EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 13427/87

Stran Greek Refineries S.A.
and
Stratis Andreadis

against

Greece

REPORT OF THE COMMISSION

(adopted on 12 May 1993)

TABLE OF CONTENTS

I. INTRODUCTION

1 The following is an outline of the case, as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The Application

2 The application was introduced by Mr. Stratis Andreadis, a Greek citizen, and by the Stran Greek Refineries S.A., a company registered in Greece wholly owned by the former and currently under liquidation. The applicant Mr. Stratis Andreadis died in 1989. His son and heir, Peter Andreadis, expressed the wish to maintain the application. The applicants were represented before the Commission by Mr. Peter Martyr of Norton Rose, Solicitors, London.

3 The application is directed against Greece. The respondent Government were initially represented by their Agent, Mr. Constantinos Economides, Head of the Special Legal Department of the Ministry of Foreign Affairs. They are now represented by their Agent, Mr. George Sgouritsas, President of the Legal Council of the State (**miko *ymvouli* **n *ratons).

4 The case concerns domestic civil proceedings whereby the validity of an arbitration award in favour of the applicants was challenged by the Greek State and an interpretative law (Ermineitikos nomos) which was enacted while the above proceedings were pending and which provided that the award was invalid. It raises issues under Articles 6 para. 1 and 13 of the Convention and Article 1 of Protocol No 1.

B. The Proceedings

5 The application was introduced on 20 November 1987 and registered on the same date. Between November 1988 and December 1989 the member of the Commission appointed as Rapporteur requested the applicants to submit further information and documents relating to the then pending domestic proceedings. The applicants submitted the information on 25 January 1990.

6 On 2 April 1990 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on the admissibility and merits of the application before 15 June 1990. After obtaining a prolongation of the above time limit the Government submitted their observations on 30 June 1990. The applicants submitted their observations in reply on 24 October 1990.

7 On 1 March 1991 the Commission decided to invite the Government to submit further written observations on the admissibility and merits of the application. The Government submitted such observations on 6 May 1991. The applicants' further observations in reply were submitted on 13 June 1991.

8 On 4 July 1991 the Commission declared the application admissible. The text of the decision on admissibility was sent to the parties on 15 July 1991 and they were invited to submit further evidence and additional observations on the merits of the application. The respondent Government submitted further observations on the merits on 10 September 1991. The applicants' further observations were submitted on 27 September 1991. The applicants completed their

submissions on 3 December 1991.

9 On 10 September 1992 the Commission decided in accordance with Rule 53 of its Rules of Procedure to obtain the parties' oral submissions on certain issues arising in relation to the merits of the case. At the hearing, which took place on 20 October 1992, the respondent Government were represented by Mr. Fokion Georgakopoulos, Member of the Legal Council of the State, Acting Agent of the Government. The applicants were represented by Mr. Peter Martyr of Norton Rose Solicitors, as representative, and by Mr. Michael Beloff Q.C., Ms Tracy Forster, Solicitor, Professor K.D. Kerameus of the University of Athens and Mr. George Alexopoulos, liquidator of the applicant company, as Counsel.

10 At the hearing the Government requested the Commission to declare the application inadmissible for non compliance with the requirement of the exhaustion of domestic remedies in Article 26 of the Convention. The Commission considered this request on the same day and found no basis for the application of Article 29 of the Convention.

11 After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The Present Report

12 The present Report has been drawn up by the Commission in pursuance of Article 31 para. 1 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
M.P. PELLONPÄÄ

13 The text of this Report was adopted on 12 May 1993 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

14 The purpose of the Report, pursuant to Article 31 of the Convention, is:

i) to establish the facts, and

ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

15 A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

16 The full text of the parties' submissions, together with the

documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

17 By a contract concluded on 22 July 1972 between the Greek State and Mr. Stratis Andreadis it was agreed that the latter would establish an oil refinery to process crude oil in Megara, Greece. The contract was to be carried out by Mr Andreadis' wholly owned company, Stran Greek Refineries S.A., the establishment of which was contemplated by the contract. Under the contract all rights and obligations of Mr. Andreadis were automatically to be transferred to the company upon its incorporation.

18 The Greek Government ratified the contract by legislative decree L.D. 1211 published in the Official Gazette on 26 July 1972. Under Article 21 of the contract the Greek State undertook to acquire, not later than 31 December 1972, a plot of land in Megara for the building of the refinery.

19 However, the Greek State failed to acquire the land and, consequently, the applicant company was unable to proceed with the project.

20 On 14 October 1977 the contract was formally terminated by a decision of the democratically elected Government pursuant to Law 141/1975 concerning the termination of preferential contracts (Haristikes simvaseis) entered into during the military regime in Greece. This law, being enacted by special authorisation of the constitutional legislator under Article 107 of the Constitution of 1975, has superior force (aiksimeni tipki simami) and takes precedence over common legislation.

21 Prior to the discontinuation of the contract the company had already incurred expenditure in connection with the project. In particular, the company had incurred liabilities by entering into agreements with Greek and foreign firms for the supply of services, goods and materials and had arranged loans to finance the project. A dispute arose between the company and the Greek State in which the former brought an action dated 10 November 1978 before the Athens First Instance Court (Polimeles Protodikeio) seeking reimbursement of the expenses it had incurred.

22 The Greek State challenged the competence of this jurisdiction arguing that the litigation should be referred to arbitration as provided in the contract.

23 However, by its judgment of 29 September 1979 (judgment No 13910/1979), the Athens First Instance Court rejected this argument, inter alia, on the ground that the arbitration clause in the contract had been annulled. As regards the merits of the claims, the court rejected the State's argument that the termination of the contract was the result of the company's shortcomings and ordered the parties, and in particular the applicant company, to submit further evidence relating to its claims.

24 On 12 June 1980 the Greek State referred the case to arbitration according to Article 27 of the contract paragraphs 1 and 9 of which read as follows:

> "1. Any difference, dispute or disagreement arising between the State and the concessionaire <Mr. Stratis Andreadis> as to the application of this Agreement and relative to the implementation or interpretation of the terms and conditions thereof and the extent of the rights and

obligations deriving therefrom shall be resolved exclusively by arbitration by three arbitrators according to the following procedure, no other arbitration agreement being required.

9. The arbitration award shall be definite, final and irrevocable, and shall constitute an enforceable instrument requiring no further action for enforcement or any other formality. It shall be liable to no regular or extraordinary judicial remedy. The party failing to comply with the provisions of the arbitration award shall be obligated to make good any and all damages (damnum emergens or lucrum cessans) caused to the other party."

25 On 17 June 1980 arbitration proceedings commenced in accordance with the above clause at the initiative suit of the State. The latter requested the Arbitration Court to declare that all claims for compensation against the State brought by Stran in the action before the First Instance Court were unfounded (action for a declaratory award). The applicant company appeared before the Arbitration Court arguing that this court had no jurisdiction in the case. The company further refuted the State's submissions.

26 On 27 February 1984 the Court of Arbitration gave its award concluding that it was competent and accepting a part of the State's claims. The Court of Arbitration found in particular that the claims of the company were well founded up to Drachmas 116,273,442, US$ 16,054,165 and French Francs 614,627 and unfounded as far as they exceeded these sums.

27 On 24 July 1984 the company applied to the First Instance Court for an order for the return by the Greek State of a letter of guarantee. By its judgment No 3113/1985 the court adjourned the proceedings until a final judgment would be given on the company's original action before the same court (see para. 23 above)

28 On 2 May 1985 the State challenged the decision of the Court of Arbitration before the Athens First Instance Court requesting the arbitration proceedings and the award to be declared null and void. By its decision No 5526/1985 the Athens First Instance Court dismissed the State's action having found, by a majority, that the decision whereby the contract was annulled did not affect the validity of the arbitration clause.

29 On 4 November 1986 the Athens Court of Appeal (Efeteio) confirmed the above decision (judgment No 9336/1986).

30 On 15 December 1986 the State appealed to the Court of Cassation (Areios Pagos).

31 On 17 December 1986 the applicant company withdrew its original court action which was still pending before the Athens First Instance Court and requested the proceedings for the return of the letter of guarantee (cf. para. 27 above) to continue. Having regard to the State's appeal before the Court of Cassation, the Athens First Instance Court adjourned the examination of the case until the final judgment of the Court of Cassation.

32 Before the Court of Cassation a hearing was originally scheduled to take place on 4 May 1987 but it was subsequently adjourned to 1 June 1987.

33 On 25 May 1987 the Parliament enacted Law 1701/1987 by publication in the Official Gazette. The principal stated object of this law was to expropriate the assets in certain oil companies and to provide for compensation. Moreover, Article 12 of Law 1701/1987 provides as follows:

"1. The true and lawful meaning of the provisions of Article 2 para. 1 of Statute 141/1975 concerning the termination of contracts entered into between 21 April 1967 and 24 July 1974 is that, upon the termination of these contracts, all their terms, conditions and clauses including the arbitration clause, are ipso facto repealed and the arbitration tribunal no longer has jurisdiction.

2. Arbitration awards and/or decisions referred to in paragraph 1 are no longer valid or enforceable.

3. Any principal or ancillary claims against the Greek State, expressed either in foreign or local currency, which arise out of any of the contracts statutorily sanctioned entered into between 21 April 1967 and 24 July 1974 and terminated pursuant to Law No. 141/1975, are now extinguished by prescription.

4. Any court proceedings at whatever level pending at the time of the enactment of this statute, in respect of claims referred to in the paragraph above, are cancelled."

34 On 10 July 1987 the First Chamber of the Court of Cassation gave its judgment No. 1387/1987 declaring, inter alia, that the provisions in Article 12 of Law 1701/1987 were unconstitutional. The Chamber noted in particular the following:

"The (provisions of the Constitution) afford superior force to Law 141/1975 and also prohibit any subsequent amendment or supplementation or even authentic interpretation of that law by the ordinary legislator. The purpose of such superior force and of the constitutional provision for a 'law to be issued once only within three months after the Constitution enters into force' is to establish legislative stability and international confidence in investments in Greece. This opinion is based on the only possible meaning of the reference to '... a law to be issued once only ...' and in the ease with which that condition could be breached if amendments or supplementations or authentic interpretations were permitted of the law which has been issued."

The Chamber referred the matter to the Plenary Court of Cassation.

35 The Plenary Court of Cassation held a hearing on 25 February 1988. In its judgment No 4/1989 of 16 March 1989 the Court of Cassation found that the interpretative provision of Article 12 para. 1 of Law 1701/1987 was not unconstitutional per se for the following reasons:

"<The Constitution> provides for the enactment of a law, '... to be issued once ...', which - as to its nature - carries a superior force in the sense that it may not be amended or changed by a common law (...). However, the prohibition of amending or changing the content of laws carrying a superior force does not also mean the exclusion of the interpretation of such laws. Their special nature does grant to such laws a precedence over common laws, but it does not also exclude their interpretation,... when this is dictated by the necessity of circumstances. This is so because interpretation does not change the content of a law being interpreted, but reveals its original meaning and resolves the differences that arose from its application or that may arise in the future. The need for (such interpretation) will be finally judged by the Court, which

has a duty to check whether the law being interpreted has actually created a doubt as to its meaning justifying the legislative intervention.

(...)

Therefore, in principle, the interpretation of Law 141/1975 is not contrary to the Constitution on the mere premise that such Law carries a superior force. However, the issues arise on the one hand, whether there was a need for interpretation in this specific case and on the other hand, whether or not the other non-interpretative provisions of that law are contrary to the Constitution.

As noted hereinabove, the wording of Article 2, paragraph 5 of Law 141/1975 is unclear and this creates a doubt as to whether -following the termination of the agreement- the arbitration clause retains its force. In the present case the doubt originally arose when the interested parties resorted to the civil court and subsequently (following the issuance of a preliminary judgment by the First Instance Court) when that action was abandoned and the parties resorted to arbitration. Diametrically opposite views were then presented and were also expressed in the arbitration award issued. However, irrespective of the doubts which arose in this case, the matter relates to the acceptance or non-acceptance of the doctrine of the independence of an arbitration clause and the extent of such independence. The issue has long created a serious difference of opinions in international case-law ..., the result being that in certain countries the principle of the survival of the arbitration clause prevails ..., while in other countries the prevailing view is that the termination of an agreement also leads to the cancellation of the arbitration clause and to the consequent reference of all disputes to the ordinary courts, and yet in other countries the principle prevails that the separation of the arbitration agreement from the contract applies only to disputes of a certain nature.

Therefore, there was a need to interpret Law 141/1975. The interpretation resolved the matter, as concerns the Greek State, by ruling in favour of the cancellation of the arbitration clause after the termination of the agreements which were concluded during the dictatorship period, as well as of the termination of any jurisdiction of the court of arbitration. The need for such action by the legislator is not ruled out by the fact that the legislative intervention emerged ... five days before the hearing of the case before the First Chamber of this Court following an adjournment, because the instant case served as the occasion for settling an already existent issue.

Given the above, it cannot be considered that the action of the legislator to proceed to an interpretation constitutes an intervention in and encroachment on the competence of the ordinary courts in this specific dispute. In view of the above, the provision of Article 12, para. 1 of Law 1701/1987 does not overstep the limits which have been set by the Constitution."

36 As regards para. 2 of Article 12, the Court of Cassation found that this provision was not unconstitutional since it essentially supplemented the provision of para. 1 aiming at "rendering powerless any arbitration awards which may have been issued after the termination of the contracts and which would not have been issued if the true meaning of Law 141/1975 had been clarified in time".

37 The Court of Cassation refused to examine the constitutionality of para. 3, since this provision was not applicable in the litigation before it.

38 Finally, the Court of Cassation found that the application of Article 12 para. 4 to the present case constituted an "intervention in and an encroachment on the competence of the courts" since the enactment of this provision just prior to the hearing of the cassation appeal was aiming at excluding the judicial investigation of the validity of the challenged award. It was therefore contrary to the constitutionally secured principle of the separation of powers.

39 The matter was accordingly remitted back to the First Chamber of the Court of Cassation for an examination of the State's appeal.

40 A hearing before the First Chamber of the Court of Cassation took place on 12 February 1990.

41 The Court gave its judgment on 11 April 1990. It quashed the challenged judgment of the Court of Appeal and declared the arbitration award null and void pursuant to the provisions of Article 12 of Law 1701/1987.

B. Relevant domestic law and practice

42 Article 26 of the Constitution (Separation of Powers)

> "1. Legislative power shall be vested in Parliament and the President of the Republic.
>
> 2. Executive power shall be vested in the President of the Republic and the Government.
>
> 3. Judicial power shall be vested in the courts of law, the decisions of which shall be executed in the name of the Greek People."

43 Article 77 of the Constitution (Authentic Interpretation)

> "1. The authentic interpretation of the laws shall rest with the legislative power.
>
> 2. A law which is not truly interpretative shall enter into force as of its publication."

44 Article 93 para.4 (Control of constitutionality of laws)

> "The Courts shall be bound not to apply laws, the contents of which are contrary to the Constitution."

45 Article 107 of the Constitution and Law 141/1975

Following the restoration of democracy in Greece in 1974, the legislator decided the revocation of various administrative acts issued during the 7-year military regime which concerned capital investments. This was deemed necessary since by such acts the military regime had granted benefits to various investors which were regarded as excessive or preferential and inconsistent with the general public interest. Article 107 para. 2 of the Constitution of 1975 provided that "a law which will be issued once only within three months from the date of entry into force of the Constitution, shall determine the terms and the procedure for the revision or termination of ... the contracts concluded from 21 April 1967 to 23 July 1974 concerning foreign investments...".

Law 141/1975 was issued for this purpose and provided, inter

alia, that the termination of such contracts could take place by a unilateral decision of the Ministerial Economic Committee. Article 2 para. 5 of Law 141/1975 reads, in as far as relevant, as follows:

> "Following the termination of the contract ... the privileges and the special arrangements ... cease and the enterprise or the investment is subject to the common legislation concerning ordinary enterprises and investments..."

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

46 The Commission has declared admissible the following complaints by the applicants:

a) that as a result of the enactment and the application of Law 1701/1987 in their case they have not been entitled to a fair hearing in the determination of their civil rights to compensation ;

b) that their case has not been determined within a reasonable time ;

c) that as a result, on the one hand, of the provisions of Article 12 of Law 1701/1987 and, on the other hand, of the lengthy and dilatory proceedings instituted by the Greek State they are deprived of their property rights which have been recognised by the arbitration award.

B. Points at issue

47 The following points are at issue in the present application:

- whether there has been a violation of the applicants' right to a fair hearing by a tribunal under Article 6 para. 1 (Art. 6-1) of the Convention;

- whether the length of the proceedings exceeded the "reasonable time" referred to in Article 6 para. 1 (Art. 6-1) of the Convention;

- whether there has been a violation of the applicants' right to peaceful enjoyment of their possessions under Article 1 of Protocol No 1 (P1-1) to the Convention.

C. Fair trial by a tribunal

48 The applicants allege a violation of their right to a fair hearing in the determination of their civil right to compensation under Article 6 para. 1 (Art. 6-1) of the Convention which, insofar as relevant, reads as follows:

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

49 The applicants submit that they participated in the arbitration proceedings in reliance upon the good faith of the State which called for and took part in these proceedings. On the contrary the State, having failed in the arbitration proceedings, embarked upon a series of dilatory appeals which failed.

50 The applicants observe that Law 1701/1987 was enacted five days before the hearing in their case before the Court of Cassation. They find that the purpose of this Law was to bar the applicants from having

their claims resulting from the discontinuation of the contract determined. In this respect they submit that Article 12 of Law 1701/1987 constitutes an unfair and calculated attempt to interfere with and encroach upon the powers of the judiciary.

51 The applicants submit that the judgment of the Plenary of the Court of Cassation by declaring Article 12 para. 4 of Law 1701/1987 inapplicable to their case did not remedy the situation. The sole effect of that judgment was that the domestic proceedings were not cancelled. However, the applicability of paras. 1 to 3 of Article 12 of Law 1701/1987 in fact put an end to the litigation since under these provisions the arbitration award is no longer valid or enforceable and their claims are extinguished by prescription.

The applicants consider that this constitutes an infringement of the rule of law.

52 The Government argue that an action by the legislator involving an authentic interpretation of Law 141/1975 was necessary in order to settle the controversies as to the meaning of the provisions of this Law. It was not, therefore, an interference with the applicants' case before the courts.

53 The Government submit that the abolition of the arbitration clause in the contract was an obvious consequence of Law 141/1975. However, a dispute arose as to the real will of the legislator, which dispute was expressed in the legal writings of distinguished lawyers and in the contradictory decisions of the courts. The parties to the present litigation alternatively supported different opinions and views. It was a matter of principle for the legislator to make clear that his will was to eliminate from the economic and public life the consequences of the military regime and not to tolerate the exercise of rights or privileges acquired in non-democratic political situations.

54 The Government further note that the exercise by the legislator of his right to interpret a law is expressly provided by the Constitution. The exercise of this right is controlled by the courts which are bound not to apply a law which is unconstitutional. In the present case the constitutionality of the provisions of Law 1701/1987 was challenged before the Plenary of the Court of Cassation and this court found the provisions of Article 12 paras. 1 and 2 to be in conformity with the Constitution, while at the same time it declared para. 4 unconstitutional. Consequently, contrary to the applicants' allegations, the decision as to the validity of the arbitration clause and award was not taken by the legislator but by the Court of Cassation.

55 The Commission first observes that the issue which was under litigation before the domestic courts was the validity of the arbitration award given in the applicants' favour. The question raised under Article 6 para. 1 (Art. 6-1) of the Convention is whether the matter was decided by an independent and impartial court after a fair hearing. This provision does not only require that the parties' arguments are heard by the courts in adversarial proceedings. It also guarantees the principle of equality of arms and requires that the matter under litigation is decided by the courts on the basis of the relevant existing legislation and without any interference by any of the parties or by any other State authority.

56 The Commission notes that the constitutionality of the provisions complained of was debated before and decided by the Plenary of the Court of Cassation after both parties had been heard. The proceedings were not cancelled and the litigation ended by a judgment of the First Chamber of the Court of Cassation.

57 However, the Commission also observes that the issue as to the

validity of the award, which was the subject matter of the litigation, was expressly addressed by the legislator while the proceedings were pending. By interpreting the existing law in favour of the invalidity of the arbitration clause and by providing that the award was null and void Article 12 paras. 1 and 2 of Law 1701/1987 left no room for a decision by the court and in reality determined the outcome of the proceedings.

58 The Commission notes the Government's argument that such a legislative intervention was necessary, since not only the parties to this case but also the courts, individual judges and distinguished lawyers had expressed differing opinions on the disputed point.

59 The Commission cannot however follow this approach. The fact that contradictory or differing views are expressed is rather common in court litigations. Courts are often required, in the exercise of their judicial functions, to clarify the will of the legislator by interpreting the laws. Moreover, the Government have been unable to present a single case, other than that of the applicants, to which the challenged provisions have been applied.

60 The Commission finds no sufficient explanation for the fact that this interpretative legislative action was not taken until 1987, i.e. 12 years after the enactment of Law 141/1975 and 9 years after the commencement of the litigation, at a moment when the proceedings were reaching their end.

61 It observes, furthermore, that no explanation was given for the apparent inconsistency between the State's position in 1979, when it called for arbitration, and action taken in 1987, when the legislator intervened in favour of the invalidity of the arbitration clause and proceedings.

62 To sum up, the Commission finds nothing to support the submission that the legislative intervention was necessary at the time it occurred.

63 In this respect the Commission recalls the following remarks in the Golder judgment (Eur. Court H.R., Golder judgment of 21 February 1975, Series A no. 18, p. 17, paras. 34-35):

> "One reason why the signatory Governments decided to 'take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration' was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimedconsideration when interpreting the terms of Article 6 para. 1 (Art. 6-1) according to their context and in the light of the object and purpose of the Convention.
>
> This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member (Article 66 of the Convention), refers in two places to the rule of law; first in the Preamble, where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 which provides that 'every Member of the Council of Europe must accept the principle of the rule of law ...
>
> The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (Art. 6-1) must be read in the light of these principles."

64 In the Commission's view where a court is dealing with a dispute between an individual and the State over civil rights and obligations, the legislator must not take action with a view to resolving that particular pending dispute. Were Article 6 para. 1 (Art. 6-1) to permit such action, a Contracting State could, without acting in breach of that text, prevent its courts from exercising in practice their jurisdiction to determine civil actions brought against the State. Such assumption, indissociable from a danger of arbitrary power, would have serious consequences which are incompatible with the rule of law.

65 The Commission finds therefore that by enacting and applying Article 12 paras. 1 and 2 of Law 1701/1987 in the applicants' case the Greek authorities denied the applicants the right to have their civil rights and obligations determined after a fair hearing by a tribunal.

Conclusion

66 The Commission finds, unanimously, that there has been a violation of Article 6 para. 1 (Art. 6-1) as regards the applicants' right to a fair hearing by a tribunal.

D. Length of the proceedings

67 The applicants further complain that their case was not determined within a reasonable time as required by Article 6 para. 1 (Art. 6-1) of the Convention.

68 According to the consistent case-law of the Court and the Commission, the reasonableness of the length of proceedings falling within the scope of Article 6 para. 1 (Art. 6-1) of the Convention must be assessed in the light of the circumstances of each case and having regard in particular to the following criteria: the complexity of the case, the conduct of the parties and that of the competent authorities (cf., for example, Eur. Court H.R., Vernillo judgment of 20 February 1991, Series A no 198, p. 12, para. 30).

69 As regards the proceedings which the applicants instituted before the First Instance Court of Athens on 10 November 1978, the Commission notes that these proceedings are still pending. It recalls that the period for which it is competent began on 20 November 1985, when Greece recognised the Commission's competence to receive individual applications. However, in assessing the reasonableness of the proceedings account must be taken of the state of the proceedings on the above-mentioned date (cf. Eur.Court H.R., Foti and Others judgment of 10 December 1982, Series A no 56, pp. 18-19, para. 53) The Commission observes that these proceedings were in practice discontinued when the case was referred to arbitration. Moreover, on 17 December 1986 the applicants declared that they wished to withdraw these proceedings and since that date they have taken no further procedural steps.

70 In view of the above elements the Commission finds that the length of these proceedings is essentially due to the fact that the applicants were no longer interested in their continuation.

71 The Commission further notes that it is competent ratione temporis to examine the reasonableness of the length of the proceedings concerning the validity of the arbitration award but not the arbitration proceedings as such. It recalls in this respect that the arbitration proceedings as such ended before 20 November 1985, when recognition by Greece of the right of individual petition took effect.

72 The proceedings concerning the validity of the arbitration award commenced on 2 May 1985 and terminated on 11 April 1990. They lasted nearly 5 years. The first instance and appeal proceedings lasted 18 months. The total length of the cassation proceedings is more than 3 years but during this period the Court of Cassation gave three

judgments in the case. Having regard to the complexity of the issues dealt with by the Court of Cassation, the Commission finds that the length of these proceedings can still be considered as reasonable.

Conclusion

73 The Commission concludes, by 12 votes to 2, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention as regards the length of the proceedings.

E. Peaceful enjoyment of possessions

74 The applicants complain that as a result, on the one hand, of the lengthy and dilatory proceedings and, on the other hand, of the provisions of Article 12 of Law 1701/1987 they have been deprived of their property rights recognised by the arbitral award. They invoke Article 1 of Protocol No 1 (P1-1) to the Convention 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."

75 The applicants submit that the arbitral award, although of a declaratory nature, represents a financial asset and a "possession" within the meaning of Article 1 of Protocol No 1 (P1-1). As a result of the entry into force of Law 1701/1987 this award was annulled and all their claims were extinguished by prescription.

76 The Government submit that the arbitral award was based on a very precarious legal ground and was finally invalidated. The applicants were aware of the precarious nature of the award since they knew and had themselves pleaded for the incompetence of the arbitration court. Nevertheless, the applicants did not take any steps to accelerate the proceedings before the ordinary courts in order to avoid any disadvantages which might result from a possible nullity of the arbitration proceedings.

77 The Government further observe that the prescription of the applicants' claims is a necessary limitation in the exercise of their rights. As the applicants' claims resulted from a preferential contract prejudicial to the public interest, prescription of the claims after 10 years cannot be considered unreasonable.

78 The Commission recalls that a claim can constitute a "possession", within the meaning of Article 1 of Protocol No 1 (P1-1), provided that it is sufficiently established (cf. No 7742/76, Dec. 4.7.78, D.R. 14 p. 146; No 7775/77, Dec. 5.10.78, D.R. 15 p. 143). In the present case it is true that no final decision was given in the proceedings before the ordinary courts as regards the applicant company's claims. It is also true that the declaratory arbitral award recognising the existence of a debt of the State to the company was annulled as a result of Article 12 paras. 1 and 2 of Law 1701/1987. However, in order to examine whether the applicants had a "possession" affected by Law 1701/1987 account must be taken of the situation as regards their rights before the enactment of this law.

79 The Commission recalls in this respect that the existence of a debt of the Greek State to the applicant company was in principle

recognised by judgment No 13910/1979 of the First Instance Court of Athens. The company's claims were also regarded as established in the arbitral award given in 1984. What was at stake in the subsequent proceedings was not the very existence of the debt but the precise extent of the State's obligation and the competence of the arbitration court. Moreover, the Government do not deny the very existence of the a debt but submit that the applicants did not choose the proper procedural way for the recovery of their expenses.

80 The Commission finds therefore that the applicants' claims constituted "possessions" within the meaning of Article 1 of Protocol No 1 (P1-1) to the Convention prior to the enactment of Law 1701/1987.

81 Article 1 of Protocol No 1 (P1-1) 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, is concerned, amongst other things, with a right of the State to control the use of property (Eur. Court H.R., Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 24, para. 61). These 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 (Eur. Court H.R., James and others judgment of 21 February 1986, Series A no. 98, p. 30, para. 37 in fine).

82 The Commission notes that according to Article 12 para. 2 of Law 1701/1987 the arbitration award was declared null and void and its enforcement excluded. Moreover, Article 12 para. 3 of the same law provides that the applicants' claims are now extinguished by prescription. It follows that the applicants can no longer recover the State's debt on the basis of the arbitral award and that they are also prevented from continuing or instituting proceedings for this purpose.

83 In the Commission's view the combined effect of the provisions in paras. 2 and 3 of Article 12 of Law 1701/1987 amounts to an interference with the applicants' right to peaceful enjoyment of their possessions. In order to be compatible with Article 1 of Protocol No 1 (P1-1), this interference must "achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of individual fundamental rights" (cf. above-mentioned Sporrong and Lönnroth judgment, p. 26, para. 69). In addition, there must be a reasonable relationship of proportionality between the means employed and the aim pursued (above-mentioned James and Others judgment, p. 34, para. 50).

84 Having regard to the Contracting States' wide margin of appreciation as regards the existence of a public interest justifying interferences with individual rights guaranteed by Article 1 of Protocol No 1 (P1-1) (cf. Eur.Court H.R., Mellacher and Others judgment of 19 December 1989, Series A No 169, p. 26, para. 45) the Commission accepts that there may have been some justification for the abolition of arbitral awards based on arbitration clauses which the Greek State regarded as privileges conceded by the military regime in Greece and for the prescription of claims based on preferential agreements contracted by that regime. The Government have indeed argued that these measures showed the State's will to eliminate the economical consequences of the dictatorship.

85 In this respect the Commission notes first that the applicants' claims aimed at recovering their expenses incurred with a view to the performance of the contract and not at obtaining any compensation for

loss of profits from the agreement.

86 Moreover, the Commission has had regard to the fact that the proceedings before the arbitration court commenced at the initiative of the State, after the applicants had lodged their civil action with the ordinary courts. When the arbitration court found in favour of the applicants, it was again the State that challenged the validity of the arbitral award before the ordinary courts, which conduct, in the Commission's view, appears as venire contra factum proprium. Finally, the invalidity of the arbitration clause resulted from a legislative intervention which occurred 13 years after the restoration of democracy and the rule of law in Greece and which has been found above to be in breach of Article 6 (Art. 6) of the Convention while prior to this intervention both the arbitration and the ordinary courts had found this clause to be valid.

87 In these circumstances, the Commission finds that the applicants cannot be blamed either for having participated in the arbitration proceedings instituted by the State or for having prolonged the litigation.

88 Having regard to the nature and origin of the applicants' claims and to their conduct as parties in the litigation the Commission finds that, even assuming that the provisions of Article 12 paras. 2 and 3 were in the public interest, their effects on the applicants' fundamental rights were disproportionate to the legitimate aims eventually pursued by the provisions complained of. The interference complained of can therefore not be justified under Article 1 of Protocol No 1 (P1-1).

Conclusion

89 The Commission concludes, unanimously, that there has been a violation of Article 1 of Protocol No 1 (P1-1) to the Convention.

RECAPITULATION

90 The Commission concludes,

- unanimously, that there has been a violation of Article 6 para. 1 (Art. 6-1) as regards the applicants' right to a fair hearing by a tribunal (para. 66) ;

- by 12 votes to 2, that there has been no violation of Article 6 para. 1 (Art. 6-1) of the Convention, as regards the length of the proceedings (para. 73) ;

- unanimously, that there has been a violation of Article 1 of Protocol No 1 (P1-1) to the Convention (para. 89).

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)

(Or. English)

PARTIALLY DISSENTING OPINION OF MR. STEFAN TRECHSEL AND SIR BASIL HALL

We are not in agreement with the majority of the Commission that there has been no violation of Article 6 para. 1 in relation to the length of proceedings in this case. The situation on 20 November 1985, when the Declaration of Greece under Article 25 took effect, was that the Government were challenging the validity of the arbitration award. The Government were contending that the arbitration award was invalid notwithstanding that they had referred the dispute to arbitration themselves.

Both the Athens first instance court and the court of appeal rejected the Government's contention, the proceedings at two instances taking 18 months (of which just under twelve months elapsed after the Greek Declaration under Article 25).

On 15 December 1986 the Government appealed to the Court of cassation. The final decision of the Court of cassation was the judgment of its First Chamber on 11 April 1990 - more than three years later.

The majority of the Commission conclude that the complexity of the issues justified the time taken. We do not agree that the issues were so complex as to justify the delay. The issue was in our view a simple point of law which it had not taken long for the courts of first and second instance to resolve. The time taken appears to have resulted in part from the structural arrangements of the Court of cassation which resulted in reference from the First Chamber to the Plenary Court and back again. It was in part a result of the need to consider new legislation, law 1901/1987 taking effect while the appeal in cassation was pending. Those are matters of State responsibility.

In our view the determination of the applicants' civil rights in relation to the arbitration award was not made within a reasonable time, and there was a violation of Article 6 para. 1.

In other respects we are in agreement with the conclusions of the Commission.

(Or. English)

CONCURRING OPINION OF Mr. M.P. PELLONPÄÄ

I agree with the report in so far as concerns Article 6 of the Convention. I also fully agree with the finding of a violation concerning what I regard as the main issue in the present case, i.e. Article 1 of Protocol No. 1. While the majority, however, limits itself to finding an "interference" with the right guaranteed in the first sentence of Article 1, I would characterize this interference as a "deprivation" of possessions within the meaning of the second sentence of that Article.

As stated in para. 78 of the report, a sufficiently established claim can constitute a "possession". According to the majority it appears to be a combination of the arbitral award of 1984 and the debt of the Greek State to the applicant company, recognised "in principle" (para. 79 of the report) by the judgment No. 13910/1979 of the First Instance Court of Athens, that constitutes the claim in question.

I have certain doubts about the relevance of the "non-definitive" judgment of 1979. The judgment did not explicitly establish any liability of the Greek State, although I agree that the acceptance of such a liability may be inferred from the Court's decision. Nevertheless, the fact remains that the proceedings so far have not led even to a final first instance judgment, not to speak about a judgment confirmed in appeal and cassation proceedings. The mere existence of pending proceedings with a "non-definitive" first instance judgment recognizing indirectly the liability of the Greek State hardly constitutes a claim to be regarded as possessions. While one possibly could see here an element of possessions, to be taken into account with other elements, I do not, for reasons given below, find it necessary to take a final stand on the issue.

I leave the above question open, because in my view the applicant company had an "established claim" based on the declaratory arbitral award of 27 February 1984. This award created a property interest which can and must be regarded as a possession within the meaning of

Article 1 of the Protocol. An arbitral award is, according to Greek law, final and binding and, as a rule, immediately enforceable. Although the situation concerning the enforceability of "declaratory awards" appears to be somewhat unclear, the award in question in any case confirmed the liability of the Greek State in amounts defined in a detailed manner in Drachmas, US Dollars and French Francs (see report para. 26). This award was only subject to challenge by way of setting-aside proceedings on limited grounds. A challenge action brought by the Greek State was dismissed by the decision of the Athens First Instance Court which held, in conformity with widely accepted principles of arbitration law, that the decision whereby the underlying contract had been annulled did not affect the validity of the arbitration clause contained therein. This decision was confirmed on appeal by the Athens Court of Appeal on 4 November 1986. The Law 1701/1987 intervened just before the challenge action was to be heard before the final instance, i.e. the Court of Cassation, and after the Judge Rapporteur had given his opinion proposing the dismissal of the State's action.

Although the Court of Cassation did not have an opportunity to express itself on the validity of the arbitral award before the legislative intervention, my conclusion is that by the time of that intervention a claim enjoying the protection of Article 1 of Protocol No. 1 had been created in favour of the applicant company.

I agree with the report that the combined effect of paras. 2 and 3 of Article 12 of Law 1701/1987 amounted to an interference with the applicants' property rights (see para. 83). I, however, would go a step further. In my view the interpretative law did not just interfere with the applicants' right to peaceful enjoyment of their possessions but in an unequivocal manner took away the claim which had been created by the arbitral award. Therefore the events in my opinion should be characterized as a "deprivation" of possessions within the meaning of the second sentence of Article 1 of the Protocol. This conclusion is not affected by the fact that some proceedings concerning the underlying contractual relationships are still, at least in theory, pending before Greek courts. They cannot change the decisions whereby the arbitral award was annulled, although they might have impact as regards the compensation due for the deprivation in question.

As far as the requirements of the public interest behind and the proportionality of the measure are concerned, the considerations put forward by the Commission in paras. 84-88 of the report apply mutatis mutandis also when the interference is seen as a deprivation of possessions.

My above conclusion concerning a violation does not amount to any opinion as to the justification of the termination of the contract itself.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
20.11.1987	Introduction and registration of the application
25.01.1990	Submission of further information by the applicants
Examination of Admissibility	
02.04.1990	Commission's decision to give notice of application to the respondent Government and to

	invite the parties to submit written observations
30.06.1990	Government's observations
24.10.1990	Applicant's observations in reply
01.03.1991	Commission's decision to invite the Government to submit further observations merits
06.05.1991	Government's further observations
13.6.1991	Applicants' further observations in reply
04.07.1991	Commission's decision to declare the application admissible
Examination of the Merits	
15.07.1991	Parties invited to submit further information and observations on the merits of the application
10.09.1991	Government's observations on the merits
27.09.1991	Applicants' observations on the merits
03.12.1991	Applicants supplement their submissions
07.12.1991	Consideration of state of proceedings
04.04.1992	Consideration of state of proceedings
10.09.1992	Commission's decision to hold a hearing on the merits of the application
20.12.1992	Hearing on the merits
13.02.1993	Consideration of state of proceedings
04.05.1993	Commission's deliberations on merits, and on text of its Article 31 Report. Final votes taken.
12.05.1993	Adoption of Report