COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF SOVTRANSAVTO HOLDING v. UKRAINE

(Application no. 48553/99)

JUDGMENT

STRASBOURG

25 July 2002

FINAL

06/11/2002

In the case of Sovtransavto Holding v. Ukraine,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mrs S. BOTOUCHAROVA, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 27 September 2001 and 4 July 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 48553/99) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian company, Sovtransavto Holding ("the applicant company"), on 11 May 1999.

2. The applicant company was represented by Mr M. de Guillenchmidt, of the Paris Bar. The Ukrainian Government ("the Government") were represented by their Agent, Ms V. Lutkovska of the Ministry of Justice

3. The applicant company alleged that it had not had a fair trial within a reasonable time by an impartial and independent tribunal. It also complained that its case had not been tried in public. It relied on Article 6 § 1 of the Convention.

It complained under Article 1 of Protocol No. 1 that following the Lugansk Executive Council's ratification of unlawful decisions by the Sovtransavto-Lugansk company, the value of its shareholding in that company had been reduced and it had lost control of the company's activity and assets as a result. It also maintained that the payment it had received on the winding-up of Sovtransavto-Lugansk was not in proportion to its original shareholding in that company.

Lastly, the applicant company complained under Article 14 of the Convention that it had been subjected to discriminatory treatment by the Ukrainian authorities, which had sought to "defend the interests of Ukrainian nationals" by protecting the rights of Sovtransavto-Lugansk, a Ukrainian company, to the detriment of the applicant company's interests.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 27 September 2001 the Chamber declared the application admissible following a hearing dealing with both the admissibility and merits of the application (Rule 54 § 4).

6. In accordance with Rule 61 § 1, the decision on the admissibility of the application was communicated to the Government.

7. The applicant company and the Government each filed observations on the merits (Rule 59 § 1).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within the former Fourth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant company, Sovtransavto Holding, an international transport undertaking, is a Russian limited company that was set up in 1993 and has its registered office in Moscow.

10. Between 1993 and 1997 the applicant company held 49% of the shares in Sovtransavto-Lugansk, a Ukrainian public limited company.

A. The decisions to increase Sovtransavto-Lugansk's capital and alter its memorandum and articles of association, and the ratification of those decisions by the Lugansk Executive Council

11. On 3 January 1996 a general meeting of Sovtransavto-Lugansk's shareholders adopted a resolution altering the company's memorandum and articles of association, converting it into a private limited company. On 23 January 1996 the Lugansk Executive Council (виконавчий комітет), a municipal body legally vested with the requisite power, ratified the decision of 3 January.

12. By decisions of 26 December 1996, 11 August 1997 and 20 October 1997, Sovtransavto-Lugansk's managing director increased the company's share capital, each time by one-third, and altered its memorandum and articles of association accordingly. These decisions were ratified by the Lugansk Executive Council on 30 December 1996, 12 August 1997 and 18 November 1997 respectively.

13. These increases in Sovtransavto-Lugansk's share capital enabled its directors to assume sole control of the company's management and assets. The applicant company's shareholding fell from 49% to 20.7%.

14. According to the applicant company, between 1997 and 1999 some of Sovtransavto-Lugansk's assets were sold to various undertakings that had been set up by its managing director.

B. Commencement of the proceedings against Sovtransavto-Lugansk and the Lugansk Executive Council

15. On 25 June 1997 the applicant company lodged a complaint (Case no. 70/10-98) with the Lugansk Region Arbitration Tribunal (the court of first instance in the present case) against Sovtransavto-Lugansk and the Lugansk Executive Council. It sought a declaration that the decisions altering Sovtransavto-Lugansk's memorandum and articles of association and the Executive Council's decision of 23 January 1996 ratifying the changes were unlawful. It submitted that, contrary to the requirements of the legislation in force and Sovtransavto-Lugansk's memorandum and articles of association, the general meeting on 3 January 1996 had been organised without the participation or agreement of the representatives of Sovtransavto Holding. Moreover, the minutes had not been signed by all the shareholders. On 4 August 1997 the Arbitration Tribunal rejected the applicant company's claim.

16. On 9 September 1997 the applicant company lodged with the President of the Lugansk Region Arbitration Tribunal an application for revision under the "supervisory review" procedure (заява про перевірку рішення у порядку нагляду) [*Note by the Registry*. Under the arbitration rules in force prior to 21 June 2001, an application for revision was a remedy that allowed the parties to seek "supervisory review" of a final judgment or order of an arbitration tribunal] of the judgment of 4 August 1997. In a judgment of 14 October 1997, the tribunal's Vice-President refused the application.

17. On 21 November 1997 the applicant company applied to a bench of the Ukrainian Supreme Arbitration Tribunal seeking revision under the "supervisory review" procedure of the two judgments mentioned above. In a judgment of 6 March 1998 the bench set aside the judgments of 4 August and 14 October 1997 on the ground that the tribunals concerned had not taken sufficient account of the facts of the case and the applicant company's arguments. It remitted the case for reconsideration to the Kiev Region Arbitration Tribunal (which thus became the court of first instance in the case) and asked it to pay special attention to the need for a detailed examination of the facts of the case and the documents produced by the parties.

C. Period from January to May 1998

18. On 16 January 1998 Sovtransavto-Lugansk's board sent the Ukrainian President a letter asking him to "place the case under his personal control" in order to ensure that "Ukrainian interests [were] safeguarded". In a letter of 3 February 1998 the President of Ukraine urged the President of the Supreme Arbitration Tribunal to "defend the interests of Ukrainian nationals".

19. On 1 February 1998 a general meeting of Sovtransavto-Lugansk's shareholders adopted a revised version of the company's memorandum and articles of association. On 17 February 1998 the Lugansk Executive Council ratified that decision.

20. In a coded telegram of 6 March 1998 the Chief Executive of the Lugansk Region informed the Ukrainian President that, notwithstanding his resolution of 28 January 1998 calling for the defence of national interests, the Supreme Arbitration Tribunal had set aside the judgments of 4 August and 14 October 1997 and remitted the case for reconsideration, a decision which, in his opinion, constituted a threat to Sovtransavto-Lugansk's ability to carry on its business and adversely affected Ukraine's interests in Russia's favour. He asked the President to intervene in the case immediately in order to defend the interests of the Ukrainian company and of Ukrainian nationals.

21. Between 10 and 31 March 1998 the Ukrainian Securities Exchange Commission (Державна Комісія з цінних паперів та фондового ринку), a public body responsible for supervising limited companies, investigated the activities of Sovtransavto-Lugansk. On 29 April 1998 it found that the general meeting of shareholders of 3 January 1996 and the decisions subsequently adopted by the company's management had not complied with the legislation in force.

22. On 19 May 1998 Mr T. (a member of the Ukrainian parliament) urged the President of Ukraine to "defend the interests of Ukrainian nationals". In a resolution adopted on the same day the President once again drew the President of the Supreme Arbitration Tribunal's attention to the need to protect the State's interests.

D. Subsequent steps in the litigation

23. On 20 May 1998, during the trial, Mr Kravchuk (the arbitrator appointed by the Kiev Region Arbitration Tribunal) publicly refused to conduct the proceedings on account of the heavy pressure brought to bear by the defendants (Sovtransavto-Lugansk and the Lugansk Executive Council). On 21 May 1998 another arbitrator was appointed.

24. On 28 May 1998 the President of the Supreme Arbitration Tribunal sent the President of the Kiev Region Arbitration Tribunal a copy of the

Ukrainian President's resolution of 19 May 1998 so that it could be taken into account when the applicant company's case was considered.

25. On 3 June 1998 the applicant company made a further application against Sovtransavto-Lugansk and the Lugansk Executive Council (Case no. 13/10-98) to the Kiev Region Arbitration Tribunal, seeking a declaration that the following decisions were unlawful: firstly, the decisions to increase the share capital and alter the memorandum and articles of association taken by Sovtransavto-Lugansk's managing director on 26 December 1996, 11 August and 20 October 1997; secondly, the ratification of those decisions by the Executive Council on 30 December 1996, 12 August and 18 November 1997; and thirdly, the ratification by the Executive Council on 17 February 1998 of the resolution to alter the memorandum and articles of association adopted by the general meeting of Sovtransavto-Lugansk shareholders on 1 February 1998.

26. On 9 June 1998 the Kiev Region Arbitration Tribunal adjourned Case no. 13/10-98 until after judgment had been given in Case no. 70/10-98.

27. By a letter of 17 June 1998 the Vice-President of the Supreme Arbitration Tribunal asked the President of the Kiev Region Arbitration Tribunal to "take the case under his personal control".

28. On 23 June 1998 the Kiev Region Arbitration Tribunal tried Case no. 70/10-98 and, after stating in a set formula that neither the decision of 3 January 1996 to alter Sovtransavto-Lugansk's memorandum and articles of association nor the ratification of that decision on 23 January 1996 had been unlawful, refused the applicant company's application.

29. It then tried, on the same day, Case no. 13/10-98 and, after stating in a set formula that the decisions challenged by the applicant company were lawful, refused its application.

30. On 2 July 1998 the applicant company lodged with the President of the Kiev Region Arbitration Tribunal two applications for revision under the "supervisory review" procedure of the judgments of 23 June 1998 in Cases nos. 13/10-98 and 70/10-98. It submitted in particular that the defendants had breached Law no. 1576-XII of 19 September 1991, Law no. 533-XII of 7 December 1990 and Government Ordinance no. 276 of 29 April 1994, governing the activities of limited companies and the procedure for ratifying their decisions. It further complained that the proceedings before the first-instance court had not been public.

31. In two judgments of 12 October 1998 the Vice-President of the Arbitration Tribunal refused the applications, after upholding the findings of the first-instance court.

32. On 24 November 1998 the applicant company applied to a bench of the Ukrainian Supreme Arbitration Tribunal seeking revision under the "supervisory review" procedure of the judgments concerning it. In two judgments of 12 January 1999 the bench dismissed the appeals relating to

Cases nos. 13/10-98 and 70/10-98, reproducing the set formulas used by the first-instance court.

E. Period from January 1999 to April 2000

33. In February 1999 the applicant company asked the Ukrainian Attorney-General's Office to intervene in the arbitration proceedings concerning Cases nos. 13/10-98 and 70/10-98 to verify their lawfulness. It also asked the Supreme Arbitration Tribunal to issue an objection under the "supervisory review" procedure (протест у порядку нагляду) [*Note by the Registry*. Under the arbitration rules in force prior to 21 June 2001, an objection was a remedy that allowed the Attorney-General's Office or, as the case may be, the President of the Ukrainian Supreme Court or their deputies to seek the annulment of a final judgment or order of an arbitration tribunal] seeking revision of all the judgments in the cases in which it was involved.

34. In a letter of 26 February 1999 the head of the arbitration proceedings department of the Attorney-General's Office refused the applicant company's application on the ground that in the cases in question the participation of a representative of the State was not necessary.

35. On 8 June 1999 a general meeting of Sovtransavto-Lugansk's shareholders, organised, according to the applicant company, without its participation, decided to wind the company up.

F. Reopening of the proceedings following an objection (протест)

36. In April 2000 the President of the Supreme Arbitration Tribunal lodged an objection under the "supervisory review" procedure to the Presidium of that court seeking annulment of all the judgments relating to Cases nos. 13/10-98 and 70/10-98. In a judgment of 21 April 2000 the Presidium of the Supreme Arbitration Tribunal set aside the judgments of 23 June 1998, 12 October 1998 and 12 January 1999 and remitted Cases nos. 13/10-98 and 70/10-98 to the Kiev Region Arbitration Tribunal for reconsideration. In its judgment it held that the arbitration tribunals' judgments had been given without a proper, detailed examination of the facts and the parties' arguments, and that their rulings had been contradictory and premature in that they had not taken into account either the findings of the Ukrainian Securities Exchange Commission, which had revealed that a number of decisions taken by Sovtransavto-Lugansk's board had contravened the provisions of the legislation in force, or the requirements of the legislation governing the ratification of the memorandum and articles of limited companies; moreover, there had been no verification whether Sovtransavto-Lugansk's memorandum and articles of association complied with the legislation in force.

G. Proceedings in the Kiev Region Arbitration Tribunal

37. In a letter of 12 May 2000 the President of the Kiev Region Arbitration Tribunal drew the attention of the President of the Supreme Arbitration Tribunal to the fact that "in a judgment of 21 April 2000 the Supreme Arbitration Tribunal [had] set aside the judgments given by the arbitration tribunals two years [before] in Cases nos. 13/10-98 and 70/10-98" and that "the Kiev Region Arbitration Tribunal [had] already ruled on the matter". He observed that "certain events concerning the case cast doubt on the guarantee that the Tribunal's judges [would] try the case impartially, a circumstance which [might] entail negative consequences". He asked the President of the Supreme Arbitration Tribunal to remit Cases nos. 13/10-98 and 70/10-98 to another tribunal with a view to "guaranteeing the objectivity and impartiality of the proceedings".

38. In a letter of 25 May 2000 the President of the Supreme Arbitration Tribunal refused the President of the Kiev Region Arbitration Tribunal's request for Cases nos. 13/10-98 and 70/10-98 to be remitted to another court, having noted that the judgment of 21 April 2000 complied with the legislation in force.

39. On 7 August 2000 the Kiev Region Arbitration Tribunal tried Cases nos. 13/10-98 and 70/10-98. After examining the documents submitted by the applicant company and noting that Sovtransavto-Lugansk had been wound up, it ordered the Lugansk Executive Council to produce the documents concerning the winding-up and the originals of the documents concerning the registration of a limited company, Trans King, that had been set up with Sovtransavto-Lugansk's assets. It adjourned the case until 7 September 2000.

40. On 7 September 2000 the Kiev Region Arbitration Tribunal, after noting that it was necessary for State Counsel's Office to take part in the proceedings, adjourned the case until 18 October 2000.

41. On 25 October 2000 the Kiev Region Arbitration Tribunal, noting that it was necessary for the documents relating to Cases nos. 13/10-98 and 70/10-98 to undergo further examination by the Attorney-General's Office, adjourned the case.

42. In a judgment of 23 April 2001 the Kiev Region Arbitration Tribunal allowed the applicant company's claims in part, in so far as it ordered Trans King, the successor of Sovtransavto-Lugansk, to return to the applicant company part of the assets it had owned at the material time, but refused the applicant company's claim against the Lugansk Executive Council. In particular, the Tribunal held that Sovtransavto-Lugansk's managing director's decisions of 26 December 1996, 11 August 1997 and 20 October 1997 to increase the company's share capital and alter its memorandum and articles of association had been unlawful, as under applicable law such decisions could only be taken by the board. It further held that as a result of

those decisions the applicant company's rights in respect of the management of Sovtransavto-Lugansk and control of its assets had been infringed and that the compensation the applicant company had received following the winding-up of Sovtransavto-Lugansk had not been in proportion to the applicant company's shareholding when Sovtransavto-Lugansk's memorandum and articles of association were ratified in January 1996.

43. By an order of 7 May 2001 the Lugansk court bailiffs' service stayed execution of the judgment of 23 April 2001 because the defendant company had lodged an application with the President of the Kiev Region Arbitration Tribunal seeking revision thereof under the "supervisory review" procedure.

H. The Kiev Economic Court of Appeal's judgment of 24 January 2002

44. In a judgment of 24 January 2002, following an objection by the Ukrainian Attorney-General's Office and an application under the "supervisory review" procedure by Trans King, the bench of the Kiev Economic Court of Appeal (the appellate court in the instant case following the reform of the judicial system), set aside the order in the Kiev Region Arbitration Tribunal's judgment of 23 April 2001 for the restitution of the applicant company's assets and dismissed all the applicant company's claims.

I. Proceedings in the Ukraine Supreme Economic Court

45. On 25 February 2002 the applicant company lodged an appeal on points of law with the bench of the Ukraine Supreme Economic Court (as the former Supreme Arbitration Tribunal was now known, following the reform of the judicial system) against the judgment of 24 January 2002.

46. In an order of 2 April 2002, the bench of the Ukraine Supreme Economic Court dismissed the applicant company's appeal on points of law without examining it on the merits. It found, in particular, that the applicant company had not furnished any evidence that it had paid the court fee due to the Supreme Economic Court for the examination of the appeal on points of law. The Supreme Economic Court reimbursed the applicant company the sum it had paid in respect of the court fee and advised it that it could resubmit its appeal once it had completed that formality.

47. The applicant company lodged its appeal on points of law afresh. By an order of 26 April 2002, the bench of the Ukraine Supreme Economic Court dismissed the appeal without examining it on the merits, finding, *inter alia*, that it had been lodged out of time and there had been no application for an extension of time.

II. RELEVANT DOMESTIC LAW

A. The Arbitration Tribunals Act (Law no. 1142-XII of 4 June 1991) (as worded at the time when the application was lodged)

48. Section 1 of the Act provides:

"In accordance with the Constitution of Ukraine, the arbitration tribunals shall have jurisdiction in economic cases.

The arbitration tribunal is an independent entity with jurisdiction in all economic cases between corporations, public or other bodies and litigation arising out of insolvency."

B. The Code of Civil Procedure of 1 January 1964 (as worded at the time when the application was lodged)

49. The relevant provisions of the Code of Civil Procedure provide:

Article 327

"Judgments and court orders or decisions which have become final may be reconsidered under the supervisory review procedure on an objection [протест] lodged by one of the officials specified in Article 328 of this Code."

Article 328

"The following officials are empowered to lodge objections under the supervisory review procedure with a view to securing the revision of judgments and court orders or decisions which have become final:

(1) the President of the Ukrainian Supreme Court, the Attorney-General and their deputies ...;

(2) the presidents of the Supreme Court of Crimea, the regional courts, the Kiev District Court and the Sebastopol District Court and their deputies, and State counsel at the Supreme Court of Crimea, the regional courts, the Kiev District Court and the Sebastopol District Court and their deputies ...;

(3) the presidents of the regional military tribunals and military or admiralty courts, military prosecutors ... and their deputies ..."

Article 329

"The officials mentioned in Article 328 of this Code ... are empowered to require the relevant court to submit the file on a civil case to them so that they can decide whether there are grounds for an objection under the supervisory review procedure.

...

Where there are no grounds for an objection, the official concerned shall notify his or her decision to the person who requested revision, with a short statement of the reasons for it, the case being remitted to the relevant court."

C. The Code of Arbitration Procedure of 6 November 1991 (as worded when the application was lodged)

50. The relevant provisions of the Code of Arbitration Procedure provide:

Article 91

"The lawfulness and merits of a judgment, order or decision of an arbitration tribunal ... may be reconsidered under the supervisory review procedure on an application by a party or an objection by State Counsel or his deputy, in accordance with the said Code and other Ukrainian laws.

An application by a party for revision of a judgment, order or decision under the supervisory review procedure shall be examined by the President of the Supreme Arbitration Tribunal of Crimea or his deputy, by the presidents of the regional arbitration tribunals, the Kiev City Arbitration Tribunal or the Sebastopol City Arbitration Tribunal or their deputies, or by a bench of the Ukrainian Supreme Arbitration Tribunal.

The following persons are empowered to lodge an objection:

The Attorney-General and his deputies ...;

State counsel at the courts of Crimea, the regions, Kiev City and Sebastopol City and their deputies ..."

Article 97

"The President of the Supreme Arbitration Tribunal of Ukraine, the Attorney-General or his deputies shall be entitled to lodge an objection with the Presidium of the Supreme Arbitration Tribunal seeking revision of a judgment of a bench of the Supreme Arbitration Tribunal in an economic case.

..."

Article 100

"...

An objection by the Attorney-General or his deputy for revision of a judgment, order or decision under the supervisory review procedure shall not stay execution of the decision concerned ..."

Article 102

"An application by a party for revision of a judgment, order or decision under the supervisory review procedure must be lodged within two months of the date of the judgment, order or decision in question."

Article 104

"The parties may participate in proceedings for the revision of a judgment, order or decision under the supervisory review procedure. ...

Revision of a judgment, order or decision under the supervisory review procedure must be completed within two months of the lodging of an application or objection. ...

...

The judgment, order or decision of the arbitration tribunal may be revised under the supervisory review procedure no later than one year after its delivery or issue."

Article 106

"Following revision of a judgment, order or decision under the supervisory review procedure, an arbitration tribunal may:

(i) leave the judgment, order or decision as it stands;

(ii) vary the judgment, order or decision;

(iii) quash the judgment, order or decision and adopt a new decision, adjourn the case for further consideration, close the case or decline to entertain the application.

The judgment, order or decision of the arbitration tribunal shall be examined as a whole, irrespective of the grounds for the application or objection.

An arbitration tribunal examining an application for revision of a judgment, order or decision under the supervisory review procedure shall be vested with all the powers of an arbitration tribunal considering an economic dispute.

Where a judgment, order or decision has been revised under the supervisory review procedure by the Supreme Arbitration Tribunal, its judgment shall be final ..."

Article 108

"Following revision under the supervisory review procedure of a judgment of the Supreme Arbitration Tribunal of Crimea, a regional arbitration tribunal, the Kiev City Arbitration Tribunal or the Sebastopol City Arbitration Tribunal, the arbitration tribunal concerned shall issue, in the name of Ukraine, a reasoned decision.

The decision shall be signed by the President of the Supreme Arbitration Tribunal of Crimea or his deputy, the President of the regional arbitration tribunal or his deputy, the President of the Kiev City Arbitration Tribunal or his deputy or the President of the Sebastopol City Arbitration Tribunal or his deputy.

Following revision under the supervisory review procedure of a judgment, order or decision of a bench of the Ukrainian Supreme Arbitration Tribunal, the bench concerned shall issue, in the name of Ukraine, a reasoned judgment signed by all its judges."

Article 109

"Directions set out in a judgment delivered following the revision of a judgment, order or decision under the supervisory review procedure shall be binding on the arbitration tribunal to which the case is remitted for retrial.

..."

Article 115

"Judgment, orders and decisions of arbitration tribunals shall be effective on the day they are delivered or issued and all undertakings, organisations and public authorities shall be bound to comply with them."

D. The Ukrainian Constitution of 28 June 1996

51. The relevant provisions of the Constitution read as follows:

Article 56

"Everyone shall have a right to compensation from public or municipal bodies for losses sustained as a result of unlawful decisions, acts or omissions by public or municipal bodies or civil servants in the performance of their official duties."

Article 144

"Municipal bodies shall exercise their powers in accordance with the statutory rules of competence; decisions of municipal bodies shall be mandatory in the area concerned.

Execution of decisions of municipal bodies shall be stayed, in accordance with the law, if their compatibility with the Constitution or the legislation in force is contested in the courts or tribunals."

E. Arbitration Tribunal Reform Act (Law no. 2538-III of 21 June 2001)

52. Under this Act, the system of arbitration tribunals was replaced by a system of economic courts with jurisdiction to try disputes relating to economic matters.

Section 5 of the Act provides that the system shall comprise three levels of jurisdiction: district economic courts, economic courts of appeal and the Supreme Economic Court of Ukraine.

F. Code of Economic Procedure of 6 November 1991 (as renamed and amended on 21 June 2001)

53. The Code of Economic Procedure of 6 November 1991 (as renamed and amended on 21 June 2001) abolished the objection (протест) procedure.

Article 53 provides that economic courts may grant extensions of time on an application by a party or State Counsel or on their own initiative.

Article 110 lays down that appeals on points of law may be lodged no later than one month after the judgment of the district economic court or the economic court of appeal shall have become effective.

Article 111 requires notices of appeal on points of law to be accompanied, *inter alia*, by evidence that the court fee has been paid to the court or tribunal.

Article 111-3 § 4 provides that courts and tribunals shall return notices of appeal on points of law to the appellant without examining the appeal on the merits if the appellant fails to furnish evidence that the court fee has been paid to the tribunal.

Article 111-3 § 5 provides that courts and tribunals shall return notices of appeal on points of law to the appellant without examining the appeal on the merits if it has been lodged out of time and the appellant has not applied for an extension of time.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

54. The Government contended at the outset that the Court had no jurisdiction to examine the applicant company's complaints in so far as they concerned events that had taken place prior to the entry into force of the Convention in respect of Ukraine on 11 September 1997. In their submission, that part of the application had to be dismissed as being incompatible *ratione temporis* with the provisions of the Convention.

55. The applicant company said that the reduction in value of its shareholding had been an ongoing process. Although the first two stages in that process had taken place before 11 September 1997, the third had not begun until 18 November 1997. From that date onwards, its shareholding had fallen in total from 49% to 20.7%, such that it had lost control over Sovtransavto-Lugansk's activity. The case therefore concerned a "continuing situation" that had culminated in the Ukrainian company's liquidation in June 1999. The applicant company also contended that as regards the complaints under Article 6 of the Convention the entire proceedings had been reopened after the Supreme Arbitration Tribunal's ruling of 6 March 1998, that is to say after the entry into force of the Convention in respect of Ukraine.

56. The Court observes that, in accordance with generally accepted principles of international law, a Contracting Party is only bound by the Convention in respect of events occurring after it has entered into force in respect of that State. It notes that the date on which the Convention entered into force in respect of Ukraine and of the Ukrainian declaration accepting the right of individual application was 11 September 1997 and that some of the events referred to in the application in the instant case occurred prior to that date.

The Court must therefore determine whether and to what extent it has jurisdiction to examine the applicant company's complaints.

57. As regards the complaints under Article 6 § 1 of the Convention, the Court notes that the proceedings in issue began in June 1997, so that part of those proceedings falls outside its jurisdiction *ratione temporis*.

The Court considers that it has jurisdiction *ratione temporis* to examine all of the proceedings in issue from the date of the decision of the Vice-President of the Lugansk Region Arbitration Tribunal of 14 October 1997. However, it will take into account events prior to 11 September 1997 when

examining the complaints as a whole (see, *mutatis mutandis*, *Baggetta v. Italy*, judgment of 25 June 1987, Series A no. 119, p. 32, § 20).

58. As to the applicant company's complaint under Article 1 of Protocol No. 1, the Court notes that it does not concern a deprivation of property as such – as deprivation is indisputably an instantaneous act – but the loss of control of Sovtransavto-Lugansk's activity and assets following the reduction of its shareholding in that company, and the lack of adequate compensation after Sovtransavto-Lugansk was wound up.

The Court observes in that connection that the reduction in the applicant company's shareholding was a protracted three-stage process that ended with Sovtransavto-Lugansk's liquidation. The procedure followed was identical at each stage, with three separate decisions being taken by the managing director to increase the company's share capital, on each occasion by a third, and to alter its memorandum and articles of association accordingly. Each decision was ratified by the Lugansk Executive Council.

The Court notes that the first two stages took place before 11 September 1997 and the third after that date. At the end of the third stage, the applicant company's shareholding in Sovtransavto-Lugansk was reduced in total to 20.7%. Ultimately, Sovtransavto-Lugansk was liquidated. The Court considers that that sequence of events taken as a whole created a continuing situation with which the applicant company still has to contend, as it has yet to receive adequate compensation. In these circumstances, the Court finds that the mere fact that some of the events material to the case occurred prior to the relevant date does not render the complaint under Article 1 of Protocol No. 1 incompatible *ratione temporis*.

Nevertheless, the Court considers that on a strict construction of the generally accepted principles of international law, it may only exercise jurisdiction *ratione temporis* to examine the applicant company's complaint under Article 1 of Protocol No. 1 in respect of the third stage of the process whereby its shareholding was reduced (18 November 1997). However, it will take the events prior to 11 September 1997 into account when examining the complaint as a whole (ibid.).

Consequently, the Government's preliminary objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

59. Relying on Article 6 § 1 of the Convention, the applicant company submitted that it had been prevented from obtaining a fair hearing of its case by an independent and impartial tribunal by the exertion of strong political pressure and the permanent monitoring of the proceedings by the Ukrainian authorities, including the President of Ukraine. It maintained that the arbitration tribunals had not examined the documents and arguments it had submitted to them properly or in accordance with the law. It further

complained that the Kiev Region Arbitration Tribunal had given judgment on 23 June 1998 in Case no. 13/10-98 without inviting it to make submissions and that the Ukrainian Supreme Arbitration Tribunal had tried Cases nos. 13/10-98 and 70/10-98 without its participation and in camera. Lastly, it complained of the length of the proceedings, which had begun in June 1997 and had still not ended.

60. The relevant part of Article 6 § 1 of the Convention reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ..."

61. The Court notes that there are three limbs to this complaint: the first concerns the lack of impartiality and independence of the tribunals; the second the lack of a public hearing before the Kiev Region Arbitration Tribunal and the Supreme Arbitration Tribunal; and the third the length of the proceedings.

A. Submissions of the parties

1. Whether the tribunals were impartial and independent

(a) The Government

62. The Government maintained that Ukrainian law afforded a whole series of guarantees of the impartiality and independence of its courts and tribunals as regards appointments to judicial office and the financing of the judiciary's activities. They added that the domestic law also provided guarantees to protect the courts and tribunals from external pressure.

63. The Government considered that the information that had been supplied by the applicant company was not sufficient to cast doubt on the impartiality and independence of the courts and tribunals that had heard its case. In particular, under the legislation in force, the President of Ukraine was under a duty to respond to petitions from Ukrainian nationals and to take a decision on such petitions in accordance with the law. In addition, the Ukrainian President's resolutions in the instant case had been intended to guarantee the rule of law, and the fact that the arbitrator from the Kiev Region Arbitration Tribunal had refused to examine the case served only to confirm the tribunal's adherence to the principle of independence.

(b) The applicant company

64. The applicant company did not contest the fact that Ukrainian law contained rules intended to guarantee the independence and impartiality of its courts and tribunals. However, it maintained that compliance with those rules was not always reflected in judicial practice. It referred in particular to

cases in which it was common knowledge that tribunals were financially dependent on local-authority budgets, a point that had been noted by the Ukraine Audit Court (Рахункова Палата України) in its annual report for 1999. Such dependence constituted "a means of influencing the tribunals and was a threat to the constitutionally guaranteed independence of the State legal service".

65. As to the Ukrainian President's resolutions, the applicant company observed, firstly, that they had not been addressed solely to the people who had requested the President's intervention, but also to high-ranking officials or members of the State legal service unconnected to them, including the President of the Supreme Arbitration Tribunal. Secondly, the aim was not only to "guarantee the rule of law" but also to "defend the national interests of Ukraine". The applicant company drew the Court's attention to the telegram of 6 March 1998 from the Chief Executive of the Lugansk Region informing the Ukrainian President that, despite his resolution calling for the defence of the national interests, the Supreme Arbitration Tribunal had overturned the judgments of 4 August and 14 October 1997 and remitted the case for reconsideration. He had gone on to say that that decision constituted a threat to Sovtransavto-Lugansk's ability to carry on its business and adversely affected Ukraine's interests in Russia's favour. The Chief Executive had requested the Ukrainian President's immediate intervention in the case in order to defend the interests of the Ukrainian company and Ukrainian nationals. In addition, the President of the Kiev Region Arbitration Tribunal had expressed doubts in a letter of 12 May 2000 concerning the ability to guarantee the total impartiality of the judges of that tribunal at the trial of the applicant company's case.

66. The applicant company said that the arbitrator's decision not to sit in the case had been taken on 20 May 1998, the day after the Ukrainian President's new resolution urging the "defence of Ukrainian national interests" was sent to the President of the Supreme Arbitration Tribunal. The result had been that on 23 June 1998 the new arbitrator had decided both cases at the same time without inviting the parties to set out their arguments and without explaining the reasons for his decision; the new judgment had been markedly more favourable to "Ukrainian national interests".

2. Lack of a public hearing before the Kiev Region Arbitration Tribunal and the Supreme Arbitration Tribunal

(a) The Government

67. The Government submitted that under the Court's case-law, the guarantees contained in Article 6 of the Convention applied less stringently to civil proceedings than to criminal proceedings and that in appellate proceedings restrictions on publicity were permissible if the circumstances

of the case required. They said that "special circumstances" had existed in the present case that justified restrictions being placed on publicity in the proceedings. In any event, the applicant company had been able to present all the arguments it had considered appropriate to the Supreme Arbitration Tribunal in writing and the tribunal had addressed each of those arguments. There had been a hearing in public at first instance. The Government therefore considered that the trial had been fair within the meaning of Article 6 of the Convention.

(b) The applicant company

68. The applicant company observed that on 9 June 1998 the trial of Case no. 13/10-98 had been adjourned until the delivery of a new judgment in Case no. 70/10-98 and that under Ukrainian law the tribunal should first have decided whether to reopen the proceedings in Case no. 13/10-98 before ruling on the merits of that case. However, on 23 June 1998 the tribunal had decided the merits of Case no. 13/10-98 without formally reopening the proceedings or inviting submissions from the parties. The applicant company therefore considered that its right to a public hearing had not been complied with.

3. Length of the proceedings

(a) The Government

69. The Government maintained that the applicant company's case had been highly complex legally, and a thorough examination of all the facts of the case and the parties' arguments had been necessary, as had been an interpretation of the legislative provisions in force. They added that at each stage of the litigation it had been the applicant company, and not a public authority, that had initiated the review process, thus increasing the length of the proceedings. Consequently, the Government maintained that the reasons for the protracted nature of the proceedings were the complexity of the case and the conduct of the applicant company in repeatedly seeking revision of judgments that had become final. They thus argued in conclusion that the length of the domestic proceedings could not be regarded as unreasonable.

(b) The applicant company

70. The applicant company contested the Government's arguments. In its initial observations it said that its case had been pending in the Ukrainian courts since June 1997. As a result of their inadequate and contradictory application of Ukrainian law the Ukrainian courts had been obliged to reconsider the case several times, in accordance with directions received from the Supreme Arbitration Tribunal. In addition, it noted that the proceedings had been reopened for a second time on the initiative of a

public authority, which had waited one year and two months – beyond the statutory limitation period – before making an objection with a view to having previously delivered judgments set aside. The applicant company thus argued that it had been kept in a state of uncertainty over a lengthy period, during which it continued to wait for delivery of a final judicial decision with only vague prospects of seeing the proceedings come to an end.

B. The Court's assessment

1. The applicant company's right to have a fair and public hearing of its case by an independent and impartial tribunal

71. The Court considers that in the circumstances of the instant case it has to determine whether, taken as a whole, the proceedings in issue before the Ukrainian courts and tribunals were compatible with the applicant company's right to have a fair hearing of its case in public by an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention.

The Court considers that it must first determine in the context of the present case the general issue which arises, namely whether and to what extent the objection (протест) procedure, in the form then laid down by Ukrainian law and applied in practice in the instant case, is compatible with the principles of Article 6 § 1 of the Convention read in the light of *Brumărescu v. Romania* ([GC], no. 28342/95, ECHR 1999-VII).

72. Under the Court's settled case-law the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question (ibid., § 61).

73. In *Brumărescu*, cited above, the Court held that there had been a violation of the applicant's right to a fair hearing because the Supreme Court of Justice had, on an application by the Procurator-General, set at naught an entire judicial process that had ended in a decision that was irreversible and *res judicata*.

74. The Court considers the present case to be on all fours with *Brumărescu*. It notes in that connection that at the material time the President of the Supreme Arbitration Tribunal, the Attorney-General and their deputies were empowered by Article 97 of the Code of Arbitration Procedure to challenge final judgments under the supervisory review

procedure by lodging an objection. That power was discretionary, so final judgments were liable to review indefinitely.

In the instant case, by a judgment of 21 April 2000 made on an objection by its President, the Supreme Arbitration Tribunal quashed all the judicial decisions concerning the applicant company and remitted the cases in which it was involved to the first-instance tribunal for a rehearing.

75. The Court observes that, unlike the applicant in *Brumărescu*, in the present case, following supervisory review on an objection by the President of the Supreme Arbitration Tribunal, the applicant company was afforded a fresh opportunity to put forward its case before the tribunals of fact.

That is because by a judgment of 23 April 2001 the Kiev Region Arbitration Tribunal held that the decisions of the managing director of Sovtransavto-Lugansk to increase the company's share capital and alter its memorandum and articles of association had been unlawful, with the result that the applicant company's shareholding had been reduced and its rights in respect of the management of the company and control of its assets infringed. The tribunal also ruled that the payment the applicant company had received on the winding-up was not in proportion to the shareholding in Sovtransavto-Lugansk when that company's memorandum and articles of association were ratified in January 1996. The tribunal therefore ordered Sovtransavto-Lugansk's successor, a company called Trans King, to return to the applicant company part of the assets it had owned at the time.

However, the Kiev Region Arbitration Tribunal dismissed the applicant company's claims against Sovtransavto-Lugansk without examining them on the merits on the ground that Sovtransavto-Lugansk had been wound up on 8 June 1999. It discontinued the proceedings relating to those claims.

76. Nonetheless, by a judgment of 24 January 2002, following an objection by the Ukrainian Attorney-General's Office, which was not a party to the initial proceedings, the Kiev Economic Court of Appeal set aside the judgment of 23 April 2001 in so far as it concerned the order for the restitution of the applicant company's assets, upheld the order discontinuing the proceedings against Sovtransavto-Lugansk and dismissed all the applicant company's claims.

77. Accordingly, the Court notes that the applicant company only derived a temporary benefit from the reopening of the proceedings and, as matters stand, none of its demands have been recognised by the domestic courts. In addition, the applicant company has been definitively deprived of any possibility of obtaining a fair hearing of its claims against Sovtransavto-Lugansk by a tribunal.

The Court considers that judicial systems characterised by the objection (протест) procedure and, therefore, by the risk of final judgments being set aside repeatedly, as occurred in the instant case, are, as such, incompatible with the principle of legal certainty that is one of the fundamental aspects of

the rule of law for the purposes of Article 6 § 1 of the Convention, read in the light of *Brumărescu* (cited above).

78. Even supposing that the foregoing matters were insufficient to amount to a violation of Article 6 § 1 of the Convention, other features of the instant case raise serious doubts that the applicant company's right to a fair hearing in public by an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention was complied with.

79. Firstly, while recognising that it has only limited power to review compliance with domestic law (see *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I), the Court has to say that it finds the different and on occasion conflicting approaches taken by the Ukrainian courts in the application and interpretation of the domestic law surprising: the Supreme Arbitration Tribunal twice overturned decisions of the tribunals below on the grounds that they had failed to apply the relevant law adequately or to conduct a proper, detailed examination of the facts and the applicant company's arguments, and that their rulings had been contradictory and premature (see paragraphs 17 and 36 above).

The Court notes that the arbitration tribunals do not appear to have complied with the directions given by the Supreme Arbitration Tribunal in its initial judgment of 6 March 1998, despite the fact that under Ukrainian law such directions were binding on them. Even though the Supreme Arbitration Tribunal had held that the tribunals below had not conducted a proper, detailed examination of the facts and the applicant company's arguments, the Kiev Region Arbitration Tribunal, in its two judgments of 23 June 1998, merely dismissed the applicant company's new claim without providing any further explanation of its reasons for doing so. In addition, the tribunal's judgment in Case no. 13/10-98 was delivered without the applicant company being afforded an opportunity to put forward its arguments at a hearing (see paragraph 29 above).

80. Lastly, the Court can but note that the Ukrainian authorities acting at the highest level intervened in the proceedings on a number of occasions. Whatever the reasons advanced by the Government to justify such interventions, the Court considers that, in view of their content and the manner in which they were made (see paragraphs 18, 20, 22 and 24 above), they were *ipso facto* incompatible with the notion of an "independent and impartial tribunal" within the meaning of Article 6 § 1 of the Convention.

The Court sees no reason to speculate on what effect such interventions may have had on the course of the proceedings in issue, but finds that in the circumstances of the present case the applicant company's concerns as to the independence and impartiality of the tribunals were not unreasonable. Coming from the executive branch of the State, such interventions nonetheless reveal a lack of respect for judicial office itself.

81. The Court observes that by a decision of 2 April 2002 the Supreme Economic Court dismissed the applicant company's appeal on points of law

without examining it on the merits, on the ground that the applicant company had failed to produce evidence that it had paid the court fee payable to the Supreme Economic Court on the examination of such appeals. The Supreme Economic Court reimbursed the applicant company the amount the latter had paid in court fees and informed it that once it had carried out that formality it could reinstate its appeal. By a judgment of 26 April 2002 the Supreme Economic Court dismissed the applicant company's appeal on the ground that it had been lodged outside the one-month time-limit.

The Court notes, therefore, that the applicant company's appeal on points of law was not examined on the merits owing to its failure to comply with the statutory rules, a state of affairs that might be regarded as showing that the applicant company has failed to exhaust domestic remedies. However, the Court reiterates that, in accordance with its settled case-law on the subject, the rule on the exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism and is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case (see, *mutatis mutandis*, *İlhan v. Turkey* [GC], no. 22277/93, § 59, ECHR 2000-VII). It considers that like considerations apply, *mutatis mutandis*, to the present case.

The Court notes that although the Supreme Economic Court acknowledged in its judgment of 2 April 2002 that the applicant company had paid the court fees due, it nonetheless dismissed its appeal on points of law on the ground that it had failed to produce evidence of payment. In addition, the Court considers that the Supreme Economic Court must have been aware, when it informed the applicant company that it could reinstate its appeal once it had complied with the procedural rule concerned, that the one-month time-limit for lodging appeals would have expired. However, it did not touch upon that issue in its judgment of 2 April 2002 or grant the applicant company a specific period in which to validate its appeal. As a consequence, by a judgment of 26 April 2002 the Supreme Economic Court dismissed the applicant company's appeal on points of law as being out of time.

In view of that unhelpful stance taken by the Supreme Economic Court and of the previous conduct of the domestic courts and tribunals (see paragraph 79 above) the Court considers that it would be unduly formalistic in the circumstances to lay the blame for the failure of its appeal on points of law on the applicant company.

82. Having regard to interventions of the executive branch of the State in the court proceedings, the role played by the objections procedure in the proceedings in issue and to all the other aforementioned matters, the Court finds that the applicant company's right to have a fair hearing in public by an independent and impartial tribunal within the meaning of Article 6 § 1 of

the Convention, construed in the light of the principles of the rule of law and legal certainty, was infringed.

Consequently, there has been a violation of Article 6 § 1 of the Convention.

2. The applicant company's right to a hearing within a reasonable time

83. In the light of its foregoing findings, the Court considers that no separate examination of the applicant company's complaint relating to the length of the proceedings in issue is necessary, as that complaint constitutes one of the individual elements of the right to a fair hearing guaranteed by Article 6 § 1 of the Convention, which the Court has already examined.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

84. Relying on Article 1 of Protocol No. 1, the applicant company alleged that following the ratification by the Lugansk Executive Council of the unlawful resolutions and decisions of Sovtransavto-Lugansk, its shareholding in that company had been reduced in value and it had lost control of the company's activity and assets as a result. It also submitted that the payment it had received following Sovtransavto-Lugansk's liquidation was not in proportion to its original shareholding. Article 1 of Protocol No. 1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Submissions of the parties

1. The Government

85. The Government referred to the Ukrainian legislation that made the company owners responsible for ensuring the legal conformity of the memorandum and articles of association lodged with the State body responsible for company registration. They maintained that, as the public body with authority to ratify Sovtransavto-Lugansk's memorandum and articles of association and resolutions, the Lugansk Executive Council could not be held responsible for the content of those documents.

86. The Government said that between 1996 and 1998, various public bodies had carried out a number of audits of Sovtransavto-Lugansk's activity and had not found any "serious" breach of domestic legislation. In any event, even if such a breach had been found, Sovtransavto-Lugansk should have borne all responsibility for it. The State's role had consisted of ratifying Sovtransavto-Lugansk's resolutions and decisions between 18 November 1997 and 17 February 1998; the legal conformity of the deeds of ratification and of Sovtransavto-Lugansk's resolutions and decisions had been confirmed by the arbitration tribunals. Furthermore, in the Government's submission, there was no direct link between the deeds of ratification issued by the Executive Council and the applicant company's loss of control over Sovtransavto-Lugansk's assets. The right guaranteed by Article 1 of Protocol No. 1 had not, therefore, been interfered with by the State.

The Government referred to the case of *Bramelid and Malmström v. Sweden* (nos. 8588/79 and 8589/79, Commission decision of 12 October 1982, Decisions and Reports (DR) 29, p. 64), in which they said that the European Commission of Human Rights had found that the compulsory sale of shares with an economic value did not constitute a violation of Article 1 of Protocol No. 1.

2. The applicant company

87. The applicant company said that executive councils' powers to ratify resolutions and decisions of limited-liability companies were delegated by the State and strictly regulated by domestic legislation. Under Ukrainian law executive councils were required to observe the rule of law when performing their duties and to follow procedures established by law. They were, therefore, not relieved from liability in the exercise of their powers and could incur constitutional (by virtue of Article 56 of the Constitution) or statutory liability.

88. The applicant company further argued that the basis for the Executive Council's liability was the clause requiring it to turn down requests for ratification by companies of resolutions and decisions whose content or form was unlawful. A refusal by the executive council to ratify a corporate resolution or decision was but one aspect of the liability faced by companies. However, the company's liability did not exclude liability on the part of the executive council, which was also under a duty to follow a specific procedure prior to ratification. The statute laid down, *inter alia*, an exhaustive list of the documents that had to be lodged with the executive council to enable a resolution altering the memorandum and articles of association or increasing the capital to be ratified and thus validated. One of the documents that had to be produced to the executive council was the minutes of the meeting of shareholders in which the resolution concerned was adopted. That document had to be signed by all the shareholders. In the

instant case, the signatures of individual shareholders should also have been legalised by a notary. However, the Executive Council had ratified all the decisions and resolutions for the increases in capital and alterations to the memorandum and articles of association of the Ukrainian company without requiring production of the relevant minutes. In such circumstances, the Executive Council should have turned down the request for ratification of the decisions and resolutions. Its failure to exercise its statutory powers as a public body to supervise the activities of a limited-liability company rendered it liable. If executive councils merely acted as a registration office, their supervisory powers would serve no purpose. In addition, under Ukrainian law, an action could be brought against an executive council in its capacity as "a public entity responsible for its acts", as compensation for damage sustained as a result of the unlawful acts or omissions of executive councils was guaranteed by both statute and the Constitution (Article 56).

89. The applicant company submitted that the Executive Council had validated Sovtransavto-Lugansk's resolutions and decisions by illegally ratifying them. It further maintained that of all the public bodies responsible for supervising the activity of limited-liability companies, the most important was the Ukrainian Securities Exchange Commission. The Securities Exchange Commission had examined Sovtransavto-Lugansk's activities in March 1998 and found a number of breaches of the legislation in force by the company. However, its conclusion that the applicant company should intervene in the proceedings had not been taken into account by the arbitration tribunals.

As regards the Government's reference to *Bramelid and Malmström*, the applicant company pointed out that the instant case did not concern "a compulsory sale of shares", as the interference with its right to the peaceful enjoyment of its possessions was the result of its being deprived of control of Sovtransavto-Lugansk's activity and assets.

B. The Court's assessment

1. Applicability of Article 1 of Protocol No. 1

90. The Court reiterates that, under its settled case-law, Article 1 of Protocol No. 1 comprises three distinct rules: "The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control use of property in accordance with the general interest ... The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular

instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (*Beyeler*, cited above, § 98).

91. The Court observes that it has already found in its admissibility decision in the instant case that the shares held by the applicant company undoubtedly had an economic value and constituted "possessions" within the meaning of Article 1 of Protocol No. 1. As the Government do not dispute that the applicant company was the owner of the shares concerned, the Court therefore finds that Article 1 is applicable.

92. The Court also has to determine which provision of Article 1 is applicable in the instant case.

The Court observes in that connection that "a company share is a complex thing. It certifies that the holder possesses a share in the company together with the corresponding rights. This is not only an indirect claim on company assets but other rights, especially voting rights and the right to influence the company, may follow the share" (*Company S. and T. v. Sweden*, no. 11189/84, Commission decision of 11 December 1986, DR 50, p. 138).

The Court notes that in the present case the applicant company initially held a 49% stake in Sovtransavto-Lugansk. Following repeated increases in that company's share capital the percentage held by the applicant company was reduced from 49% to 20.7%. Consequently, there were changes in the powers the applicant company exercised as a shareholder, that is to say in its ability to run the company and control its assets.

93. In the light of the circumstances of the case and having regard to the special nature of the applicant company's possessions, the Court considers that owing to the factual and legal complexity of the present case it cannot be classified in any specific category within Article 1 of Protocol No. 1. Accordingly, it considers it necessary to examine the case in the light of the general rule set out in that Article.

2. Compliance with Article 1 of Protocol No. 1

94. The Court refers to the three rules contained in Article 1 of Protocol No. 1 (see paragraph 90 above). It observes that in the instant case there was no direct deprivation by the domestic authorities of the applicant company's possessions and no interference comparable to such a deprivation.

95. The Court notes that the applicant company's complaint is that the State failed to comply with its obligation to exercise effective control in accordance with the law over Sovtransavto-Lugansk's activity, thus allowing unlawful resolutions to be adopted for increases in Sovtransavto-Lugansk's share capital and alterations to its memorandum and articles of association and subsequently its winding-up.

The Court notes that its jurisdiction to verify compliance with the domestic law is limited (see *Håkansson and Sturesson v. Sweden*, judgment

of 21 February 1990, Series A no. 171-A, p. 16, § 47) and that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I).

Nevertheless, the Court must examine whether the decisions of the domestic courts and tribunals in the instant case were compatible with the applicant company's right to the peaceful enjoyment of its possessions.

96. The Court reiterates that by virtue of Article 1 of the Convention each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention". The obligation to secure the effective exercise of the rights defined in that instrument may result in positive obligations for the State (see, among other authorities, *X and Y v. Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, §§ 22-23). In such circumstances, the State cannot simply remain passive and "there is ... no room to distinguish between acts and omissions" (see, *mutatis mutandis*, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 14, § 25).

As regards the right guaranteed by Article 1 of Protocol No. 1, those positive obligations may entail certain measures necessary to protect the right of property (see, among other authorities and *mutatis mutandis*, *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 55, § 55), even in cases involving litigation between individuals or companies. This means, in particular, that the States are under an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons.

97. In the present case it is clear that the Court is not entitled to call into question the decisions reached by the Ukrainian courts and tribunals. Its role is instead to verify whether the consequences of their interpretation and application of the domestic law were compatible with the principles laid down in the Convention. In that regard, the Court can but point to the serious procedural shortcomings it noted above when examining the complaint under Article 6 § 1 of the Convention (see paragraphs 71-82 above).

The Court considers that the unfair manner in which the proceedings in issue were conducted had a direct impact on the applicant company's right to the peaceful enjoyment of its possessions, as it is indisputable that the refusal by the tribunals of fact to comply with the directions of the Supreme Arbitration Tribunal, coupled with the considerable differences of approach to the application and interpretation of the domestic law between the various levels of jurisdiction, made the repeated reopening of the proceedings in issue possible, thus creating permanent uncertainty about the lawfulness of the decisions of Sovtransavto-Lugansk and the Lugansk Executive Council.

The interventions of the State executive branch in the judicial process considerably added to that uncertainty. Lastly, the manner in which the litigation ended (see paragraph 81 above) does not appear to have been consistent with the State's obligation to deal with the applicant company's situation in as coherent a manner as possible (see *Beyeler*, cited above, § 120). Consequently, the applicant company had to cope with that uncertainty during the period in which its initial shareholding was reduced, with the consequent changes to its ability to manage Sovtransavto-Lugansk and to control its assets that that entailed (ibid., § 110).

98. Having regard to the foregoing, the Court finds that the manner in which the proceedings were conducted and ended, and the uncertainty in which the applicant company was left, upset the "fair balance" that has to be struck between the demands of the public interest and the need to protect the applicant company's right to the peaceful enjoyment of its possessions. Consequently, the State failed to comply with its obligation to secure to the applicant company the effective enjoyment of its right of property, as guaranteed by Article 1 of Protocol No. 1.

There has accordingly been a violation of that provision.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

99. The applicant company considered that it had been subjected to discriminatory treatment by the Ukrainian authorities, which had sought to "defend the interests of Ukrainian nationals" by protecting the rights of the Ukrainian company to the detriment of the rights of the Russian company. In that connection, it relied on Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

100. The Government said that the applicant company had brought proceedings in the tribunal with a view to challenging the public authorities' actions and that the applicant company's treatment by the domestic courts and tribunals had not been discriminatory. They further argued that the applicant company had provided insufficient information to substantiate its complaint under Article 14 of the Convention.

101. In the light of its findings under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, the Court considers that there is no need for any separate examination of the issue whether the applicant company was discriminated against on the grounds of its nationality, contrary to Article 14 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

103. The applicant company submitted, firstly, that the measure of just satisfaction had to be assessed in the light of the specific nature of the assets it had held, namely company shares. As it had had a 49% shareholding in Sovtransavto-Lugansk, it was entitled to 49% of Sovtransavto-Lugansk's assets, to manage it and control its assets, and to dividends. As a result of the reduction in the value of its shareholding, its ability to manage Sovtransavto-Lugansk had been considerably diminished and, consequently, it had lost control of both the company's activity and assets. Subsequently, having been deprived of the possibility of influencing Sovtransavto-Lugansk's decisions about its assets, it had been unable to prevent the company management from engaging in a massive sale of its assets at considerable undervalue. Consequently, as a result of the illegal actions of the company's management and the Lugansk Executive Council, not only had the applicant company's shareholding fallen from 49% to 20.7%, there had also been a considerable diminution of the company's assets. Finally, following the winding-up of Sovtransavto-Lugansk, the payment received by the applicant company had not been in proportion to its initial 49% shareholding.

104. The applicant company submitted that, in the light of the circumstances of the case, it was entitled to seek from the State, pecuniary damage caused by the violation of its right of property, reimbursement of the value of its initial 49% shareholding in Sovtransavto-Lugansk less 9,200 United States dollars (USD), being the payment it had received on the winding-up. It sought USD 14,921,674 under this head.

It also sought USD 1,388,000 in reimbursement of the dividends to which it would have been entitled by virtue of its 49% shareholding.

105. The applicant company claimed USD 300,000 in respect of the violation of its rights guaranteed by Article 6 § 1 of the Convention.

106. It said that as a result of the unlawful acts of Sovtransavto-Lugansk's management and the State, it had lost control of the activity and assets of one of the best international transport companies in Europe. Following the winding-up of Sovtransavto-Lugansk, it had lost a huge market in Ukraine and overseas. It submitted that the loss of such a market and the interminable litigation in the Ukrainian courts had caused enormous damage to its reputation as an international transport company. It sought USD 1 million in respect of non-pecuniary damage.

107. The applicant company sought USD 153,470 for costs incurred in the domestic courts and before the Court, representing its lawyers' expenses and fees and sundry costs.

108. It did, however, say that it was prepared to examine alternative proposals from the State for reparation of the damage that had been caused by the violation of its rights under the Convention and its Protocols.

109. The Government said at the outset that the method used by the applicant company to calculate the value of Sovtransavto-Lugansk's assets and to assess the pecuniary damage was incorrect. They added that the applicant company could not claim reparation for pecuniary damage, as it had already received compensation when Sovtransavto-Lugansk was wound up, and that no domestic court had found any violation of its right of property.

110. As to the applicant company's claims for reparation for non-pecuniary damage, the Government said they were unfounded. The applicant company could not assert that it had lost a market as a result of Sovtransavto-Lugansk being wound up, as it had never been the owner of the company. Added to which, the loss of a market could under no circumstances be regarded as non-pecuniary damage.

111. As to the applicant company's claim for reparation for damage caused by the alleged violation of Article 6 § 1 of the Convention, the Government argued that there was no direct link between the alleged violation and the stated damage. It was impossible to assert that the domestic courts' decisions would have been different had there been no violation of Article 6 § 1. The Government also contended that a finding by the Court of a violation of the applicant company's rights under Article 6 § 1 would constitute sufficient reparation.

112. The Government left the issue of the applicant company's claims for reimbursement of their lawyers' costs and expenses to the Court's discretion. They nevertheless pointed out that the amount sought by the applicant company was, in their view, exorbitant, at any rate by reference to prevailing rates in Ukraine. They added that the applicant company had not furnished any vouchers.

113. In the circumstances of the case, the Court considers that the issue of the application of Article 41 of the Convention is not ready for decision. Consequently, it decides to reserve it and to fix the subsequent procedure in the light of the possibility of an agreement between the respondent State and the applicant company (Rule 75 § 1 of the Rules of Court). The Court accords the parties six months to that end.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;

2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by six votes to one that there has been a violation of Article 1 of Protocol No. 1;

4. *Holds* unanimously that it is unnecessary to examine separately whether the applicant company has been subjected to discrimination on the grounds of nationality, contrary to Article 14 of the Convention;

5. *Holds* unanimously that the question of the application of Article 41 of the Convention is not ready for decision; accordingly,
   (a) *reserves* the said question in whole;
   (b) *invites* the Government and the applicant company to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in French, and notified in writing on 25 July 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly concurring and partly dissenting opinion of Mr Cabral Barreto is annexed to this judgment.

G.R.
V.B.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE CABRAL BARRETO

(Translation)

I have difficulty in following part of the majority's reasoning.

1. As regards the complaint concerning the impartiality and independence of the tribunals (Article 6 § 1 of the Convention), I agree that, in view of the intervention of the executive branch of the State in the judicial process, the applicant company's case was not examined by a tribunal offering all the guarantees required by Article 6.

There has therefore been a violation of Article 6 § 1 of the Convention.

2. I would be the first to admit that the objection (протест) procedure constitutes one of the most serious and flagrant violations of the *res judicata* rule, which is itself one of the major foundations of a democratic society based on the rule of law, as required by the Convention.

However, owing to the applicant company's own conduct, I hesitate to find that it may still be regarded as a victim of a breach of that rule.

Allow me to explain.

By two judgments of 12 January 1999 a bench of the Supreme Arbitration Tribunal dismissed appeals by the applicant company. Once those judgments had become final, the proceedings ended.

The proceedings in issue were reopened following an objection by the President of the Supreme Arbitration Tribunal at the express request of the applicant company in February 1999 (see paragraph 33 of the judgment).

It is true that there was subsequently a further objection, by the Ukrainian Attorney-General's Office, against the decisions that were favourable to the applicant company.

However, this was as a result of the applicant company's initial conduct and, therefore, in my opinion, it cannot escape application of the principle "*nemini licet venire contra factum proprium*" (no one may set himself in contradiction to his own previous conduct).

3. The finding of a violation of Article 1 of Protocol No. 1 is based on the same matters that led the Court to find a violation of Article 6 § 1.

The applicant company's complaints under Article 1 of Protocol No. 1 are the same as those already examined by the Court under Article 6 § 1, in respect of which it found a violation.

In these circumstances, it seems to me that it is unnecessary to examine whether there has also been a violation of Article 1 of Protocol No. 1 in the instant case.

This is the only reason for my not concurring with the majority on this point.