BERICHTE UND URKUNDEN

Vorbemerkung zum Urteil des Europäischen Gerichtshofs für Menschenrechte im Fall Lithgow vom 8. Juli 1986

Das nachstehend abgedruckte Urteil des Europäischen Gerichtshofs für Menschenrechte vom 8. Juli 1986 schließt sich an das Urteil im Fall *James and Others* vom 21. Februar 1986[1] an. Im Zentrum beider Entscheidungen steht die Eigentumsgarantie des Art. 1 des 1. Zusatzprotokolls zur Europäischen Menschenrechtskonvention[2]. Bei unterschiedlichen Sachverhalten waren die rechtlichen Probleme in beiden Fällen ähnlich, und es bedurfte der Klärung von Auslegungsfragen, die viel diskutiert, aber vom Gerichtshof noch nicht entschieden waren[3].

In beiden Verfahren waren Gesetze des Vereinigten Königreichs von den Beschwerdeführern als unvereinbar mit der Konvention angegriffen worden. Die Europäische Menschenrechtskommission hatte in ihren Berichten eine Verletzung der Konvention verneint, und der Gerichtshof hat in gleichem Sinn entschieden.

Im *James*-Fall ging es um eine Art von Erbbau- und Erbpacht-Verträgen, die langfristig geschlossen worden waren und die vorsahen, daß der Berechtigte auf fremdem Grund Gebäude errichten und/oder unterhalten sollte und sie während der Dauer des Vertrages allein nutzen durfte. Am Ende der Vertragsdauer fielen die Gebäude zusammen mit dem Grundstück an den Eigentümer zurück, ohne daß dieser eine Entschädigung zu zahlen hatte. Dies wurde seit längerem als sozial unbefriedigend

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[1] Erscheint demnächst in Bd. 98 der Serie A der Amtlichen Sammlung des Gerichtshofs.

[2] Nur hierauf wird in dieser Vorbemerkung eingegangen, während die Äußerungen des Urteils zu den Art. 14, 6 und 13 unberücksichtigt bleiben.

[3] Vgl. zur früheren Rechtsprechung von Gerichtshof und Kommission zu Art. 1 des Zusatzprotokolls die Zusammenstellung in Digest of Strasbourg Case-Law relating to the European Convention on Human Rights, Bd. 5 (1985), S. 631–741.

angesehen. 1967 verabschiedete der britische Gesetzgeber ein Gesetz, das dem Berechtigten die Möglichkeit eröffnete, das Eigentum auch gegen den Willen des bisherigen Eigentümers zu erwerben, gegen Bezahlung des Grundstückswertes, aber ohne Berücksichtigung des Wertes des Gebäudes. Die Entscheidung des Europäischen Gerichtshofs für Menschenrechte hat die Vereinbarkeit der Gesetzgebung mit Art.1 des Zusatzprotokolls bejaht, weitgehend mit einer ähnlichen Begründung wie im *Lithgow*-Urteil. Eine Besonderheit des *James*-Falles lag darin, daß der Entzug des Eigentums zugunsten Privater und nicht des Staates erfolgt war; auch dies hielt der Gerichtshof für zulässig.

Im *Lithgow*-Fall handelte es sich nun um einen »klassischen« Nationalisierungsfall: Die britische (Labour-)Regierung hatte 1977 die Unternehmen der Luftfahrt- und der Schiffbauindustrie in der Weise verstaatlicht, daß die Anteile an den Unternehmen in staatliche Hand überführt wurden. Umstritten war nicht die Zulässigkeit der Nationalisierung, sondern die Angemessenheit der Entschädigung. Der Gesetzgeber hatte für die Höhe der Entschädigung den (wirklichen oder hypothetischen) Börsenwert in einer Referenzperiode für maßgeblich erklärt, die vom 1. September 1973 bis 28. Februar 1974 dauerte (das letzte Datum war der Tag der Wahl, an dem die Labour-Party die Mehrheit im Unterhaus gewann). Zwischen der Referenzperiode und dem "Vesting Day", an dem die Anteile und damit die Unternehmen auf die öffentliche Hand übergingen (29. April 1977 bzw. 1. Juli 1977), lagen also weit über drei Jahre. Die Regierung rechtfertigte das damit, daß Kursschwankungen seit der Ankündigung der Nationalisierung keine Auswirkungen auf die Entschädigung haben sollten. Die Beschwerdeführer brachten vor, daß der Wert der Unternehmen zwischen Referenzperiode und Vesting Day ebenso wie die Unternehmensgewinne erheblich gestiegen seien, die Entschädigung sei daher unangemessen und grob unbillig; dazu habe auch die Inflationsrate im fraglichen Zeitraum beigetragen.

Art.1 des 1. Zusatzprotokolls zur Europäischen Menschenrechtskonvention (siehe den Text am Anfang des Urteilsabdrucks) enthält im ersten Satz zunächst eine Garantie des Eigentums und erklärt im zweiten Satz Eigentumsentziehungen für zulässig "in the public interest and subject to the conditions provided for by law and by the general principles of international law". Der zweite Absatz erkennt das Recht des Staates an, den Gebrauch des Eigentums zu kontrollieren; dieser Absatz spielte im vorliegenden Zusammenhang keine Rolle.

Eine seit langem viel diskutierte Frage war, ob der Verweis auf die allgemeinen Prinzipien des Völkerrechts nur eine Bestätigung der ohnehin

geltenden Prinzipien enthält und damit nur Ausländer betrifft, da nur sie nach allgemeinem Völkerrecht gegen Eigentumsentziehungen geschützt sind, oder ob es sich um eine »Rechtsfolgenverweisung« handelt, die die Entschädigungsregeln des Völkerrechts auf alle von Enteignungsmaßnahmen Betroffenen (also die Angehörigen des nationalisierenden Staates ebenso wie Staatenlose) erstreckt. Der Europäische Menschenrechts-Gerichtshof hat sich im *James-* und im *Lithgow*-Fall ebenso wie zuvor die Kommission für die erste Alternative entschieden. Der Staatsbürger, der von seinem eigenen Staat enteignet wird, ist danach nicht über die Verweisung in Art.1 von den allgemeinen Regeln des Völkerrechts geschützt.

Heißt das nun, daß der Staat das Eigentum seiner Bürger entschädigungslos entziehen kann, wie das nach allgemeinem Völkerrecht wohl zulässig ist? Das verneint der Gerichtshof. Unter Hinweis auf insoweit übereinstimmende Stellungnahmen von Kommission und betroffener Regierung betont er, daß die entschädigungslose Entziehung von Eigentum in den Vertragsstaaten der Europäischen Menschenrechtskonvention nur in Ausnahmefällen zulässig sei und auch die Konvention so interpretiert werden müsse, da sonst die Eigentumsgarantie der Konvention weitgehend illusorisch wäre. Somit impliziert die Konvention eine eigenständige Entschädigungsverpflichtung bei Enteignungen (von außergewöhnlich gelagerten Fällen abgesehen, man denke etwa an unrechtmäßig erworbenes oder verwendetes Eigentum).

Nach diesem Ausgangspunkt war die Frage zu beantworten, ob die Entschädigungen im vorliegenden Fall ausreichend waren. Dazu sagt der Gerichtshof prinzipiell: "The taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1". Eine volle Entschädigung sei jedoch nicht erforderlich, auch dürfe der Staat legitimerweise bei Nationalisierungsmaßnahmen andere Maßstäbe anlegen als bei der Enteignung einzelner Grundstücke. Entscheide sich der staatliche Gesetzgeber für eine Nationalisierung, so sei diese Entscheidung von vielfältigen politischen Erwägungen getragen, die der Europäische Gerichtshof im Regelfall hinnehmen müsse; "it will respect the legislature's judgment ... unless that judgment was manifestly without reasonable foundation". Hier sei der Gestaltungsspielraum des Gesetzgebers nicht überschritten. Damit hat der Gerichtshof erneut die *margin of appreciation* des nationalen Gesetzgebers anerkannt und betont.

Im Anschluß an das *James*-Urteil hat das *Lithgow*-Urteil wesentliche Zweifelsfragen zur Auslegung von Art.1 des Zusatzprotokolls geklärt.

Während das *Sporrong und Lönnroth*-Urteil von 1982[4] es nur mit längerfristigen Eigentumsbeschränkungen zu tun hatte, die der Gerichtshof im konkreten Fall als Verletzung von Art.1 Abs.1 Satz 1 ansah (und die die Minderheit damals für durch Abs.2 gedeckt hielt), dürften nunmehr wichtige Leitlinien für förmliche Eigentumsentziehungen erkennbar sein.

Rudolf Bernhardt

Anhang

EUROPEAN COURT OF HUMAN RIGHTS

Case of Lithgow and Others[1]
Judgment of 8 July 1986

As to the Law

I. ARTICLE 1 OF PROTOCOL NO.1

A. Introduction

105. The applicants did not contest the principle of the nationalisation as such. However, they alleged that, for various reasons, the compensation which they had received was grossly inadequate and that on that account they had been victims of a violation of Article 1 of Protocol No. 1, which reads as follows:

> "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".

The applicants' allegation was contested by the Government and rejected by a majority of the Commission.

106. The Court recalls that Article 1 in substance guarantees the right of property (see the *Marckx* judgment of 13 June 1979, Series A no.31, pp.27–28, para.63). In its judgment of 23 September 1982 in the case of *Sporrong and Lönnroth*, the Court

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[4] Bd.52 der Serie A der Amtlichen Sammlung.

[1] The judgment will be published as vol.102 of Series A of the Publications of the Court.

analysed Article 1 as comprising "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, is concerned, amongst other things, with the right of a State to control the use of property (Series A no.52, p.24, para.61). However, the Court made it clear in its *James and Others* judgment of 21 February 1986 that the three rules are not "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 (Series A no.98, p.30, para.37 *in fine*).

107. The applicants were clearly "deprived of ⟨their⟩ possessions", within the meaning of the second sentence of Article 1; indeed, this point was not disputed before the Court. It will therefore examine the scope of that sentence's requirements and then, in turn, whether they were satisfied.

B. Were the applicants deprived of their property "in the public interest" and "subject to the conditions provided for by law"?

108. The applicants contended that a taking of property for compensation which – as in the present case, so they alleged – was unfair because it represented only a fraction of the property's value at the date of taking could not be regarded as being "in the public interest", within the meaning of the second sentence of Article 1 of Protocol No.1. They further contended that if – as here, in their view – the compensation was arbitrary because it bore no reasonable relationship to that value, the taking could not be regarded as having been effected "subject to the conditions provided for by law", within the meaning of the same sentence.

109. The Court is unable to accept the first of these contentions. The obligation to pay compensation derives from an implicit condition in Article 1 of Protocol No.1 read as a whole (see paragraph 120 below) rather than from the "public interest" requirement itself. The latter requirement relates to the justification and the motives for the actual taking, issues which were not contested by the applicants.

110. As regards the phrase "subject to the conditions provided for by law", it requires in the first place the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions (see, amongst other authorities, the *Malone* judgment of 2 August 1984, Series A no.82, pp.31–33, paras.66–68). Save as stated in paragraph 153 below, the applicants did not dispute that these requirements had been satisfied.

It is true that the word "law" in this context refers to more than domestic law

(ibid., p.32, para.67). However, the applicants' contention in this respect (see paragraph 108 above) is, in the Court's view, so closely linked to the main issues in the present case, which are dealt with in paragraphs 123–175 below, that it would be superfluous also to examine this question under this phrase of Article 1.

C. "*General principles of international law*"

111. The applicants argued that the reference in the second sentence of Article 1 to "the general principles of international law" meant that the international law requirement of, so they asserted, prompt, adequate and effective compensation for the deprivation of property of foreigners also applied to nationals.

112. The Commission has consistently held that the principles in question are not applicable to a taking by a State of the property of its own nationals. The Government supported this opinion. The Court likewise agrees with it for the reasons which are already set out in its above-mentioned *James and Others* judgment (Series A no.98, pp.38–40, paras.58–66) and are repeated here, *mutatis mutandis*.

113. In the first place, purely as a matter of general international law, the principles in question apply solely to non-nationals. They were specifically developed for the benefit of non-nationals. As such, these principles did not relate to the treatment accorded by States to their own nationals.

114. In support of their argument, the applicants relied first on the actual text of Article 1. In their submission, since the second sentence opened with the words "No one", it was impossible to construe that sentence as meaning that whereas everyone was entitled to the safeguards afforded by the phrases "in the public interest" and "subject to the conditions provided for by law", only non-nationals were entitled to the safeguards afforded by the phrase "subject to the conditions provided for ... by the general principles of international law". They further pointed out that where the authors of the Convention intended to differentiate between nationals and non-nationals, they did so expressly, as was exemplified by Article 16.

Whilst there is some force in the applicants' argument as a matter of grammatical construction, there are convincing reasons for a different interpretation. Textually the Court finds it more natural to take the reference to the general principles of international law in Article 1 of Protocol No.1 to mean that those principles are incorporated into that Article, but only as regards those acts to which they are normally applicable, that is to say acts of a State in relation to non-nationals. Moreover, the words of a treaty should be understood to have their ordinary meaning (see Article 31 of the 1969 Vienna Convention on the Law of Treaties), and to interpret the phrase in question as extending the general principles of

international law beyond their normal sphere of applicability is less consistent with the ordinary meaning of the terms used, notwithstanding their context.

115. The applicants also referred to arguments to the effect that, on the Commission's interpretation, the reference in Article 1 to the general principles of international law would be redundant since non-nationals already enjoyed the protection thereof.

The Court does not share this view. The inclusion of the reference can be seen to serve at least two purposes. Firstly, it enables non-nationals to resort directly to the machinery of the Convention to enforce their rights on the basis of the relevant principles of international law, whereas otherwise they would have to seek recourse to diplomatic channels or to other available means of dispute settlement to do so. Secondly, the reference ensures that the position of non-nationals is safeguarded, in that it excludes any possible argument that the entry into force of Protocol No.1 has led to a diminution of their rights. In this connection, it is also noteworthy that Article 1 expressly provides that deprivation of property must be effected "in the public interest": since such a requirement has always been included amongst the general principles of international law, this express provision would itself have been superfluous if Article 1 had had the effect of rendering those principles applicable to nationals as well as to non-nationals.

116. Finally, the applicants pointed out that to treat the general principles of international law as inapplicable to a taking by a State of the property of its own nationals would permit differentiation on the ground of nationality. This, they said, would be incompatible with two provisions that are incorporated in Protocol No.1 by virtue of Article 5 thereof: Article 1 of the Convention which obliges the Contracting States to secure to everyone within their jurisdiction the rights and freedoms guaranteed and Article 14 of the Convention which enshrines the principle of non-discrimination.

As to Article 1 of the Convention, it is true that under most provisions of the Convention and its Protocols nationals and non-nationals enjoy the same protection but this does not exclude exceptions as far as this may be indicated in a particular text (see, for example, Articles 5 para.1 (f) and 16 of the Convention, Articles 3 and 4 of Protocol No.4).

As to Article 14 of the Convention, the Court has consistently held that differences of treatment do not constitute discrimination if they have an "objective and reasonable justification" (see, as the most recent authority, the *Abdulaziz, Cabales and Balkandali* judgment of 28 May 1985, Series A no.94, pp.35–36, para.72).

Especially as regards a taking of property effected in the context of a social reform or an economic restructuring, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designa-

tion of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals (see paragraph 120 below).

117. Confronted with a text whose interpretation has given rise to such disagreement, the Court considers it proper to have recourse to the *travaux préparatoires* as a supplementary means of interpretation (see Article 32 of the Vienna Convention on the Law of Treaties).

Examination of the *travaux préparatoires* reveals that the express reference to a right to compensation contained in earlier drafts of Article 1 was excluded, notably in the face of opposition on the part of the United Kingdom and other States. The mention of the general principles of international law was subsequently included and was the subject of several statements to the effect that they protected only foreigners. Thus, when the German Government stated that they could accept the text provided that it was explicitly recognised that those principles involved the obligation to pay compensation in the event of expropriation, the Swedish delegation pointed out that those principles only applied to relations between a State and non-nationals. And it was then agreed, at the request of the German and Belgian delegations, that "the general principles of international law, in their present connotation, entailed the obligation to pay compensation to non-nationals in cases of expropriation" (emphasis added).

Above all, in their Resolution (52) 1 of 19 March 1952 approving the text of the Protocol and opening it for signature, the Committee of Ministers expressly stated that, "as regards Article 1, the general principles of international law in their present connotation entail the obligation to pay compensation to non-nationals in cases of expropriation" (emphasis added). Having regard to the negotiating history as a whole, the Court considers that this Resolution must be taken as a clear indication that the reference to the general principles of international law was not intended to extend to nationals.

The *travaux préparatoires* accordingly do not support the interpretation for which the applicants contended.

118. Finally, it has not been demonstrated that, since the entry into force of Protocol No.1, State practice has developed to the point where it can be said that the parties to that instrument regard the reference therein to the general principles of international law as being applicable to the treatment accorded by them to their own nationals. The evidence adduced points distinctly in the opposite direction.

119. For all these reasons, the Court concludes that the general principles of international law are not applicable to a taking by a State of the property of its own nationals.

D. Entitlement to compensation

120. The question remains whether the availability and amount of compensation are material considerations under the second sentence of the first paragraph of Article 1, the text of the provision being silent on the point. The Commission, with whom both the Government and the applicants agreed, read Article 1 as in general impliedly requiring the payment of compensation as a necessary condition for the taking of property of anyone within the jurisdiction of a Contracting State.

Like the Commission, the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle.

In this connection, the Court recalls that not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This latter requirement was expressed in other terms in the above-mentioned *Sporrong and Lönnroth* judgment by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (Series A no.52, p.26, para.69). The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden" (ibid., p.28, para.73). Although the Court was speaking in that judgment in the context of the general rule of peaceful enjoyment of property enunciated in the first sentence of the first paragraph, it pointed out that "the search for this balance is ... reflected in the structure of Article 1" as a whole (ibid., p.26, para.69).

Clearly, compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions.

E. Standard of compensation

121. The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than

reimbursement of the full market value (see the above-mentioned *James and Others* judgment, Series A no.98, p.36, para.54).

In this connection, the applicants contended that, as regards the standard of compensation, no distinction could be drawn between nationalisation and other takings of property by the State, such as the compulsory acquisition of land for public purposes.

The Court is unable to agree. Both the nature of the property taken and the circumstances of the taking in these two categories of cases give rise to different considerations which may legitimately be taken into account in determining a fair balance between the public interest and the private interests concerned. The valuation of major industrial enterprises for the purpose of nationalising a whole industry is in itself a far more complex operation than, for instance, the valuation of land compulsorily acquired and normally calls for specific legislation which can be applied across the board to all the undertakings involved. Accordingly, provided always that the aforesaid fair balance is preserved, the standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property.

122. Whilst not disputing that the State enjoyed a margin of appreciation in deciding whether to deprive an owner of his property, the applicants submitted that the Commission had wrongly concluded from this premise that the State also had a wide discretion in laying down the terms and conditions on which property was to be taken.

The Court is unable to accept this submission. A decision to enact nationalisation legislation will commonly involve consideration of various issues on which opinions within a democratic society may reasonably differ widely. Because of their direct knowledge of their society and its needs and resources, the national authorities are in principle better placed than the international judge to appreciate what measures are appropriate in this area and consequently the margin of appreciation available to them should be a wide one. It would, in the Court's view, be artificial in this respect to divorce the decision as to the compensation terms from the actual decision to nationalise, since the factors influencing the latter will of necessity also influence the former. Accordingly, the Court's power of review in the present case is limited to ascertaining whether the decisions regarding compensation fell outside the United Kingdom's wide margin of appreciation; it will respect the legislature's judgment in this connection unless that judgment was manifestly without reasonable foundation.

F. Did the compensation awarded to the applicants meet the standard identified by the Court?

1. Issues common to all the applicants

(a) Approach to the case

123. The applicants criticised the Commission for having, in its report, looked solely at the compensation system, as such, established by the 1977 Act; in their view, it should rather have examined the consequences of applying that system, but had failed to do so.

The Government, on the other hand, submitted that if the valuation method laid down by the legislation were a proper one, then it would of necessity have produced compensation that was real and effective. For them, the value of nationalised property could only be determined by the application of a proper valuation method.

124. In proceedings originating in an individual application (Article 25) the Court has to confine itself, as far as possible, to an examination of the concrete case before it (see, amongst numerous authorities, the *Ashingdane* judgment of 28 May 1985, Series A no.93, p.25, para.59). In the present case, the applicants' complaint is that the 1977 Act resulted in the payment of compensation which was not reasonably related to the value of their property when it was taken. This raises issues concerning both the terms and conditions of the legislation and its effects. The Court must therefore direct its attention in the first place to the contested legislation itself, and the effects of the legislation must be considered in the context of terms and conditions which Parliament had to determine in advance and which had to be of general application to the nationalised companies.

(b) The system established by the 1977 Act

(i) Compensation based on share values

125. Parliament decided to base compensation on the value of the shares in the nationalised companies. Since, under the 1977 Act, it was the shares themselves that passed into public ownership, this decision, which was not as such contested by the applicants, appears to the Court to be appropriate. There are, moreover, well-established techniques for valuing shares, notably in the field of taxation.

The principal alternative would have been to base compensation on the value of the underlying assets but, as the Government pointed out, this would have necessitated, by reason of the different accounting practices as regards book values, a costly and time-consuming revaluation of the assets concerned. Moreover, in valuing a business which is to continue to operate as a going concern earnings may

often be a more important factor than assets. In any event the chosen method did enable account to be taken of asset values, in addition to the other relevant factors (...)[2].

126. The Court thus concludes that Parliament's decision was not in principle inconsistent with the requirements of Article 1.

(ii) The hypothetical Stock Exchange quotation method of valuation

127. The 1977 Act provided that the "base value" for compensation purposes of securities listed on the London Stock Exchange was to be the average of their weekly quotations during the Reference Period. The "base value" of unquoted securities was, in general, to be the base value which they would have had if they had been listed on the Stock Exchange throughout the Reference Period (...). The applicants – whose complaints all related to shares in the latter category – contended that the prescribed method was a distorted and untrue basis for valuation.

128. Notwithstanding the complexities involved in treating, for valuation purposes, shares which were not quoted as if they were quoted, the Court notes that the chosen method had a distinct advantage. Being based on the impression which a Stock Exchange investor might be presumed to have formed about the company in question, it enabled account to be taken, in an objective manner, of all relevant factors such as historic and prospective earnings, asset-backing, dividend yield and the price of any comparable quoted shares (...). It is also a method that had been used previously, notably in the United Kingdom Iron and Steel Acts 1949 and 1967.

As the applicants pointed out, it is true that, by resorting to the information assumed to be available to investors, the system involved having regard in the first place to material that had already been published, some of which could and did relate to periods prior to the valuation reference period. However, in practice assumptions were also made as to the other – and more up-to-date – information that would have been supplied to the stock market if the shares in question had been listed (...). Moreover, utilisation of the chosen method did not prevent account being taken, in the course of the compensation negotiations, of a company's prospective earnings after the end of the Reference Period.

129. The applicants suggested that a more appropriate method would have been to estimate the price which their shares would have fetched on a sale by private treaty between a willing seller and a willing buyer. However, the Court, like the Commission, observes that even in the valuations prepared on this basis and supplied to it by the applicants recourse was had to comparisons with analogous

[2] Reference to the Facts.

quoted shares, notably for such purposes as the selection of an appropriate price/earnings ratio.

Apart from the fact that compensation assessed by the hypothetical Stock Exchange quotation method contained no element representing the special value of a large or controlling shareholding – a matter dealt with by the Court in paragraphs 148–150 below –, the principal difference between the methods would appear to be that a purchaser by private treaty might be assumed to have more complete information about a company than a Stock Exchange investor (...). However, the Court does not consider that this difference is of such moment as to lead to the conclusion that the United Kingdom acted unreasonably and outside its margin of appreciation in opting for the hypothetical Stock Exchange quotation method. This is especially so if one bears in mind that a degree of artificiality would also have been involved in an assumption that there would have been a willing buyer for large shareholdings in a company engaged in the particular industries concerned.

130. The Court thus concludes that recourse to the method in question was not in principle contrary to Article 1.

(iii) The Reference Period

131. The compensation which the applicants received was based on the value of their shares during the Reference Period laid down by the 1977 Act, namely 1 September 1973 to 28 February 1974 (...). This period antedated by more than three years the formal transfer of the shares (...), whereas the applicants maintained that in order to be "reasonably related" to the value of the property taken, compensation had to be assessed by reference to the value at the time of taking.

In selecting the valuation Reference Period, the Government sought to take a period which was as recent as possible and was also not untypical, provided always that it was not one in which the value of the shares could have been distorted by the announcement of the nationalisation or of the compensation terms: experience showed that such an announcement was liable to affect the value of the property in question, with the result that an objective valuation, free of such influences, could only be effected if the valuation date or period preceded the announcement.

132. The Court notes in the first place that the Reference Period terminated on the date of the election of the Labour Government (...). That was the date on which the prospect of nationalisation became a reality, even though, as the applicants pointed out, the precise identity of the undertakings that would pass into public ownership was not known for certain until the 1977 Act received the Royal Assent.

The applicants argued that the sole justification for selecting a Reference Period preceding vesting day was to exclude the artificial influence on the value of the property caused by the threat or fact of nationalisation. They asserted that in the

present case the prospect of nationalisation had not affected the profits or assets of their companies and that any impact it might have had on the value of their shares could, under the hypothetical quotation method, have been left out of account.

The Court would point out that the possibility of distortion cannot be assessed after the event and with the benefit of hindsight. In its opinion, the Government did not act unreasonably in assuming, at the time when the legislation was in the process of preparation and adoption, that the nationalisation programme would have a distorting effect on the value of the shares to be acquired. Indeed, in the circumstances which prevailed, particularly the decline after February 1974 in the value of shares generally as evidenced by the Financial Times Industrial Ordinary Share Index (...), the selection of certain later valuation Reference Periods might not have been universally welcomed.

133. The Court also notes that there are a number of precedents for the utilisation of a valuation Reference Period antedating vesting date.

Thus, such a system was incorporated in previous United Kingdom nationalisation legislation to which the applicants referred and which they admitted did provide fair and just compensation. What is more, as the Government pointed out, in none of that legislation was proof of actual distortion of prices or values a condition precedent to the operation of the system.

134. The applicants also laid considerable stress on the references in international law cases to valuation as at vesting date. The Court, however, does not find these references to be persuasive. Some of the cases cited did not raise issues comparable to those in the present case; moreover, in many international cases the date of the nationalisation announcement and the date of taking were, in fact, one and the same, with the result that there was no period during which a threat of impending nationalisation could have caused distortion. In any event, international practice does not show that only the vesting date can be taken as the basis for valuation.

135. For these reasons, the choice of the Reference Period was not, in the Court's view, in principle inconsistent with Article 1.

(iv) Conclusion regarding the system established by the 1977 Act

136. The Court thus concludes that, as regards the compensation system established by the 1977 Act, as such, none of its components can be regarded as in principle unacceptable in terms of Protocol No.1.

(c) The effects of the system established by the 1977 Act

(i) Introduction

137. The applicants have furnished to the Court copious material in support of their plea that there was a gross disproportionality between the compensation awarded and the actual value of their nationalised undertakings on Vesting Day. Whilst the Government have not in general commented on this material, they have indicated that they are not to be taken as having accepted it as correct (...).

The Court notes that the alleged disproportionality is basically attributable to three general effects of the system established by the 1977 Act; it will examine these effects in turn.

(ii) Absence of allowance for developments between 1974 and 1977 in the companies concerned

138. The applicants contended that they had not received fair compensation because, under the 1977 Act, the shares in the nationalised companies fell to be valued as at the Reference Period. They complained that the effect of this provision was to exclude any allowance for subsequent developments in the companies' fortunes up to Vesting Day and, in particular, for the growth that occurred in the undertakings with which the present case is concerned.

The Commission expressed the view that it was within the bounds of Article 1 of Protocol No.1 for the British legislature to see the growth after the commencement of the nationalisation process as growth for which compensation would not necessarily be due.

139. This complaint calls for the following initial observations on the part of the Court.

(a) When a nationalisation measure is adopted, it is essential – and this the applicants accepted – that the compensation terms be fixed in advance. This is not only in the interests of legal certainty but also because it would clearly be impractical, especially where a large number of undertakings is involved, to leave compensation to be assessed and fixed subsequently on an *ad hoc* basis or on whatever basis the Government might at their discretion select in each individual case. The Court recognises the need to establish at the outset a common formula which, even if tempered with a degree of inbuilt flexibility, is applicable across the board to all the companies concerned.

(b) Compensation based on Reference Period values remained payable not only in respect of companies whose fortunes improved between then and Vesting Day but also in respect of companies whose fortunes declined. The public sector thus not only reaped the benefit of any appreciation but also bore the burden of any depreciation. It is true, as the applicants pointed out, that in the course of the

legislative process certain companies might have been excluded from the nationalisation programme and that in fact Drypool Group Ltd., which had become insolvent, was so excluded (...). However, this one case does not alter the fact that, as regards the companies which were actually nationalised, there was also a risk that remained at the end of the day with the public sector; indeed it appears probable that some of the nationalised companies, other than those with which the present proceedings are concerned, did decline in value between 1974 and 1977.

(c) Admittedly, such growth in the applicants' companies as may have occurred in the period in question may have been partly attributable to their efforts, notably in fulfilment of their statutory obligations to shareholders. However, it cannot be excluded that it was also partly attributable to a wide variety of factors some of which were outside the applicants' control, such as the very prospect of nationalisation and the provision of Government financial assistance to ensure the companies' continuing viability.

(d) Under the hypothetical Stock Exchange quotation method of valuation, future developments in the companies' fortunes were taken into account as one of the "relevant factors", to the extent that those developments could have been foreseen by a prudent investor in the Reference Period (...).

140. The applicants emphasised at the hearings before the Court that the duty to ensure fairness as regards the quantum of compensation was a continuing duty. Accordingly, a compensation formula which might have been fair when initially selected should be modified if, as here, it ceased to be so as a result of supervening developments.

141. The Court would observe that the long interval between the Reference Period and Vesting Day was solely the result of a very thorough democratic Parliamentary process during which criticisms substantially identical to those made by the applicants in the present proceedings were exhaustively discussed (...). In particular, the possibility of amending the statutory compensation formula to take account of intervening developments was fully debated and rejected.

142. Whilst these historical facts are not of themselves decisive, the Court notes that the discussions at the time highlight the following difficulties which would have been involved in modifying the proposed system.

(a) Any amendment would have undermined the legal certainty created by the initial choice of compensation formula.

(b) The announcement of the compensation terms had created certain public expectations, on the basis of which share dealings had taken place.

(c) Between 1974 and 1977 the Financial Times Industrial Ordinary Share Index fluctuated; at times – and in particular between the end of the Reference Period and March 1975 (when the compensation terms were first announced) – it stood below the figure obtaining at the end of the Reference Period (...). The selection of a different date or period might therefore have been disadvantageous

for former owners; indeed, retention of the Reference Period initially chosen served to protect them against any adverse effects of a decline in stock market prices.

(d) The Court has already observed that the United Kingdom Government did not act unreasonably in selecting, with a view to ensuring that the valuation of the applicants' shares be effected free of any distorting influences, a valuation Reference Period that preceded the announcement of the nationalisation (see paragraph 132 above). Since the risk of distortion continued to exist until the shares passed into public ownership, to have opted, by way of modification of the original terms, for a later Reference Period would have left room for those influences to take effect.

143. In coming to its conclusion on this aspect of the case, the Court attaches particular importance to the considerations that nationalisation is a measure of a general economic nature in regard to which the State must be allowed a wide margin of appreciation (see paragraph 122 above) and that it requires the adoption of legislation laying down a common compensation formula (see paragraph 139 above). Moreover, the system established by the 1977 Act has been found not to be in principle unacceptable in terms of Protocol No.1 (see paragraph 136 above). In view of these factors and also of the aggregate of the other considerations set out in paragraphs 139 and 141–142 above, the Court is of the opinion that there are sufficiently cogent reasons to regard the decision to adopt provisions making no allowance for intervening developments in the companies concerned as one which the United Kingdom was reasonably entitled to take in the exercise of its margin of appreciation.

(iii) Absence of allowance for inflation

144. The applicants referred to the facts that the 1977 Act tied the amount of compensation to Reference Period values and that compensation was not paid until some years later. Seen in combination, these facts, it was argued, meant that they had not received fair compensation since no account had been taken of the fall in the value of money between 1974 and the date of payment, a period of high inflation (...).

145. As regards the facts underlying this complaint, the Court observes that compensation bore interest – at a rate reasonably close to the average Bank of England minimum lending rate – as from Vesting Day (...), thus providing some shelter against inflation during the period from then until the date of payment. Furthermore, after Vesting Day, all the applicants received payments on account of compensation and did not have to wait until its amount had been finally determined (...).

Again, as regards the period between the Reference Period and Vesting Day, the applicants were not deprived of income from their investments since they remained

entitled to dividends on the acquired securities in respect of that period. It is true that the safeguarding provisions contained in the 1977 Act imposed restrictions in this connection but, broadly speaking, they did no more than limit the amount of such dividends to the amount paid in respect of the period immediately preceding the Reference Period (...). Moreover, a higher rate was payable with the authority of the Secretary of State for Industry.

146. The information supplied to the Court reveals that in the interval between the Reference Period and Vesting Day share prices did not increase to the same extent as the Retail Price Index (...). Accordingly, to have adjusted compensation by reference to that Index would have provided the applicants with an advantage not available to other investors in securities.

The Commission pointed out that the most that could have been demanded would have been that compensation be linked to the general level of share prices. It is true that between the Reference Period and the respective Vesting Days there was, according to the Financial Times Industrial Ordinary Share Index, a certain increase in share values generally (...). However, matters of this kind cannot be judged with hindsight: by effectively freezing the value of the nationalised shares at the Reference Period figure, the 1977 Act not only excluded account being taken of any increase in the share price index but also protected the applicants against any adverse effects of subsequent fluctuations in that index.

147. The Court thus considers that, in the circumstances prevailing, the decision to adopt provisions that excluded any allowance for inflation was one which the United Kingdom was reasonably entitled to take within its margin of appreciation.

(iv) Absence of an element representing the special value of a large or controlling shareholding

148. The applicants referred to the facts that, under the 1977 Act, their shares were valued by the hypothetical Stock Exchange quotation method and that Stock Exchange prices represented merely what would be paid for a small parcel of shares (...). Taken in combination, these facts, it was argued, meant that they had not received fair compensation since the amounts paid to them included no element representing the special value attaching to their large – and in most of the cases controlling – shareholdings in the companies concerned.

149. As the Government rightly pointed out, a nationalisation measure cannot be assimilated to a takeover bid: the nationalising State is proceeding by compulsion and not by inducement. Accordingly, there is, in the Court's view, no warrant for holding that the applicants' compensation should have been aligned on the price that might have been offered in such a bid.

It is true that in a sale by private treaty between a willing seller and a willing buyer the price paid for the applicants' securities might have included an element

representing the special value attributable to the size of their shareholdings. However, to have assessed compensation on this basis would have involved assuming that a buyer could be found for the large blocks of shares in question, an assumption which, in the case of these particular industries, would have been at least questionable.

Finally, the Court does not consider that the United Kingdom was obliged under Article 1 of Protocol No.1 to treat the former owners differently according to the class or size of their shareholdings in the nationalised undertakings: it did not act unreasonably in taking the view that compensation would be more fairly allocated if all the owners were treated alike.

150. In these circumstances, the Court considers that the decision to adopt provisions that excluded from the compensation an element representing the special value of the applicants' large or controlling shareholdings was one which the United Kingdom was reasonably entitled to take within its margin of appreciation.

(v) Conclusion regarding the effects of the system established by the 1977 Act

151. In the light of the foregoing, the Court concludes, as regards the issues common to all the applicants, that the effects produced by the system established by the 1977 Act were not incompatible with Article 1 of Protocol No.1.

In reaching this conclusion, the Court has also had regard to certain aspects of the method of payment of compensation which were advantageous to the former owners: thus, interest, at a reasonable rate, accrued on compensation as from Vesting Day, payments on account were made as early as practicable and the balance was paid as soon as the final amount had been determined (...).

2. Issues specific to individual applicants

152. In addition to the common issues dealt with above, certain of the applicants alleged that, by reason of factors specific to their individual cases, their award of compensation failed to meet the requirements of Article 1 of Protocol No.1. Their complaints, which were contested by the Government and rejected by the Commission, will be considered in turn.

(a) Alleged disparity between compensation and Reference Period values (Kincaid and Yarrow Shipbuilders *cases*)

153. By way of alternative plea, Sir William Lithgow and Yarrow PLC asserted that the compensation they received did not represent even the value as at the Reference Period of their shares in Kincaid and Yarrow Shipbuilders, respectively.

154. The Court notes that this complaint amounts in essence to a submission that the 1977 Act was misapplied.

It has, however, to be pointed out that the sums offered by the Department of Industry at the close of the negotiations were agreed to by the respective Stockholders' Representatives, as an acceptable valuation within the confines of the statutory formula. Furthermore, the Arbitration Tribunal could have been seised in both cases of a claim by the Representative that the former owners were entitled under that formula to more than was being offered. Admittedly, such a course might not have been open to Sir William Lithgow himself, although this point is disputed (...). However, the other Kincaid shareholders raised no objection (...) and he was in any event bound – and, for the reasons developed in paragraphs 193–197 below, legitimately so – by the collective system established by the 1977 Act.

155. In these circumstances, the Court sees no reason to doubt that the results of the agreements were reasonable valuations, within the confines of the statutory formula. It accordingly rejects this complaint.

(b) Incidence of capital gains tax (Kincaid *case*)

156. Sir William Lithgow complained of the fact that although the Treasury Stock which he received by way of compensation was not subject to tax on receipt, disposal or redemption thereof rendered him liable to capital gains tax (...). In his view, his compensation was thus not "effective", in that it did not enable him to purchase equivalent replacement assets.

157. This complaint does not appear to the Court to be well-founded. As the Commission pointed out, the applicant would also have been potentially liable to such tax had he disposed before 1977 of his original shareholding in Kincaid. It cannot be regarded as unreasonable that the same applied on the redemption or earlier disposal of the Compensation Stock which he received in exchange for his shares.

(c) Use of an earnings-based method of valuation (Kincaid *case*)

158. Sir William Lithgow complained of the fact that the compensation paid for his ordinary shares in Kincaid had been assessed by reference to its earnings rather than to its assets, and by reference to historic rather than prospective earnings. This, he said, had deprived him of the value attributable to these other factors.

159. The Court does not consider that recourse to the earnings-based method, as such, can be regarded as inappropriate in terms of Article 1 of Protocol No.1. It is a route that is commonly used, especially in the context of the stock market, in valuing companies which, like Kincaid, are profitable. Moreover, neither Kincaid's

prospective earnings nor its assets were actually disregarded: Messrs. Whinney Murray & Co. took the company's prospects into account in preparing their suggested valuation (...) and they reviewed that valuation against, *inter alia*, the criterion of asset-backing.

Above all, the Court notes that the 1977 Act provided that the "base value" of unlisted securities was to be determined having regard to "all relevant factors" (...). It did not prescribe any particular route to be used for that purpose, this being a matter for negotiation or, in default, for decision by the Arbitration Tribunal. It was therefore open to the Kincaid Stockholders' Representative – whether or not to Sir William Lithgow himself (see paragraph 154 above) – to argue in the course of the compensation negotiations that greater weight should be attached to the company's assets or prospective earnings and, if he failed to obtain satisfaction, to refer the matter to arbitration. However, the Stockholders' Representative did not do so, having, after consulting the shareholders, accepted the Government's offer (...).

160. This complaint has therefore to be rejected.

(d) Use of the parent-company-related method of valuation
(Yarrow Shipbuilders *case*)

161. Yarrow complained of the fact that the compensation paid for its shares in its subsidiary Yarrow Shipbuilders had been assessed, solely so it said, by reference to the stock market price of its own (Yarrow's) shares in the Reference Period. It referred to the restrictions, which were already operative during the Reference Period, imposed by the terms of the Ministry of Defence loan on the payment of dividends by the subsidiary to the parent (...). As a result of those restrictions, Yarrow was deprived of income with which to pay dividends to its own shareholders and the price of its shares was therefore depressed. A valuation of Yarrow Shipbuilders based on that price therefore failed to reflect its profitability and prospects, factors which at the time were unknown to the stock market. The effect of this valuation method was that the compensation comprised no allowance for profits totalling £ 9,400,000 which Yarrow Shipbuilders had been obliged to retain as a result of the dividend restrictions (...).

162. The Court does not consider that in the present case recourse to the method complained of was unacceptable in terms of Article 1 of Protocol No.1. As the Commission rightly observed, it is reasonable, when valuing a subsidiary whose activities, like those of Yarrow Shipbuilders, represent a substantial part of the total activities of the parent (...), to have regard to the price of the latter's shares.

Furthermore, it has to be recalled that the 1977 Act did not prescribe any specific route for arriving at the "base value" of unlisted securities: as the Commission pointed out, the stock market price of a parent company's shares was but one

of the "relevant factors" to be taken into account (...). Accordingly, the Yarrow Shipbuilders Stockholders' Representative could have argued in the negotiations that too much weight was being attached to this factor and too little to the subsidiary's earnings, prospects and retained profits. Indeed, the Court notes that in the Parliamentary debates it was stated on behalf of the Government that the effects of the Ministry of Defence loan terms on the valuation of the nationalised concern would be covered by the phrase "all relevant factors" (Official Report, 16 March 1976, cols. 1789–1792, 25 October 1976, cols. 198–199, and 5 November 1976, cols. 1659–1664). Again, if the Stockholders' Representative failed to obtain satisfaction on this point in the negotiations, he could have referred the matter to arbitration. However, he did not do so, having, after consulting Yarrow, accepted the Government's offer (...).

Finally, as to the effects of this valuation method, it appears to the Court that the Government, in addition to relying on the stock market price of Yarrow's shares, must have made some allowance for the earnings, prospects and retained profits of the subsidiary itself: the compensation of £ 6,000,000 finally paid did actually exceed the total capitalisation of Yarrow during the Reference Period, which was not more than £ 4,800,000 (...). That full allowance may not have been made for these items is, in the Court's view, justified by the fact that Yarrow Shipbuilders was particularly dependent on Government financial assistance, in the form either of the Ministry of Defence loan itself or of shipbuilding grants (...).

163. The Court is thus unable to accept this complaint.

(e) Operation of the safeguarding provisions (BAC *case*)

164. English Electric and Vickers complained of the fact that, under the safeguarding provisions contained in the 1977 Act, a sum of £ 19,700,000 in respect of certain lawfully-paid dividends had been deducted from the "base value"of their shares in BAC (...). They alleged that this deduction was unfair and had, notably, deprived them of much of the income from the shares for the years 1973 to 1976.

165. The Court notes that the dividends in question were paid pursuant to resolutions all of which were passed after 28 February 1974, the date from which the relevant safeguarding provisions took effect. The deduction would not have been made if the dividends had been approved by the Secretary of State for Industry (...). However, it appears that, with minor exceptions, no such approval was sought until the matter was raised by the BAC Stockholders' Representative during the course of the compensation negotiations (...).

Furthermore, there is nothing to suggest that the deduction was not in accordance with the terms of the 1977 Act: the Stockholders' Representative could otherwise have referred the matter to the Arbitration Tribunal (...), but he did not do so.

Finally, the Court would observe that the safeguarding provisions were not

unreasonable *per se:* it was clearly necessary to prevent any dissipation of the nationalised undertakings' assets between the end of the Reference Period and Vesting Day (...). Neither does the Court consider that, when seen in terms of income yield, the result of applying those provisions can be regarded as unreasonable in terms of Article 1 of Protocol No.1. The broad effect was that the amount of post-Reference Period dividends was, subject to the discretionary powers of the Secretary of State, limited to the amount paid in the immediately preceding period (...). Ensuring continuity of dividend levels in this way is consonant with the notion that any growth in the fortunes of a nationalised company after the Reference Period should accrue to the benefit of the public sector just as that sector bore the risk of any decline (see paragraph 139 (b) above).

166. For these reasons, the Court concludes that this complaint has to be rejected.

(f) Alleged excessive delay in paying compensation and alleged insufficiency of payments on account (Vickers Shipbuilding *case*)

167. Vickers complained of excessive delay in the payment of compensation and of insufficiency of the payments on account, matters which were said to have retarded the implementation of major restructuring plans.

168. The Court notes from the Parliamentary debates (...) the controversial nature of the 1977 Act. Until it received the Royal Assent on 17 March 1977, there was no certainty as to the form it would take and it would therefore have been virtually impossible to commence the compensation negotiations before that date. The Vickers Shipbuilding negotiations were concluded on 26 September 1980 and the final payment of compensation was made shortly thereafter, so that, reckoning from Vesting Day (1 July 1977), the period to be taken into account for the purposes of this complaint is some three and a quarter years (...).

Formal negotiations in this case were not opened until June 1978; however, the interval between the Royal Assent and that date is accounted for by the preparation not only of Messrs. Whinney Murray & Co.'s valuation report but also of financial data treating the component parts of Vickers Shipbuilding as a single enterprise (...). These were complex matters. Again, the period between September 1979 and September 1980 is accounted for by the fact that the Vickers Shipbuilding Stockholders' Representative had instituted proceedings before the Arbitration Tribunal (...). In these circumstances and having regard to the size of the nationalised undertaking, the Court does not find that the overall period – of which some fifteen months were devoted to negotiations – was unreasonable.

169. As regards the payments on account, it has to be recalled that they were made unconditionally (...) and thus necessarily had to be limited in amount. Moreover, by November 1978 (some five months after the opening of formal negotiations) Vickers had received £ 8,450,000 on account – that is, more than half

of the total compensation of £ 14,450,000 finally agreed – and a further payment on account, of £ 3,150,000, was made in March 1980, whilst the arbitration proceedings were pending (...). Above all, the totality of the compensation bore interest as from Vesting Day (...) and this, bearing in mind the dates of the payments on account, must have mitigated the effects of the inevitable delay in making the final payment.

170. The Court is accordingly unable to accept these complaints.

(g) Alleged particular inappropriateness of the Reference Period in the Brooke Marine *case*

171. The former owners of Brooke Marine alleged that the compensation provisions in the 1977 Act were particularly inappropriate in their case because during the Reference Period, but not at Vesting Day, the value of their shares in that company was adversely affected by the existence of certain unfavourable contracts and of options to convert debenture stock into shares (...).

172. The Court agrees with the Commission that this complaint cannot be sustained. Firstly, it is necessary, in a nationalisation measure, to establish a common formula that is applicable across the board (see paragraph 139 (a) above) and the fact that, for each individual company, the most favourable valuation date is not chosen cannot be regarded as contrary to Article 1 of Protocol No.1 (see, *mutatis mutandis*, the above-mentioned *James and Others* judgment, Series A no.98, pp.41–42, para.68). Secondly, this particular complaint amounts in substance to a claim that valuation should have been effected as at Vesting Day, whereas the Court has already held that the utilisation for this purpose of an earlier period was neither in principle nor by reason of its effects incompatible with the said Article (see paragraphs 136 and 151 above).

(h) Disparity between compensation paid and cash in hand

173. Sir William Lithgow and the former owners of Vosper Thornycroft, BAC, Hall Russell and Brooke Marine contrasted the amount of compensation which they had received with the amount of cash which the company concerned had in hand on Vesting Day (...).

174. The Court is not persuaded that this factor establishes that the appropriate standard of compensation had not been met. The amount of cash in hand at Vesting Day is not a determining factor where the value of the shares which are to pass into public ownership has effectively been frozen at the start of the nationalisation process. In any event, a company's current asset position has to be determined by reference not only to cash in hand but also to such items as its liabilities and advance payments received on contracts (...).

G. Conclusion on Article 1 of Protocol No.1

175. In the light of the foregoing, the Court concludes that no violation of Article 1 of Protocol No.1 has been established in the present case.

The Court is unable to accept the applicants' contention that since the Government had recognised that "the terms of compensation imposed by the 1977 Act were grossly unfair to some of the companies" (...), it was no longer open to them to argue that fair compensation had been paid. The statement in question was made as an expression of opinion in a political context and is not conclusive for the Court in making its appreciation of the case.

II. ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO.1

A. Introduction

176. Certain of the applicants alleged that, by reason of factors specific to their individual cases, they had been victims of discrimination, contrary to Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No.1 The former Article reads as follows:

> "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".

These allegations, contested by the Government, were rejected by the Commission.

177. Before considering in turn the various complaints, the Court would recall that Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised by the Convention (see the *Belgian Linguistic* judgment of 23 July 1968, Series A no.6, p.34, para.10). It safeguards persons (including legal persons) who are "placed in analogous situations" against discriminatory differences of treatment; and, for the purposes of Article 14, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, amongst many authorities, the *Rasmussen* judgment of 28 November 1984, Series A no.87, p.13, para.35, and p.14, para.38). Furthermore, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to the circumstances, the subject-matter and its background (ibid., p.15, para.40).

B. Alleged discrimination as compared with the owners of other undertakings nationalised under the 1977 Act

1. Incidence of capital gains tax (*Kincaid* case)

178. Sir William Lithgow alleged that he had been the victim of discrimination, in that he was liable to capital gains tax on the disposal of the Compensation Stock which he received, whereas those former owners of undertakings nationalised under the 1977 Act who were corporations were entitled to defer that liability under the "roll-over relief" provisions in the Finance Act 1976 (...).

179. The Court is unable to accept this claim. As the Commission pointed out, "roll-over relief" would not have been available to a corporation holding, as did Sir William Lithgow, only 28 per cent of the shares in the nationalised company (...). He was thus treated no differently from former owners in a situation analogous to his own.

2. Use of an earnings-based method of valuation (*Kincaid* case)

180. Sir William Lithgow complained of the fact that, whereas the shares of certain non-profitable companies had been valued for compensation purposes by reference to their assets, the ordinary shares in Kincaid had been valued by reference to its earnings (...). He alleged that the former method would have been more favourable in his case and that there had been discrimination as far as Kincaid, a profitable company, was concerned.

181. The Court recalls that the 1977 Act laid down no specific route for arriving at the value of unlisted securities (see paragraph 159 above). It provided that compensation therefor was to be determined, by negotiation or by arbitration, by reference to their hypothetical Stock Exchange quotation, having regard to all relevant factors. This global method was applied to the Kincaid ordinary shares just as it was to all the other unquoted shares involved. Again, if the Kincaid shareholders had not accepted the negotiated settlement, it would have been open to their Representative to submit the matter to arbitration, just as it would have been to other Stockholders' Representatives in similar circumstances. In these respects, therefore, the Court agrees with the Commission that the holders of Kincaid ordinary shares, including Sir William Lithgow, were treated no differently from the other owners concerned.

It is of course true that the statutory formula did comprise an element of flexibility which could and did result in its being applied differently to different companies. However, this enabled account to be taken of dissimilarities between them and, notably, of the relative importance in each case of the various factors

considered; thus, it is clear that earnings will provide a more appropriate route to valuation if the company is profitable, but that assets will do so if it is not. The differences in the application of the global method therefore had an objective and reasonable justification.

3. Similar treatment of growing and declining companies (*Vosper Thornycroft, Hall Russell* and *Brooke Marine* cases)

182. The former owners of Vosper Thornycroft, Hall Russell and Brooke Marine alleged that they had been victims of discrimination, in that the same treatment had been applied both to nationalised companies which were growing and to those which were in decline. This was demonstrated, in particular as regards Vosper Thornycroft, by the fact that, when measured against Vesting Day values or earnings, the compensation paid for the former companies was proportionately less than that paid for the latter companies.

183. The Court has already held that the choice of the Reference Period for the valuation of the companies nationalised under the 1977 Act, and hence the exclusion of any allowance for subsequent developments, were based on reasonable grounds (see paragraphs 131–135 and 138–143 above). Consequently, whether or not it falls within the ambit of Article 14, the difference said by the applicants to result from the similar treatment of both growing and declining companies can be regarded as having an objective and reasonable justification.

4. Use of the parent-company-related method of valuation (*Yarrow Shipbuilders* case)

184. Yarrow alleged that it had been the victim of discrimination, in that its shares in its subsidiary Yarrow Shipbuilders had been valued for compensation purposes by reference to the stock market price of its own (Yarrow's) shares, whereas unquoted shares in other nationalised companies had been valued not by this means but, in particular, by reference to the earnings of those companies (...). In support of this claim, Yarrow pointed out that, whether the computations were made on Reference Period or on Vesting Day figures, the compensation which it received represented a lesser multiple or proportion of the nationalised company's profits or assets than did the compensation paid to other former owners.

185. For the reasons given in paragraph 181, first sub-paragraph, above, the Court agrees with the Commission that Yarrow was treated no differently from the other owners concerned, in the sense that in each case the same global method was applied and the same possibility of resort to arbitration was available.

The Court also considers that the differences, as between Yarrow and the other owners, in the application of the global method had an objective and reasonable justification. In applying the hypothetical Stock Exchange quotation method, it is

clear that, if the company to be valued has a parent whose shares are listed and if the former's activities comprise a substantial part of the latter's business, the quoted price of those shares can provide a more appropriate and less artificial route to valuation than other factors.

C. Alleged discrimination as compared with the owners of undertakings nationalised under earlier legislation

186. The former owners of Vosper Thornycroft and Brooke Marine alleged that they had been victims of discrimination, in that the compensation terms laid down by the 1977 Act differed in a number of respects from those laid down by earlier United Kingdom nationalisation legislation (...).

187. Quite apart from the question whether these applicants were placed in a situation analogous to persons deprived of their possessions under the earlier legislation, the Court considers that the difference complained of does not raise an issue under Article 14. The Parliaments of the Contracting States must in principle remain free to adopt new laws based on a fresh approach.

D. Alleged discrimination as compared with persons deprived of their possessions under compulsory purchase legislation

188. The former owners of Vosper Thornycroft and Brooke Marine further alleged that they had been victims of discrimination, in that under the 1977 Act compensation did not fall to be assessed by reference to the value of their property as at the date of taking, whereas this was generally the case as regards property acquired under United Kingdom compulsory purchase legislation (...).

189. The Court recalls in any event that the functions fulfilled by compulsory purchase legislation and by a nationalisation statute are different. For the reasons given in paragraph 121, third sub-paragraph, above, it agrees with the Commission that the two situations referred to by these applicants are not sufficiently analogous to give rise to an issue under Article 14.

E. Conclusion on Article 14 of the Convention

190. Having regard to the foregoing, the Court concludes that in the present case there was no violation of Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No.1.

III. ARTICLE 6 PARA.1 OF THE CONVENTION

191. Certain of the applicants alleged, on various grounds, that they had been victims of a breach of Article 6 para.1 of the Convention, which, so far as is relevant, 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 established by law ...".

These allegations were contested by the Government. The Commission expressed the unanimous opinion that this provision had not been violated.

A. Applicability of Article 6 para.1

192. The Court notes in the first place that the applicants' right to compensation under the 1977 Act, derived from their ownership of shares in the companies concerned, is without doubt a "civil right" (see, *mutatis mutandis,* the above-mentioned *Sporrong and Lönnroth* judgment, Series A no.52, p.29, para.79).

In the second place, the Court recalls that Article 6 para.1 extends only to "contestations" (disputes) over (civil) "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law; it does not in itself guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States (see the above-mentioned *James and Others* judgment, Series A no.98, p.46, para.81).

It follows that in the present case Article 6 para.1 is applicable in so far as the applicants may reasonably have considered that there was cause for alleging non-compliance with the statutory compensation provisions.

B. Compliance with Article 6 para.1

1. Access to a tribunal (*Kincaid* case)

193. Sir William Lithgow alleged that he had been the victim of a violation of Article 6 para.1 – as interpreted by the Court in its *Golder* judgment of 21 February 1975 (Series A no.18) –, in that he had had no access to an independent tribunal in the determination of his rights to compensation.

194. In this area, the following principles emerge from the Court's case-law, notably its above-mentioned *Ashingdane* judgment (Series A no.93, pp.24–25, para.57).

(a) The right of access to the courts secured by Article 6 para.1 is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals".

(b) In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

(c) Furthermore, a limitation will not be compatible with Article 6 para.1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

195. The extent to which Sir William Lithgow did have access to the Arbitration Tribunal was a matter of dispute between him and the Government (...). The Court does not find it necessary to resolve this difference of opinion. It will assume for the purposes of argument that this applicant at no time had an individual right of access to the Arbitration Tribunal or to any other tribunal as regards the determination of his right to compensation.

196. Notwithstanding this bar on individual access, the Court does not consider that in the particular circumstances the very essence of Sir William Lithgow's right to a court was impaired.

The 1977 Act established a collective system for the settlement of disputes concerning compensation, in that the parties to proceedings before the Arbitration Tribunal would be the Secretary of State for Industry on the one hand and the Stockholders' Representative on the other. The latter was appointed by and represented the interests of all the holders of securities of the company concerned (...) and thus the interests of each individual shareholder were safeguarded, albeit indirectly. This is borne out by the fact that the Act made provision for meetings of shareholders at which they could give instructions or express their views to the Representative (ibid.). Furthermore, in addition to the power of removal conferred by Schedule 6 to the 1977 Act, remedies were available to an individual who alleged that the Representative had failed or was failing to comply with his duties under the Act or with his common-law obligations as agent (ibid.).

197. Moreover, the Court shares the Commission's view that this limitation on a direct right of access for every individual shareholder to the Arbitration Tribunal pursued a legitimate aim, namely the desire to avoid, in the context of a large-scale nationalisation measure, a multiplicity of claims and proceedings brought by individual shareholders (ibid.) Neither does it appear, having regard to the powers and duties of the Stockholders' Representative and to the Government's margin of appreciation, that there was not a reasonable relationship of proportionality between the means employed and this aim.

2. Alleged breach of the "reasonable time" requirement

198. All the applicants, other than Sir William Lithgow, alleged that, in breach of Article 6 para.1, the dispute as to compensation had not been determined within

a "reasonable time". However, the former owners of Vosper Thornycroft, BAC, Vickers Shipbuilding and Brooke Marine stated that this claim was pursued only in the event that the Court should accept the view, expressed by the Commission in its report, that the nationalised undertakings passed to a certain extent into the public domain before Vesting Day.

199. The Court finds that in any event this claim cannot be sustained.

In the instances in question, no proceedings were instituted before the Arbitration Tribunal, save as regards Vickers Shipbuilding where proceedings were commenced but not pursued to a conclusion; in each case, the amount of compensation payable was settled in negotiations between the Department of Industry and the Stockholders' Representative (...). In those negotiations, to which Article 6 para.1 clearly did not apply, the parties were endeavouring solely to reach a mutually acceptable solution; neither of them was empowered to give a final decision, binding on the other, on the quantum of the compensation and at any time the discussions could have been discontinued and any unresolved questions referred to the Arbitration Tribunal (...). It was only after reference of the matter to the Arbitration Tribunal that any question of breach of the "reasonable time" requirement of Article 6 para.1 could have arisen.

3. Alleged breach of other requirements of Article 6 para.1

200. The former owners of Hall Russell alleged that in certain respects the Arbitration Tribunal established by the 1977 Act did not meet the requirements of Article 6 para.1.

201. In the first place, they alleged that the Arbitration Tribunal was not a "lawful tribunal", in that it was an extraordinary court, namely a tribunal set up for the purpose of adjudicating a limited number of special issues affecting a limited number of companies.

The Court cannot accept this argument. It notes that the Arbitration Tribunal was "established by law", a point which the applicants did not dispute. Again, it recalls that the word "tribunal" in Article 6 para.1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country (see, *inter alia*, the *Campbell and Fell* judgment of 28 June 1984, Series A no.80, p.39, para.76); thus, it may comprise a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees. The Court also notes that, under the statutory instruments governing the matter, the proceedings before the Arbitration Tribunal were similar to those before a court and that due provision was made for appeals (...).

202. In the second place, it was contended that the close connection between the executive and the Arbitration Tribunal, especially the appointment of two of its members by the Minister who was a party to any proceedings (...), necessarily deprived the Tribunal of the character of an "independent and impartial tribunal".

As the Court has often observed, independence of the executive is one of the fundamental requirements that flow from the phrase in question (see, amongst many authorities, the *Le Compte, Van Leuven and De Meyere* judgment of 23 June 1981, Series A no.43, p.24, para.55). As regards the present case, although two members of the Arbitration Tribunal were nominated by the Secretary of State, the appointments could not be made without prior consultation of the Stockholders' Representatives (...). In fact, criteria for the selection of members of the Tribunal were worked out jointly (ibid.) and it does not appear that any dispute arose regarding the nominations. What is more, the Arbitration Tribunal was in no way bound by the amount of compensation offered by the Government in the negotiations (...), as is evidenced by the awards copies of which were supplied to the Court (*Scott Lithgow Drydocks Ltd.* case – 29 September 1981; *Cammell Laird Shipbuilders Ltd.* case – 23 October 1981). In these circumstances, there is no warrant for finding a lack of the requisite independence.

The applicants did not allege that the members in question were not subjectively impartial. Having regard to the manner in which the appointment procedure was actually carried out (...), the Court is of the opinion that their objective impartiality was not capable of appearing to be open to doubt (see, *inter alia*, the *De Cubber* judgment of 26 October 1984, Series A no.86, pp.13–16, paras.24–30).

C. Conclusion on Article 6 para.1 of the Convention

203. Having regard to the foregoing, the Court concludes that there has been no violation of Article 6 para.1 of the Convention in the present case.

IV. ARTICLE 13 OF THE CONVENTION

204. Sir William Lithgow alleged that, as regards his complaints concerning compensation, there was available to him no "effective remedy", within the meaning of Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in ⟨the⟩ Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

This allegation was contested by the Government and was rejected by the Commission.

205. "Article 13 requires that 'where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress' (see the *Silver and Others* judgment of 25 March

1983, Series A no.61, p.42, para.113). However, 'neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention' (see the *Swedish Engine Drivers' Union* judgment of 6 February 1976, Series A no.20, p.18, para.50). Although there is thus no obligation to incorporate the Convention into domestic law, by virtue of Article 1 of the Convention the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States (see the *Ireland* v. *the United Kingdom* judgment of 18 January 1978, Series A no.25, p.91, para.239). Subject to the qualification explained in the following paragraph, Article 13 guarantees the availability within the national legal order of an effective remedy to enforce the Convention rights and freedoms in whatever form they may happen to be secured" (see the above-mentioned *James and Others* judgment, Series A no.98, p.47, para.84).

206. The Convention is not part of the domestic law of the United Kingdom, nor does there exist any constitutional procedure permitting the validity of laws to be challenged for non-observance of fundamental rights. There thus was, and could be, no domestic remedy in respect of a complaint by Sir William Lithgow that the nationalisation legislation itself did not measure up to the standards of the Convention and Protocol No.1. The Court, however, concurs with the Commission that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms (see the above-mentioned *James and Others* judgment, ibid., p.47, para.85). The Court is therefore unable to uphold the applicant's allegation in so far as it may relate to the 1977 Act as such.

207. In so far as the allegation relates to the application of the legislation, the Court notes that it was open to the Stockholders' Representative in any case to refer the question of compensation to the Arbitration Tribunal or to test in the ordinary courts whether the Secretary of State had erred in law by misinterpreting or misapplying the 1977 Act (...). Even if these remedies were not directly available to Sir William Lithgow himself (... see paragraph 195 above), he did have the benefit of the collective system established by the Act. The Court has found this system not to be in breach of the requirements of Article 6 para.1 (see paragraphs 193–197 above), an Article whose requirements are stricter than those of Article 13 (see the above-mentioned *Sporrong and Lönnroth* judgment, Series A no.52, p.32, para.88). In addition, the applicant would have had a remedy in the domestic courts against the Kincaid Stockholders' Representative for failure to comply with his obligations under the 1977 Act or with his common-law obligations as agent (...).

In these circumstances, the Court concludes that the aggregate of remedies available to Sir William Lithgow did constitute domestic machinery whereby he could, to a sufficient degree, secure compliance with the relevant legislation.

208. There has accordingly been no breach of Article 13.

FOR THESE REASONS, THE COURT

1. *Holds* by thirteen votes to five that there has been no violation of Article 1 of Protocol No.1 on the ground that the 1977 Act contained no provisions making allowance for developments between 1974 and 1977 in the companies concerned;
2. *Holds* by seventeen votes to one that there has been no violation of the said Article 1 on any of the other grounds advanced by the applicants;
3. *Holds* unanimously that there has been no violation of Article 14 of the Convention, taken in conjunction with the said Article 1;
4. *Holds* by fourteen votes to four that there has been no violation of Article 6 para.1 of the Convention on the ground that Sir William Lithgow had no individual access to an independent tribunal in the determination of his rights to compensation;
5. *Holds* by sixteen votes to two that there has been no violation of the said Article 6 para.1 on any of the other grounds advanced by the applicants;
6. *Holds* by fifteen votes to three that there has been no violation of Article 13 of the Convention.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 8 July 1986.

For the Registrar
Jonathan L. SHARPE

The President
Rolv RYSSDAL