer, he decided to press the matter. This was accomplished through a notarial act

dated September 2, and my client immediately informed the Referee about the situation. On the same date, telegrams to the same effect were sent to the President of the Nation and to Ministers and Government officials, all as contained in the Report submitted to the Court.

* * * *

The official answer requested by the Judge was submitted by the Board, and no mention was made therein of any fact that might invalidate my client's position. *On the contrary, it was alleged and proved that on August 26, 1971 that is to say the very same date of my client's application, the National Meat Board authorized the exportation of the same product at a considerably lower price than that of my client. Such authorization was granted to SOMASCHINI, ABRANTE y CIA., who exported to Genoa a total of 5,080 kilos of first quality meat extract at a price of US$3.00 per pound, that is to say, lower by 23.4 cents per pound.* Shipping License No. 065547, duly authorized by the National Meat Board on August 26, 1971, was duly enclosed. Another copy thereof was enclosed by Customs in reply to the official statement requested by my client and which can be examined by the Honorable Court, since it is filed at page 10,434 of the record.

The record also shows that the "El Centenario" company exported two shipments of the same product at lower prices than those of my client.

In its brief appearing at pages 1388/9, my client also enclosed *Information Bulletin No. 174 of the National Meat Board, dated September 9, 1971.* This Bulletin shows that the best prices obtained for this product during the first six months of the year were those of Capistrana S.A. and Compañía Swift de la Plata S.A.F. The National Meat Board has nothing to say about these facts that might explain away the information appearing in its own pub-

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lished releases. The Board limited itself to an obvious and eloquent silence.

It should be noted that the sale of the expropriated product had been agreed to at the price of US$3.234 per pound (US$7.129 per kilo), which is higher than the overall average of all exports of such product during the first six months of the year of US$3.21 per pound (US$7.06 per kilo). The schedule appearing on the reverse of page 1388 shows that CAP, an institution founded for the protection of the producers, exported this product at US$2.49 per pound (US$5.48 per kilo) during the same period.

When the National Government decided to sanction the Expropriation Act, my client forwarded to the Minister of Agriculture the letters dated September 13 and 15 (appended to the briefs appearing on pages 1328/9 and 1388/9) which explained the damages my client could suffer, in view of the fact that based on the price established by the Act, in order to come out even, my client was entitled to the payment of the premiums or exemptions corresponding to the exports of such products. It was also pointed out that since the Act left no alternative, and in view of the circumstances of fact and law indicated in the latter of such letters, my client accepted the price shown in the letter of September 11.

In any event, the arbitrary attitude of the Board seriously damaged my client, since payments began only one month and several days after the expropriation and the claimed items have not yet been cleared up. This represents a damage to my client in the approximate sum of US$500,-000. In other words, the company received payment, under protest, only upon the intervention of the Judicial Administrators.

It should also be pointed out that the export authorized by the Board in accordance with the above mentioned

license was a considerably smaller lot and, therefore, the price should have been considerably higher than my client's price. What happened was exactly the opposite.

To erase any doubts which might arise as a result of the conceptual connection made by the Judge, we might add that this shipment of my client was not intended for the "Deltec Group".

Summarizing:

a) The facts brought forth supporting my client's claims have been fully proven;

b) The company suffered unnecessary damage as a result of the arbitrary attitude of the National Meat Board, which has not been explained or denied.

c) The Referee did not make any charge or accusation whatsoever and, in the light of this fact, my client has assumed a firm attitude to protect its interests, as is also supported by the record.

CHAPTER VII

Valuation of the Appellant

In order to evaluate the company, it is necessary to describe the company's activities, its technical and production capability and its organization as an industrial complex. All this is necessary to the confirmation of the arrangement approved by the creditors.

In its original petition, my client presented an outline of its activities. Its primary function is the production of meat and I wish to inform the Honorable Court that my client is not an ordinary slaughter house dedicated merely to the slaughter and sale of carcass meat. To the contrary, we are dealing with a sophisticated and complex

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industrial activity in which the raw material is processed into a final product containing a high percentage of value added. It is a process in which the raw material is utilized almost in its entirety. They say in Swift's plants, in a very graphic expression, that "everything is utilized except the mooing of the cow".

Especially relevant in such process is the product mix. The Appellant, a leader in its field, has been one of the originators of new products through research in its laboratory, the only one of its kind in all of South America. This has opened to our country unsuspected possibilities for export of non-additional products such as frozen cooked beef, which was invented and developed by Swift and is sold abroad to be used as raw material in the production of canned foods.

Of extreme importance in this process are sanitary procedures which undergo continuous change to ensure the highest quality of the product. This is a requirement of all Governments to assure the protection and safety of the consumer.

The requirements for exporting countries are manifold. Each one has its own rules, so that whoever wishes to participate in the market must of necessity satisfy all these requirements. You either comply or you don't export. This special characteristic of the industry has compelled my client to make large investments, especially during the last five years. These investments have of course not been superfluous, since they have resulted in a great improvement and perfection of my client's industrial plants.

The characteristics of the plants have been examined by the Referee and by the Universidad Technológica Nacional. They constitute a substantial part of an extremely valuable asset, the value of which has been cited above.

Furthermore, the plants show a high degree of industrial integration; with the most modern equipment they produce their own containers for products sold in the domestic and foreign markets.

Nor is this my client's only activity. The Rosario plant also has an oil producing plant which is the second largest in the country after Molinos Rio de La Plata. In the same complex, powered milk, cheeses and other similar products are produced, and my client has its own creameries located in various parts of the country. The company also has plants producing dried beef and pork seasoned for sausages, as well as a large chain of distributors both for its own products and for products manufactured by others, and branches throughout the national territory which it acquired through the merger of La Blanca S.A.

There is enough supporting data in the record to appraise the value of the entire operation, its efficiency and its specific characteristics. Nevertheless I believe important the findings of the experts arising out of the performance of their assignment in these proceedings.

In the folder Exhibit 1, page 1, *the Universidad Tecnológica says, with reference to the plant located in La Plata:*

> "The industrial installations, the details of which can be found in the following pages, are in good operating condition and have recently been modernized for the production of frozen cooked beef, in accordance with the strictest sanitary rules. These meat products processed by the plant are therefore not subject to any restriction for export to any country in the world. Frozen cooked beef, a product which is in great demand and which obtains the best prices internationally, constitute the major export item, and it is anticipated that it has the greatest potential for the future."

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"Similarly, the section devoted to the manufacture of canned goods, especially Corned Beef, is entirely modern and all areas are covered with stainless steel. This section has the most modern canning and sterilization machinery."

"The same may be said of its production line for both its edible products and non-edible products, constituting an integrated plant which is highly mechanized and one of the most modern and functional of South America."

"It is worthwhile mentioning that this plant produces beef extract concentrated from bones and is the only plant processing this product, which is totally geared for exports."

"It also has a high speed container installation which permits a production of more than a million containers per day."

"In short, the manufacturing plant, despite the age of some of its parts, has been entirely modernized and is able to produce a large variety of meat products which comply with the strictest current sanitary and quality requirements."

The comments by the Universidad regarding other assets, contained on pages 29, 52 and 53 of said folder, are also of interest.

In folder No. 3, Universidad Tecnológica refers also to the plants in the southern part of the country, where operations have had to be suspended because of the great shortage of animals in that region.

On page 5 of that folder, however, the experts make an interesting remark regarding the value of these assets: "It is easy to see that the book values reported by Swift have

been increased in this appraisal by 54% for the Rio Gallegos plant, 430% for Puerto San Julian and 142% for Puerto Santa Cruz, *so that the average appraisal for the total is 119% higher than the value shown in the books.*"

Possibly the most representative comments by the experts are those contained in Exhibit 2, item 12 of which states: "We have placed emphasis on the functional aspect of this plant, which is derived from its favorable location, the topography and nature of the terrain on which it is located, and the rational and compact distribution of the operating sectors of the meat packing industry. This provides an evident flexibility to adapt to the various types of production or to change the existing methods of this functionalism, which is its characteristic. Proof of this is the project, already underway with satisfactory results, of incorporating and installing its own plant for producing dried beef and seasoned pork sausage to supply the domestic market. This plant started with the production of fresh sausages and will enter into production of dried sausages, to be followed by other products immediately thereafter."

The Vegetable Oil Plant was commented on in a similar manner: "One of the largest complete cycle industrial plants in the country and one of the leading plants in Latin America, not only for its capacity to produce oil products, but also for its extremely up-to-date technology."

Referring to the plant for dairy products, the Universidad states— "whose daily drying volume compares well with the largest competitors in the country, such as Nestle, San Cor and then Cotar . . . Swift's container line is considered among the best in the country as shown by periodic comparisons with products of other manufacturers, the analysis of which shows that Swift's efficiency of vacuum, residual oxygen and nitrogen always show a higher index."

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Lastly, we cannot overlook the statement made in point 15 of this Exhibit, wherein the experts say the following: "*. . . Although it might appear irrelevant to the purposes of this report, we can not omit comment on two outstanding aspects, demonstrated and recognized in the plant itself and which to our knowledge represent a very favorable contribution toward the entire operation and the anticipated results of this plant.*"

"*The first refers to the prevailing sanitary conscientiousness. For a food products industry, as the one we are dealing with, sanitary techniques and rigorous quality control in all processes and activities, starting from its modern and well equipped bacteriological laboratory (containing a chromatograph) to the Quality Control Division, through the sanitary installations and the continuous diffusion of sanitary and health regulations. . . .*"

"*This concept has been inculcated in all levels and it is satisfying to observe the strict compliance with these regulations, no doubt uncommon in other facilities.*"

"*The second refers to the 'spirit of the plant'. Modern authors (Chiselli and Brown: Industrial Psychology) maintain that in addition to the physical, functional and standards elements forming part of a manufacturing operation, there exists an imponderable element which distinguishes one industry from another, one plant from another.*"

"*In the case of Swift in Rosario, there can clearly be perceived at all levels of its operation a sense of integration, each individual's backing of 'his' plant, an uninhibited and spotaneous support to what is considered the employee's source of work, a team spirit and a common purpose to overcome problems and go forward. All of this becomes something really praiseworthy.*"

"*The spirit of this plant, which maintains its cohesion and its dynamism, is of great importance and we feel that it might be the principal element pushing toward improvement and continuous progress of the plant.*"

I submit to the Honorable Court that the meat packing industry has experienced an unprecedented crisis in our national history. . . . We referred to the fact that the seriousness of the situation led to the National Government, in an act without precedent, to hold public debates on television in which the problem was extensively discussed. There were published the opinions of the President of the Republic, of the Minister of Economy, of the Secretary of Agriculture and of other high dignitaries, in which were recognized the scope and extent of the problem with which we are dealing.

Despite all this, the Appellant has succeeded in overcoming these difficulties and has reopened its industrial plants which had been paralyzed at the time the petition was filed. It has been operating since March and earning significant profits in the succeeding months, not just operating profit but net profit, after charging exchange losses resulting from successive devaluations.

Therefore we are convinced, as maintained at the beginning of these proceedings, that the company's commercial and industrial capacity, its organization and the esprit de corps and capability of its personnel will enable it to overcome the difficulties that it has encountered. This judgment is being shared by the official banks, by the company's workers and employees and by the other creditors in these proceedings.

The decisive point in light of the evidence discussed above is that the company committed to the judgment of this Honorable Court is seen to be an organized business,

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and it is therefore beyond dispute that it is "appropriate to maintain the corporation in existence, since it represents a source of work and credit, thus favorable to the intent of the law," as has been said by this worthy Court.

CHAPTER VIII

Summary of the Brief

Summarizing the contents of this brief in support of the challenged decision, I submit the following:

1) The decision is void and arbitrary because its grounds are not based on the evidence in the case and, furthermore, contradict applicable law.

2) The decision of the Judge expressed his ideological conviction, which is obviously foreign to grounds for a judicial determination.

3) The decision of the Judge amounts to an inadmissible act of legislation, which is expressly forbidden to him.

4) In these proceedings there have been taken decisions that are violative of prudence and sound judgment, and which do not constitute a reasoned interpretation of applicable law.

5) The arrangement was approved by a large majority of creditors, including four official banks, and a supervisory commission was to be appointed to assure compliance.

6) The objection lacks all basis; the evidence submitted in the record and the rules invoked demonstrate that there do not exist any of the grounds contemplated in paragraphs 2 and 5, Article 38 of the Bankruptcy Law.

7) The concept of general interest, as applied by the Judge, violates the very purposes of the Bankruptcy Law, since in no way did he reject the creditors agreement because it contained terms "manifestly burdensome to the general interest."

8) The sense and scope of this concept has been established by the Honorable Court in repeated, express and specific pronouncements, summarized in the en banc proceedings cited in this brief, so that the teaching is binding upon Judges of the Lower Court. This teaching has been repeated in later decisions of this Honorable Court.

9) The conduct of the Appellant has not been characterized as either deceitful or fraudulent. Neither did the Referee charge my client with bad faith nor did the Judge specify in what it consisted.

10) The charges made by the Judge do not constitute nor characterize bad faith, since they deal with legally valid acts, authorized by applicable law and performed under the supervision of competent authorities, and we have refuted them in detail in this brief.

11) The Appellant is an organized enterprise, with productive and economic capacity. It owns industrial plants without peers in the country which are a source of livelihood for more than 45,000 persons, whose export capacity generates foreign exchange of over one hundred million dollars per year, all of which establishes this company as leader in its field. All of the above demonstrates and counsels the advantages of its preservation in compliance with the principle of the Bankruptcy Law itself.

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CHAPTER IX

The Constitutional Issue

Constitutional issues have been raised in these proceedings at various occasions. My client again reserves all rights to file extraordinary appeal before the Supreme Court of Justice against a decision that is arbitrary and violates express constitutional guarantees, especially with regard to due process, because:

1) It lacks serious grounds that would support it as a judicial decision.

2) It appraises evidence appearing in the record by ignoring the depositions of witnesses when they are contrary to the opinion of the Judge and using them only when they favor it, and by considering facts as proven when the evidence is to the contrary.

3) It ignores the fundamental background of the case, such as the study made by the Universidad Tecnológica Nacional, the conclusions of which the Referee has adopted as his own and which find the existence of assets amounting to almost four times the liabilities.

4) The Judge refers to evidence which does not appear in the record and draws conclusions from pending actions.

5) It clearly departs from the provisions of the Civil Code, the Commercial Code and the Bankruptcy Law as well as of the teaching of the Commercial Court of Appeals in an act of inadmissible judicial arbitrariness.

6) The Judge usurps powers which the law confers on other branches of the government and, in an act of legislation, instructs the Executive to sell the assets to the personnel, in application of a standard foreign to judicial decisions and violative of the principle of the separation of powers (Articles 1, 67, par. 11 of the National Constitution).

7) He makes dogmatic judgments which reflect only the subjective will of the magistrate.

8) He purports to apply a theory which is foreign to our law without enunciating its presuppositions, content, limits or scope, thus deciding "contra legem".

9) The decision being appealed, rendered in an insolvency proceeding of the importance of the case at bar, threatens legal certainty, violates the purposes of the law, injures the interests of the creditors and constitutes an arbitrary act. . . .

CHAPTER X

Relief Requested

Wherefore, I respectfully request that the Honorable Court:

* * * *

3) . . . reverse the decision appealed from in all its parts, ordering the confirmation of the arrangement approved by my client's creditors.

I pray the Honorable Court to provide accordingly, THAT JUSTICE SHALL BE DONE.

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IN THE MATTER OF

COMPAÑIA SWIFT DE LA PLATA S.A.F.

OPINION OF JUDGE SALVADOR E. LOZADA

November 8, 1971

Unofficial Translation from the Original Spanish

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Opinion of Judge Salvador E. Lozada

Judicial Power of the Nation
Buenos Aires, November 8, 1971

WHEREAS: It is my duty to pass judgment on the arrangement accepted by vote of the creditors of Frigorífico Swift de la Plata, S.A.

AND CONSIDERING: That it is important in the first instance to determine the sense of this decision which bankruptcy law confers on the court in the arrangement proceedings. As pointed out by a commentator, the judge has broad powers to decide the rejection or approval of the arrangement because *the law empowers him freely to consider whether the action accepted by the majority is or is not contrary to the public interest, and authorizes him to decide whether or not the debtor, in the light of his behavior in the conduct of his business, deserves the benefit of the law, since public interest and commercial good faith override the consent of the creditors, and in the light of these considerations the judge must reject the arrangement solution where the debtor has acted in bad faith, because only those good-faith debtors whose economic troubles are due to causes beyond their control and ability, and who do not constitute a danger for the health of commerce or for credit, i.e., for the public interest* (F. Garcia Martinez, "Composition and Bankruptcy"—Book 1, Page 292), *may be permitted to continue to conduct their business.*

Similarly, the Supreme Court of the Province of Buenos Aires has ruled that if an analysis of the debtor's behavior reveals that he does not deserve to continue in the conduct of his business, the arrangement must be rejected even though it may be advantageous for the creditors who have agreed to it. (J.A. Contemp. Series V.7 Page 648).

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The decision on the approval of the arrangement is, in one of its substantial aspects, a value judgment on the debtor who has requested the arrangement and on the convenience of his continuation from the point of view of the public interest.

A thoughtful examination of the proceedings accumulated during these last ten months, which now exceed 10,500 pages, grouped in 51 volumes with more than 40 additional files, *leads me to the clear conviction that the arrangement accepted by the creditors of Frigorífico Swift de la Plata S. A., in that it implies continuation of this business entity, offends against the general interest and must be disapproved.*

I proceed from the fact that Frigorífico Swift de la Plata S.A. is a part, fraction or section of "a unified structure of decision and interest which makes it one unit, with the same and common profit objective, and a single acting and coordinating will carried out by the same group of men," as it is stated by the Referee (Page 4122). *This unified structure is the so-called Deltec Group, "a single economic group which operates with its interests intermingled so that the differentiated economic conduct of its units has disappeared and so that it has been necessary to penetrate the corporate personality,"* as it is also indicated by the Referee (Page 4168). This unitary condition has been incontrovertibly demonstrated by the Referee, it appears from Deltec's own documents and Swift itself has assented to this affirmation in the Referee's report at the time of filing its objection against it (Page 9830 and foll.).

In connection with the rejection of the supposed claims of different units of the Deltec group against Swift, I have already affirmed that I completely share the theory of the disregard of the legal entity. This theory becomes specially applicable to the situation of Swift as an only formally differentiated part of the Deltec structure. Furthermore, it must be stated here that this theory is the one that better permits the revelation of that "objective legal truth" which the Supreme Court has often pointed out as an essential element of the due process of law. (Judgements of the Supreme Court, Volume 268, Page 415, Interalia). To the commentaries and precedents referred to in the Referee's report and in Annex 3.1.6., to which I refer for the sake of brevity, I will only add the decision of Chamber C of the Court of Appeals in the proceedings "S.A.C.I.M.I.E.S.C.A. vs. S.A.C.I.M.I.E.S.C.A., etal" of November 25, 1970, wherein by affirming the judgement of Judge Dr. Julio P. Quinterno declaring void a transfer of title, this theory is given retroactive effect, in that S.A.C.I.M.I.E. and A.C.I.F., parties to said transfer, are companies of the same group, formed by persons related to each other by links of family and interest and all subject to a common direction, and thus in fact one and the same person.

As stated by Chief Justice Marshall in the famous "Dartmouth College" case, the legal personality of business corporations "is an artificial being," "invisible, intangible, and existing only in contemplation of law" (See William R. Bandy, Eugene W. Nelson and Tannell A. Shadid, "Business Law" page 710) i.e., only an instrumental means for the purposes of the law. Once this legal instrument is used in an illegal manner in order to cover a different reality, it is imperative, as it has so often been said, to lift the corporate veil and then face the real situation.

To assume that this task in the service of truth and justice may imply legal uncertainty or insecurity suggests a grave indulgence of bad faith, fraud and defenselessness

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of the public contracting with these companies, together with a dangerous indifference to the public interest affected by these concealments of a real unity, governed by a sole center of economic decision, under the appearance of different personalities.

From these proceedings there appears that the same components of this unified structure, which is the "Deltec Group," have *pretended* to be the holders of claims against Swift aggregating almost 40% of the liabilities reported by Swift, intending to prove these *supposed* claims against the debtor which is also Deltec, and the latter has attempted to recognize as such claims these *pretensions* of the other components of the Deltec structure. As the Referee has maintained, these pretensions "affect objective justice, violate the ends of the legal entity, are based on a simulation of juridical acts repudiable under the legal order in that they damage third parties (the real and unquestionable creditors), constitute an act which may be repudiated as contrary to morality and ethics" (p. 4123 Rev.) and must be considered as position of accommodation and helpfulness to the other companies of the Deltec Group, which is directly and immediately reflected in damage to the true creditors (p. 4168 Rev.). As a result, had it not been for the zealous action of a Referee of extraordinary diligence and of an equally alert court, these genuine creditors would have seen the common guarantee of their claims diminished in a proportion equal to these 40% of non-existent liabilities.

Also relevant, on the point of the accommodation of Swift to the other Deltec companies, is the merger into Swift of Armour and LaBlanca, because, as also indicated by the Referee on page 4169 the sole purpose was to avoid the dissolution of the two absorbed companies, likewise Deltec, due to total loss of their capital—"in a decision

which prejudices the creditors of the debtor at the time of the merger." It must be stated that economic asphyxia of Swift has been voluntarily decided to a substantial extent by Deltec through this merger of Armour and LaBlanca "for reasons of apparent convenience to the group and without justifiable economic reason," as stated in P. 4139 Rev., to which it must be added, as stated on the next page, that the financial debility of Swift was "voluntarily increased" by giving Swift a falling capital from which thereafter *the Deltec group later cut its financial support, "leaving it to its own fate," as the Referee put it.*

To all this must be added the other cause of Swift hemorrhage, which is the loans it has made to other companies of the Deltec group, including loans characterized by the Referee as "unacceptable transfers of financial resources to Provita in astonishing amounts," considering that the lender was suffering from such great penury. *And which is also decisive while Swift was transferring funds to the Deltec companies which appeared as supposed creditors, those who were apparent debtors refrained from refunding the loans granted by Swift.* In this respect, Provita, which owes 1,105,501,568 pesos M/N, was declared in default only last October 20th, by the Judicial Administrators appointed when the Board of Swift was separated from the administration of its business, as it appears from the telegram in p. 10129 and the letter in p. 10138.

There is therefore no doubt that the unified structure of Deltec has voluntarily placed Swift as a part of itself in a weakened condition, causing serious harm to the Argentine economy, to its creditors and to thousands of worker families threatened by unemployment.

In the face of these facts, I am convinced that Swift's conduct is incompatible with the benefit of the arrangement

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solution and that an analysis of its conduct reveals it does not deserve to continue to engage in business. Therefore, I must oppose my authority as National Judge of Commerce to the harmful possibility of the survival of this insolvent corporation.

As supererogation, it may be pointed out that two criminal actions have been initiated against Swift: One on the grounds of antitrust law infringement and another for violation of exchange regulations, both before the National Court for Economic Crimes Number 4. In the first of the above referred lawsuits, a prima facie case of violation has been established, consisting in acts tending to inhibit free competition in the Liniers market during 1965/1970.

It may be pointed out also that Swift is one of the extensions in Argentina of one of the multinational enterprises, a new species born, as has recently been said, under the impulse of new systems of production which eliminate national boundaries and generate new economic powers which, due to the concentration and flexibility of their resources are able to carry out autonomous strategies, largely independent of national public authorities and, therefore, without control from the point of view of the public interest in the spread of their activities "these private organizations may lead to a new abusive form of economic domination in the social, cultural and even in the political field (Paulo VI—Apostolic Letter to Cardinal Roy "Octogesimas Adveniens"). This circumstance makes necessary to evaluate with greater strictness the possibilities of survival of a corporation of this kind when it becomes insolvent.

It has to be pointed out also that, with regard to the export policy of the debtor, the Referee has observed a tendency to sell merchandise to other Deltec companies (to which it directs the major part of its production) at

lower prices than to buyers not forming part of the Deltec group. This points to another source of risk for the Argentine economy, with a company inclined to effect within the Deltec group a deterioration in the price of meat exports. *In this respect, reference must be made to the recent expropriation of meat extract of the debtor at out-of-line prices that would have endangered the production of the country.*

Bankruptcy, a consequence of my rejection of the Swift arrangement, should not aggravate the social problems of the country. It is necessary to avoid the problem created by this company's insolvency. Bankruptcy should not result in suspension of operations at the plants which are presently working. These should continue under the direction of the liquidator, applying the provisions of articles 195 and 198 of the Bankruptcy Law. There is no doubt that the packing industry is of "national interest." Suffice it to recall the case "Inchauspe" of September 1st, 1944, wherein the Supreme Court declared constitutional the organization of the National Meat Board. "The progress of national economy is closely related to said industry," said the court composed of Doctors Repetto, Sagarna, Nazar Anchorena and Ramos Mejia.

The liquidator shall maintain at least the present levels of employment. For purposes of the provisions in third paragraph of Art. 150 of the Bankruptcy Law, the liquidator, as soon as he has accepted his commission and assumed his duties, shall consider the possibility that the employees of the company or some of them, with the participation of the creditors and other interested parties, might acquire the parts of the company in operation, in order to reduce the period during which the liquidator functions as the authority for the continuing of the activities of the debtor.

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Such continuation is imperative for obvious social and even economic reasons, considering that the Referee has highlighted p. 4161 the efficient productivity and appropriate technology of the industrial plants, particularly the one in Rosario.

As for the appointment of a liquidator, I have no doubt that it is appropriate to designate the National Government. Not only because of the size of the claims of the various agencies and the significance of the "contingent liabilities" referred to by the Referee and related to payment by the State of the "guaranteed wage," but also above all for reasons exceeding mere arithmetic. *The condition of being the more injured creditor is rooted in the fact that the State is the organ of the community profoundly injured by the breach of values higher than economic values: social peace and solidarity—and it is also the one which is in the best position to solve the problems caused by Swift's insolvency.*

Likewise, the possibility of continuing operations depends on the State, since one of the major industrial plants is constructed on State property and, therefore, requires the permission of the State for its continued use.

It is also my duty at this time to pass judgment on the objection at page 10,006.

For this purpose, I consider it important to point out that the evidence adduced has corroborated the complaint about the granting of powers of attorney in blank by numerous creditors (p. 1337, 1347, 1394, 1395, 1399, 1400 to 1435, 1441, 1442, 1472 and 4449 to 4529 and 4539). In fact, in p. 10,250 Notary Fracchia states that he has certified the signature of almost 90 grantors of powers of attorney without mentioning the name of the attorney, i.e., in blank —he continued by stating that after certification he had

delivered said documents to an officer of Swift who paid the respective fees. Notary Rivas for his part on page 10251 testifies to the same effect, stating that he had delivered the powers of attorney in blank to a manager of Swift. This Notary was a creditor and also delivered a power of attorney in blank. He stated that he did not know who was the attorney who represented him at the creditor's meeting. Hugo Serra (page 10255) declares that he does not know who represented him at the meeting. The same occurs with Delivio Andreolo (page 10256). A manager of Swift had requested him to sign a power of attorney to avoid a trip to Buenos Aires and in order to obtain the approval of the arrangement. He continued by stating that he did not know who represented him at the meeting, that he also did not know the proposal for the arrangement and that he did not give any instructions to the person who requested him to sign the power in blank.

Manager Lopez himself, who organized the obtaining of powers of attorney in blank, admits (p. 10256) that some of the grantors never knew the identity of the attorneys. A mandate in which the principal cannot select the mandatary, where his name is inserted by a third party to whom he cannot give instructions and from whom he cannot demand an accounting or information on the fulfillment of the contract, is not mandate. There is no doubt that in all these cases the representation at the creditor's meeting has been vitiated. The practice of powers in blank, in the first place, disregards the freedom of the principal to appoint the attorney, implicit in Article 1896 of the Civil Code (Salvat, Contract II, Number 1791). In the second place, it disregards the principle that the mandate is based on the confidence of the principal in the mandatary, a principle implicit in Article 1970 of the Civil Code. In the third place, a mandate in which the principal does not know the

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mandatary's identity frustrates the former's right to demand from the latter an accounting (Article 1909 Civil Code) or information (Borda, Contracts II p. 438). Finally, no representation exists when the one who is represented does not know the matter in which the representative is to act on his behalf, does not know who he is to be, and consequently cannot instruct him as to the position he is to take.

It is true that the objecting party has invoked only Article 38 Par. 5 and that the facts described, mentioned also on the back of page 10007, fall within Par. 2 of said provision which refers to "false representation of creditors" but it is no less true that the principle "iuria curia novit" may be applied.

Moreover, the minutes of the Sociedad Rural de Lincoln at pages 10261 to 10281 also prove the grounds for applying paragraph 5, since in these minutes comes up the offer to pay the debt in ten monthly installments in exchange for the signature of the power of attorney in blank (pages 10261 and 10277). These minutes, which were drawn up a long time prior to the vote on the arrangement and the objection thereto, have a very strong persuasive force particularly because of their coincidence with the report on page 4658 based on the deposition on page 1338 in connection with the document on page 1337, which overcomes the persuasive force, under any circumstances highly debatable, of the testimony submitted after the vote on the arrangement. The evaluation of this evidence corresponds to the provisions in Article 181, in fine, of the Code of Procedure.

As for the date of suspension of payments, I rule that based on the strength of the reasons given in the Referee's report on this point as well as on the other points made

in the objection, it must be considered to be June 20, 1970, since these reasons were not overcome by the arguments of the debtor which I have carefully examined.

For the above reasons, and as provided in Articles 40, 38 Par. 2 and 5 and 53 of Law 11719, I resolve:

To reject the arrangement and to declare the bankruptcy of Compañía Swift de la Plata S. A. Frigorífica, appointing as liquidator the National Government, represented by the National Executive Power upon whom notice shall be served through the Secretary of Planning and Government Action, who shall continue the operation of the active sectors of the company, maintaining the present levels of employment, considering forthwith the possibility for the personnel or part thereof with or without the participation of creditors or other interested parties to purchase the referred to operating parts of the company.

Let the pertinent notices be issued and the corresponding measures be taken.

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