



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

FIFTH SECTION

CASE OF AGROKOMPLEKS v. UKRAINE

(Application no. 23465/03)

JUDGMENT

(Just satisfaction)

STRASBOURG

25 July 2013

FINAL

09/12/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Agrokompleks v. Ukraine,

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

Mark Villiger, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ann Power-Forde,

Ganna Yudkivska,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 2 July 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 23465/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Agrokompleks JSC (“the applicant company”) on 23 June 2003.

2. The applicant company was represented, at different times, by Cabinet Lucas-Delvolve (a French law firm), Salkom (a Ukrainian law firm), and Trillat and Associés (a French law firm). The Ukrainian Government (“the Government”) were most recently represented by their Agent, Mr N. Kulchytskyy.

3. In a judgment delivered on 6 October 2011 (“the principal judgment”), the Court found several violations of Article 6 of the Convention and Article 1 of Protocol No. 1 in respect of the insolvency proceedings initiated by the applicant company against LyNOS, a State-owned oil refinery. The Court held that the domestic courts dealing with the case could not be regarded as independent or impartial given the blatant interferences of the highest State authorities in the proceedings. It also held that the principle of legal certainty enshrined in Article 6 of the Convention had been violated by the quashing of the final judicial ruling of 2 July 1998 determining the amount of the debt owed by LyNOS to the applicant company. Furthermore, the length of the insolvency proceedings in question was found to have been excessive. Lastly, the Court found a violation of Article 1 of Protocol No. 1 on account of the aforementioned issues, as the proceedings in question had had a direct impact on the property interests of the applicant company.

4. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the

Government and the applicant company to submit, within three months of the date on which the judgment became final, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (see the principal judgment, § 178, and point 7 of the operative provisions).

5. On 8 March 2012 a panel of five judges of the Grand Chamber rejected the Government's request for the referral of the case to the Grand Chamber. The judgment therefore became final.

6. The time-limit set for the parties to reach an agreement passed without the conclusion of such an agreement. The applicant company and the Government each filed observations on the application of Article 41 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant company is a private company registered in Ukraine. It belongs to a group of several companies (known as "the Agrokompleks Group") whose business activities include the production of foodstuffs, various packaging and plastic items, printing, the wholesaling of foodstuffs and drinks and tobacco, and other types of wholesale trade. At the time of the events the applicant company carried out, in particular, transactions with Russian companies involving the exchange of raw foodstuffs from Ukraine for Russian crude oil, and the further sale of finished oil products.

A. Events and documents prior to the adoption of the principal judgment

8. In 1991-1993 the applicant company supplied for refining 375,000 tons of crude oil to LyNOS (then named the Lysychansk Oil Refinery), the largest oil refinery in Ukraine, 67.41% of whose shares were owned by the State. It received back only a small part of the oil products due to it.

9. By decisions of 18 November 1994, 5 April 1995, 19 July 1996 and 3 March 1997, the domestic arbitration courts allowed the applicant company's claims against the Refinery (a detailed summary of these decisions can be found in §§ 11, 13, 15 and 18 of the principal judgment).

10. On 9 August 1996 insolvency proceedings were initiated against LyNOS.

11. On 20 August 1997 the applicant company signed an agreement with LyNOS concerning the repayment by the latter of its arrears resulting from its failure to comply with its contractual obligations vis-à-vis the applicant company, as established by several judicial decisions. In signing that agreement, the debtor acknowledged its debt in the amount of 225,355,355 Ukrainian hryvnias (UAH), which was, according to the agreed schedule, to be repaid in kind within five years. The agreement contained a detailed breakdown of the aforementioned sum. It consisted of the following amounts:

(a) a monetary debt of UAH 29,441,292 pursuant to the judgment of the Higher Arbitration Court (“the HAC”) of 5 April 1995, calculated on the basis of the prices of the oil products as of 1 April 1995;

(b) UAH 26,370,434, being the value of the undelivered oil products, namely: 13,670 tons of A-80 petrol, 37,135 tons of diesel and 26,997 tons of fuel oil, which remained due to the applicant company under the HAC judgment of 18 November 1994, as calculated on the basis of the prices at the date of the agreement (20 August 1997);

(c) arrears of UAH 219,909 in respect of the penalties and legal costs and expenses which LyNOS had been ordered to pay to the applicant company under the HAC judgment of 19 July 1996; and

(d) compensation for financial losses in the amount of UAH 169,323,720 pursuant to the judgment of the Poltava Regional Arbitration Court of 3 March 1997.

12. As to the debt under point (a) above, the agreement further specified that it was to be repaid in kind in volumes calculated on the basis of the prices of the oil products as at the date of the agreement (20 August 1997) and VAT inclusive (20%). The prices were given as follows: A-80 petrol – UAH 486.61 per ton; diesel – UAH 411.04 per ton; and fuel oil – UAH 165 per ton. The debtor was allowed to supply pyropropylene to the applicant company instead of the above-mentioned oil products.

13. Between September and December 1997 LyNOS supplied 3,999 tons of A-80 petrol and 1,976 tons of pyropropylene to the applicant company. Between January and June 1998 it supplied some further oil products to the value of UAH 9,204,810.

14. On 2 July 1998 the HAC examined a request by the applicant company for the determination of the final amount of the debtor’s outstanding arrears. It noted that the applicant company had originally estimated the arrears at UAH 660,000,000, but, following negotiations with the debtor, that amount had been reduced to UAH 225,355,355 under the agreement of 20 August 1997. Following the partial implementation by LyNOS of that agreement between September 1997 and June 1998, which the court viewed as confirmation that LyNOS had accepted its terms, the outstanding debt was UAH 216,150,544. The HAC also invited the parties

to agree on a debt repayment schedule on the basis of that ruling and the agreement of 20 August 1997. The ruling of the HAC became final.

15. In July 2000 the State's shares in LyNOS were sold to TNK-Ukraine, a newly-established subsidiary of the Russian holding company Tyumen Oil Company in Ukraine.

16. On 27 June 2001 the HAC, at the request of LyNOS, reviewed the above-mentioned ruling in the light of newly-discovered circumstances and reduced the final amount of LyNOS' outstanding debts vis-à-vis the applicant company to UAH 97,406,920.

17. On 29 October 2001 the Donetsk Commercial Court of Appeal further reduced the debt to UAH 90,983,077.

18. On 24 December 2001 the Kyiv Scientific Research Institute of Forensic Expert Examinations of the Ministry of Justice of Ukraine issued a forensic accounting expert examination report regarding the applicant company's claims against LyNOS. The examination had been undertaken within the framework of a separate set of civil proceedings brought by an individual shareholder of LyNOS against the applicant company, about which no further information is available. Nor is it known whether, and if so where, the report was ever used.

19. The report was based on the following questions:

“1. What was the quantity and value of the oil products LyNOS was required to transfer to [the applicant company] under the agreement of 20 August 1997?

2. Have the prices of the oil products which LyNOS was required to transfer to [the applicant company] changed between the date the debt was incurred and the present?

3. How has the change in the prices of the oil products influenced the amount of the debt owed by LyNOS to [the applicant company]?

4. What was the cost of the said oil products on the date of the introduction of the claim [June 2001]?

5. Have [the applicant company's] claims increased because of an increase in the principal debt or because of surcharges?”

20. In reply to the first question, the expert stated that LyNOS was required to transfer oil products to the applicant company to the value of UAH 225,355,355 on the basis of the following prices: A-80 petrol – UAH 486.61 per ton; diesel – UAH 411.04 per ton; and fuel oil – UAH 165 per ton.

21. As to the second question, the conclusion was that the prices of oil products had increased.

22. With regard to the third question, the expert noted that LyNOS was required to redeem its debt vis-à-vis the applicant company in kind (in oil products). Accordingly, the increase in the prices of oil products had led to an increase of the amount of the principal debt. Thus, the price of the

previously stipulated volume of oil products was, at the date of the report, UAH 574,012,817.

23. In reply to the fourth question, the expert indicated the following prices:

- A-80 petrol – varying between UAH 1,037 and 1,238 per ton;
- diesel – UAH 1,106 per ton; and
- fuel oil – UAH 500 per ton.

24. Lastly, as regards the fifth question, it was concluded that, given, on the one hand, the obligation of LyNOS to repay its debt in kind, and, on the other, the increase in the prices of oil products, the amount of the principal debt had increased.

25. On 21 November 2003 a friendly-settlement agreement was signed between a committee of the creditors, on the one side, and LyNOS as the debtor, on the other, under which the creditors' claims were to be settled by exchanging them for the debtor's assets. The applicant company was to receive 90,983,077 shares (UAH 1 being the price of one share) owned by LyNOS in the share capital of the Lysychansk Oil Investment Company ("LyNIK"), a closed joint-stock company, which had been founded shortly before and whose major shareholder was TNK-Ukraine.

26. The applicant company unsuccessfully challenged that settlement before the domestic courts as discriminatory and unfair.

B. Audit and other reports commissioned by the applicant company after the adoption of the principal judgment

27. Following the adoption by the Court of the principal judgment on 6 October 2011, the applicant company ordered a number of expert reports with regard to its just satisfaction claims. The Government, conversely, did not seek any expert opinions.

1. UkrPetrolConsulting and Derzhzovnishinform data on oil product prices

28. On 5 April 2012 UkrPetrolConsulting (ООО "УкрПетрол-Консалтинг", "UPECO"), a Ukrainian company specialising in oil and gas consultancy, wrote to the applicant company in response to their enquiry, stating that "the average value grades of oil products in the large wholesale sector" were as follows:

- as of 7 March 2012: A-76/80 petrol – UAH 12,498 per ton; diesel (L-3-0.2-62) – UAH 10,675 per ton; and fuel oil M-100 – UAH 6,100 per ton (Kazakhstan origin) or UAH 6,300 (Ukraine origin);
- as of 12 March 2012: A-76/80 petrol – UAH 12,479 per ton; diesel (L-3-0.2-62) – UAH 10,700 per ton; and fuel oil M-100 – UAH 6,150 per ton (Kazakhstan origin) or UAH 6,300 (Ukraine origin).

29. On 11 April 2012 Derzhzovnishinform (ДП “Держзовнішінформ”, “DZI”), an information, analysis and expert centre under the Ukraine Ministry of Foreign Economic Relations and Trade, gave the following prices for oil products in reply to an enquiry by the applicant company,:

- as of 7 March 2012: A-80 petrol – between UAH 12,400 and UAH 12,600 per ton; diesel – between UAH 10,380 and 10,900 per ton; and fuel oil M-100 – between UAH 5,800 and UAH 6,500 per ton;
- as of 12 March 2012: A-80 petrol – between UAH 12,400 and UAH 12,600 per ton; diesel – between UAH 10,380 and 10,950 per ton; and fuel oil M-100 – between UAH 5,800 and UAH 6,500 per ton.

2. Report of Spetsotsinka-Ukraine LLC on the investment attractiveness and probable market value of the LyNIK shares in the applicant company’s possession

30. On 27 April 2012 the Consolidated Enterprise for the Valuation and Examination of Special Objects and Investments – Ukraine LLC (“Об’єднане підприємство з оцінки та експертизи спеціальних об’єктів та інвестицій”, ТОВ “СПЕЦОЦІНКА –УКРАЇНА”, “Spetsotsinka-Ukraine LLC”) issued its report in response to the applicant company’s request regarding the 90,983,077 LyNIK shares owned by the applicant company, which amounted to 4.78% of the LyNIK joint stock capital and had a nominal value of UAH 1 per share.

31. The stated purpose of the “examination” was to determine the “investment attractiveness and probable market value benchmark” of the shares. The report contained, in particular, the following observations and conclusions:

“The examination results are planned to be used in management decision-making process.

The results of the examinations cannot be used for purposes other than previously agreed with Client.

The format of this work includes only providing consulting services, and as agreed with Client, it does not include valuation. [...]

The market value benchmark of the [shares] is under examination, which will enable Client to make conclusions for decision-making process.

The market basis determines the use of the [shares] in accordance with the Highest and Best Use principle.

Market value is defined as the estimated amount for which an asset should exchange on the valuation date between a willing buyer and a willing seller in an

arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion. ...

The examination was carried out in the period from 25 to 27 April 2012. ...

As mentioned above, the format of the work does not include appraisal. The estimation of the market value benchmark of the [shares in question] was impeded by lack of adequate input data and cannot be considered feasible (obtained result may contain considerable errors). ...

As agreed with Client, the work was carried out within a limited period of time and was based on the limited data ..., without inspection of the [shares], which resulted in the limitation of the examination range.

The nature of limitations, sources, and adequate data, their probable impact on the results of the work were agreed with Client."

32. As to the investment attractiveness of the shares, Spetsotsinka-Ukraine LLC noted that LyNIK, being an oil refinery, was experiencing continuing economic losses, like all companies involved in the oil refining industry in Ukraine. The situation was not expected to change in the near future, and oil refining for the Ukrainian and Russian market would remain unprofitable. A general conclusion was drawn that investment in refineries in the existing investment climate was not feasible in principle. As a result, there was no incentive for potential investors to acquire LyNIK shares.

3. Tetra-Audit report on the expenses associated with the bank loans taken out by the Agrokomplex Group companies

33. On 14 May 2012 the auditing company Tetra-Audit ("Аудиторська фірма "Компанія "Тетра-аудит", ТОВ."), an auditing body registered by the Audit Chamber of Ukraine on 30 October 2003, issued an independent auditor's report at the applicant company's request. The aim of the report was to determine "the amount of the losses incurred as direct expenses in the raising of credit funds, including interest on the credit funds and commission under the loan agreements of the Agrokompleks Group Companies during the period 2 July 1998 to 1 May 2012".

34. The report noted that the Agrokompleks Group had been obliged to raise credit funds because of, in particular, the inability of the applicant company to recover the debt owed to it under the ruling of 2 July 1998.

35. Tetra-Audit listed all the bank loans received by the Agrokompleks Group companies during the above-mentioned period. According to its calculations, the expenses directly incurred by the raising of the credit funds constituted, as of the date of the report, EUR 44,213,247.

4. The SORGEM Evaluation Company's report on the pecuniary damage suffered by the applicant company on account of the violations found by the Court in the principal judgment

36. The applicant company assigned the SORGEM Evaluation Company ("SORGEM"), a subsidiary of SA Sorgem Holding in Paris specialising, in particular, in loss evaluation, to evaluate the pecuniary damage stemming from the violations of its rights under the Convention found by the Court in the principal judgment.

37. On 5 June 2012 SORGEM completed its report. It expressed the view that compensation to the applicant company in respect of the pecuniary damage should consist of: firstly, the repayment of the debt under the judicial ruling of 2 July 1998, and, secondly, compensation for the delay in the repayment of that debt.

38. With regard to the debt in question, SORGEM noted that the ruling of 2 July 1998 explicitly referred to the agreement between the applicant company and LyNOS of 20 August 1997, according to which the amount of the debt in monetary terms was to be based on the oil product prices as of August 1997. It had also been envisaged that the debt would be repaid to the applicant company in kind.

39. Bearing this in mind, SORGEM stated that the first option for the respondent Government would be to repay the applicant company in kind by oil products, in accordance with the ruling of 2 July 1998. In the experts' opinion, this was not impossible given the State ownership of a number of oil refineries.

40. Should this option be chosen, the following formula was suggested, where V is the volume of the oil products, the figures are the prices for oil products as defined in the agreement of 20 August 1997, and the total is the amount of the final debt under the ruling of 2 July 1998:

$$V \times 486.61 + V \times 411.04 + V \times 165.00 = 216,150,544$$

41. Under this formula, the applicant company was entitled to receive 610,221.27 tons of oil products.

42. The amounts of A-80 petrol, diesel and fuel were to be equal or in the following proportions (14.7% in petrol A-80 (= 89,702.53 tons), 32.5% in fuel (= 198,321.91 tons), and 52.8% in black oil (= 322,196.83 tons), having regard to the losses inherent in the refinery process).

43. The SORGEM report also examined another option – the repayment of the debt to the applicant company in monetary terms – should payment in kind appear too complicated.

44. Relying on the current oil product prices according to the data from UPECO and DZI (see paragraphs 28 and 29 above), SORGEM arrived at the following possible amounts:

- (a) if the UPECO data were used: from UAH 5,271,280,000 or UAH 5,996,240,000 depending on whether the oil products were taken in three equal shares or in the percentages stated; and
- (b) if the DZI data were used: from UAH 5,217,900,000 or UAH 5,962,880,000 depending on the range of oil products concerned.

Lastly, SORGEM calculated the average of the aforementioned figures, which came to UAH 5,612,070,000. If converted to euros at the exchange rate applicable on 30 May 2012, this sum corresponded to EUR 560,700,000.

45. SORGEM further proceeded to the calculation of the pecuniary damage suffered by the applicant company on account of its prolonged inability to enjoy its possessions.

46. It noted that the debt owed to the applicant company under the final judicial decision, and thus considered a possession, was UAH 216,150,544 as of 2 July 1998. According to the exchange rate published by the National Bank of Ukraine, this was equal to 96,081,000 European currency units (ECU). With the replacement of the ECU by the euro on 1 January 1999 on a one-to-one basis, this amount was equal to EUR 96,081,000.

47. In the experts' opinion, the period during which applicant company's right to peaceful enjoyment of its possessions had been infringed started running on 2 July 1998. Although technically it was impossible to establish the marginal lending rate of the European Central Bank (ECB) before the introduction of the euro on 1 January 1999, SORGEM suggested that the calculation should be based on the hypothesis that the marginal lending rate as of 1 January 1999 applied retrospectively to the period from 2 July 1998, with regard to the ECU/EUR one-to-one rate.

48. The SORGEM report provided a table setting out the ECB marginal lending facility rates from 1 January 1999 to December 2011. On the basis of the rates therein, and adding 3 %, it estimated the damages for loss of enjoyment for the period from 2 July 1998 to 8 June 2012 at EUR 88,094,431.

49. SORGEM also calculated the sum of the damages for loss of enjoyment for the said period on the basis of the National Bank of Ukraine discount rate. The total was UAH 504,677,469. Its conversion to euros at the official exchange rate of the National Bank of Ukraine gave EUR 50,422,326.

50. SORGEM estimated the amount of compensation due to the applicant company for its inability to use UAH 216,150,544 at the average of EUR 50,422,326 and EUR 88,094,431, that is, EUR 69,000,000.

51. In sum, the compensation for pecuniary damage to be paid to the applicant company under the SORGEM calculations was as follows:

- 610,221.27 tons of oil products or, in the alternative, EUR 560,700,000; plus
- EUR 69,000,000 in damages for loss of enjoyment.

THE LAW

52. Article 41 of the Convention provides:

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

A. Damage

1. *The parties' submissions*

(a) *The applicant company*

53. The applicant company submitted that it had suffered inherently unlawful dispossession of the oil products it had title to. Accordingly, it considered that the respondent Government should compensate it either by the repayment of those oil products in kind at their 1997 prices, or by payment of the current value of their volume, as well as the cost of the loss of enjoyment. More specifically, the applicant company claimed: firstly, 610,221.27 tons of oil products (in different proportions possible – see paragraphs 40-42 above) or their value, estimated at EUR 561,000,000; and, secondly, EUR 50,422,326 or EUR 88,094,431 (depending on the calculation method used) in compensation for loss of enjoyment. It based these claims on the SORGEM report (see paragraphs 48-49 above). In addition, the applicant company claimed EUR 250,000 in respect of non-pecuniary damage.

54. The applicant company considered that restitution *in integrum*, that is, the repayment in kind of the oil products to it, was in principle possible. It noted, in particular, that the State owned a number of refineries in Ukraine. Furthermore, the oil products specified in the judgment of 2 July 1998 and in the earlier agreement of 20 August 1997 were still in existence.

55. However, if this was impossible, the monetary equivalent of those products payable to the applicant company would be EUR 561,000,000.

56. The applicant company emphasised that the calculation of this amount by SORGEM was consistent with that in the forensic accounting expert report of the Kyiv Scientific Research Institute of Forensic Expert Examinations of the Ministry of Justice of Ukraine of 24 December 2001 (see paragraphs 18-24 above). That report had been issued by a government agency and its validity was not questioned. Even though it had been undertaken within separate proceedings, it nonetheless provided an evaluation of the damage suffered by the applicant company. Furthermore, the expert evaluation in question had been based on calculation methods the

soundness of which there was no reason to question. It would therefore be logical to apply the same method to the calculation of the pecuniary damage suffered by the applicant company, which SORGEM had duly done.

57. The applicant company noted that the questions before the expert of the Ministry of Justice had been those within his area of knowledge and naturally had not concerned any legal issues. Accordingly, the applicant company considered it to be of no relevance that the expert report of 24 December 2001 did not refer to the ruling of 2 July 1998.

58. The applicant company next argued that the fact that some LyNIK shares had been transferred to it should not be regarded as a reason to reduce the amount due for pecuniary damage. The applicant company insisted that those shares were and remained of no value and that they had been imposed on it as a result of the numerous violations of its rights acknowledged by the Court in the principal judgment. It further emphasised that the value of the shares in question had not been duly established at the time of their transfer into the applicant company's possession. Furthermore, it noted, with reference to the report of Spetsotsinka-Ukraine LLC, that the shares had become worthless by 2012 (see paragraphs 30-32 above).

59. The applicant company also submitted that, as a gesture of good will and subject to the full payment of the compensation for pecuniary damage, it was prepared to transfer into the State's possession, on a tax-free basis and for no charge, the shares it held in the LyNIK company in their current legal status and condition.

60. The applicant company also relied on the SORGEM report with regard to the calculation of the compensation for loss of enjoyment (see paragraphs 45-50 above).

61. The applicant company further noted that there were no effective legal mechanisms at the national level for it to seek compensation in respect of the violations of its rights under the Convention. The applicant company referred in this connection to the Law of Ukraine on the Enforcement of Judgments and the Application of the Case-law of the European Court of Human Rights, according to which the enforcement of such judgments could not be made conditional on any judgment of the national courts and did not require their approval or consent.

62. In substantiation of its claim for compensation in respect of non-pecuniary damage in the amount of EUR 250,000, the applicant company emphasised that it had always acted in good faith and shown understanding of the difficulties experienced by LyNOS with regard to the delivery of the agreed oil products. Instead of the debt being repaid, however, the amount owed had been illegally reduced and the applicant company had had a disadvantageous settlement imposed on it.

63. The applicant company maintained that it had been left in a state of uncertainty as to when its possessions would be returned to it and had thus

been unable to plan or develop its business. Furthermore, the authorities' wrongdoings had had a negative impact on its reputation.

64. Lastly, the applicant company noted that its management had been kept in a state of anxiety and had had to devote significant time and resources to the lengthy judicial proceedings and the handling of the attendant formalities.

(b) The Government

65. The Government considered that the applicant company's claims under this head should be rejected in their entirety.

66. They submitted that the applicant company could bring a fresh action for recovery of its possessions at the national level on the basis of the Court's judgment on the merits of the case. In the Government's opinion, the fact that LyNOS no longer existed was of little significance as its legal successors could take its place in the relevant domestic proceedings.

67. As to the applicant company's claim for 610,221.27 tons of oil products, the Government noted that the principal judgment concerned the quashing of the final judicial decision of 2 July 1998 and the reduction of the amount of the debt owed to the applicant company from UAH 216,150,544 to UAH 90,983,077. The Government emphasised that no issues regarding the redemption of the debt had been considered by the Court in its judgment and that they could not therefore be raised now. The Government therefore considered that there were no grounds for the applicant company to claim compensation for pecuniary damage in kind.

68. As regards the applicant company's calculations of the pecuniary damage in monetary terms, the Government considered that the application of several methods resulting in different amounts was to be viewed as "manipulation of the sums".

69. The Government noted, in particular, that the forensic accounting expert examination report of 24 December 2001, on which the applicant company had relied in its calculation in respect of pecuniary damage, had no relevance for the present case, because, firstly, it had been issued within the framework of separate unrelated proceedings, and, secondly, the questions before the expert did not concern the judicial ruling of 2 July 1998.

70. The Government further noted that the debt owed to the applicant company by LyNOS, as established by the decision of the Donetsk Commercial Court of Appeal of 29 October 2001, had been repaid to it in full by means of the LyNIK shares. They noted that the issue of the value of those shares had not been examined in the Court's principal judgment. Furthermore, the report by Spetsotsinka-Ukraine LLC, commissioned by the applicant company, had not determined the value of the shares, but had rather assessed their "investment attractiveness" as in 2012, that is, after they had been in the applicant company's possession for some eight years.

71. The Government maintained that, even if the final amount of the debt owed to the applicant company was accepted as the amount established by the HAC's ruling of 2 July 1998, as the applicant company insisted, there was still no basis for it to claim any pecuniary damage in excess of the difference between the aforementioned amount of UAH 216,150,544 and the value of the LyNIK shares it had eventually received to the amount of UAH 90,983,077. In other words, in the Government's opinion, the maximum amount of compensation for pecuniary damage the applicant company could claim on the basis of the HAC's ruling of 2 July 1998 was UAH 125,167,468.

72. The Government also drew the Court's attention to the context of that ruling. They noted that it had merely determined the amount of the debt owed to a creditor in the framework of insolvency proceedings. Given the specific nature of those proceedings, there were no guarantees that the applicant company would have been able to collect that debt in its entirety. Furthermore, that debt had not been required to be repaid to the applicant company immediately, but only after completion of the insolvency proceedings (in 2003).

73. Finally, as regards the just satisfaction claim in respect of non-pecuniary damage, the Government considered that the applicant company had not submitted any evidence to support it.

2. The Court's assessment

74. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see, for example, *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 19, ECHR 2001-I, and *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000-XI).

75. The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Brumărescu v. Romania* (just satisfaction) [GC], cited above, § 20).

76. The nature and the extent of the just satisfaction to be afforded by the Court under Article 41 of the Convention directly depend on the nature

of the breach (see *Shesti Mai Engineering OOD and Others v. Bulgaria*, no. 17854/04, § 101, 20 September 2011, with further references). Moreover, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (see, amongst others, *Stretch v. the United Kingdom*, no. 44277/98, § 47, 24 June 2003).

77. Thus, for an award to be made in respect of pecuniary damage the applicant must demonstrate that there is a causal link between the violation and any financial loss alleged (see, for example, *Družstevní záložna Priea and Others v. the Czech Republic* (just satisfaction), no. 72034/01, § 9, 21 January 2010).

78. Sometimes, however, a precise calculation of the sums necessary to make complete reparation in respect of the pecuniary losses suffered by the applicant may be prevented by the inherently uncertain character of the damage flowing from the violation (see *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 18, ECHR 2000-IX, and *Basarba OOD v. Bulgaria* (just satisfaction), no. 77660/01, § 20, 20 January 2011).

79. As to pecuniary compensation for non-pecuniary damage, the Court may award it to commercial companies ruling on equitable basis, as its exact calculation is in principle impossible.

80. If one or more heads of damage cannot be calculated precisely or if the distinction between pecuniary and non-pecuniary damage proves difficult, the Court may decide to make a global assessment (see *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 29, ECHR 2000-IV).

81. In order to determine just satisfaction, the Court has regard to the particular features of each case, which may call for an award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even for no award at all (see *Ukraine-Tyumen v. Ukraine* (just satisfaction), no. 22603/02, § 22, 20 May 2010). It is also noteworthy that the Court enjoys a certain discretion in the exercise of the power conferred by Article 41, as is borne out by the adjective "just" and the phrase "if necessary" in its text (see *Guzzardi v. Italy*, 6 November 1980, § 114, Series A no. 39).

82. Turning to the present case, the Court notes that it has found violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, mainly on account of the following two issues: firstly, the reduction, contrary to the legal certainty principle, of the finally established debt owed to the applicant company by LyNOS, a State-owned company; and, secondly, the direct interferences of the highest State authorities in the insolvency proceedings involving the applicant company as a creditor and directly affecting its property interests. It has also found a violation of Article 6 § 1 of the Convention in respect of the length of the aforementioned proceedings.

83. In establishing the pecuniary damage flowing from violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 on account of setting aside a final judicial decision in an applicant's favour contrary to the *res judicata* principle, the Court's traditional approach has been to award the applicant the sum which he/she would have received had the judgment in question not been quashed, deducting the subsequent domestic award if there had been any (see, for example, *Stanislav Volkov v. Russia*, no. 8564/02, § 40, 15 March 2007; *Zheltyakov v. Ukraine*, no. 4994/04, § 73, 9 June 2011; and *Bezrukovy v. Russia*, no. 34616/02, § 53, 10 May 2012).

84. Bearing this in mind, the Court considers that in the present case the applicant company should have the right to recover the money to which it was entitled by virtue of the HAC ruling of 2 July 1998, less the value of the LyNIK shares transferred to it by way of repayment of the debt in 2003 (see and compare *Oferta Plus SRL v. Moldova* (just satisfaction), no. 14385/04, § 71, 12 February 2008).

85. The Court observes that the parties are in dispute as regards both the nature and value of the award of the above-mentioned judicial ruling and the value of the LyNIK shares in question. According to the applicant company, the HAC ruling was based on the earlier agreement of 20 August 1997 and thus, even though it determined the final outstanding debt vis-à-vis the applicant company at UAH 216,150,544, this award implied a specific volume of oil products at the 1997 prices. Given the constant growth in the price of oil products, the applicant company considered that the amount of the judicial debt had increased accordingly. In substantiation of this position it relied, in particular, on the Ministry of Justice forensic accounting expert report of 24 December 2001 and the SORGEM report of 5 June 2012 (see paragraphs 18-24 and 36-51 above). The Government, however, insisted that the amount in question had been established in monetary terms with precision.

86. The Court considers that the mentioned expert reports cannot be accepted as a comprehensive, convincing and sufficient basis for the determination of the exact amount of the damages in the present case, in particular, in view of the insufficiency of the data they were based on (see and compare *Decheva and Others v. Bulgaria*, no. 43071/06, § 69, 26 June 2012). Namely, the evaluation of the Ministry of Justice report was confined to the agreement between the applicant company and LyNOS of 20 August 1997. It appears from its contents that that report took into account neither the subsequent partial implementation of that agreement nor the findings of the HAC ruling of 2 July 1998. As to the SORGEM report, it disregarded altogether the transfer of the LyNIK shares into the applicant company's possession.

87. In the Court's opinion, the judicial ruling of 2 July 1998 was unambiguous in determining the final debt owed to the applicant company

at UAH 216,150,544. The practical modalities for its repayment remained beyond that court's evaluation and it referred in that regard to the agreement of 20 August 1997. Accordingly, the Court considers it unfounded to simply express the debt under that ruling in terms of certain types and volumes of oil products.

88. Furthermore, the Court cannot accept the applicant company's interpretation of the report by Spetsotsinka-Ukraine LLC as establishing a "zero" value for the LyNIK shares in question. The experts explicitly stated that this task was impossible and that their conclusions only concerned the investment attractiveness of the shares at the time of the report (see paragraph 31 above).

89. It follows that the only reference point for the value of the shares is their declared nominal value as of November 2003 of UAH 1 per share (see paragraph 25 above). It appears impossible to verify the credibility of this valuation. The Court also notes that there have been no further valuations of which it is aware. At the same time, it cannot consider it established that, as the applicant company claims, the LyNIK shares were and remain worthless.

90. The Court also finds it necessary to emphasise that the quashing of the final judicial decision of 2 July 1998, being in the applicant company's favour, was not the only violation it found in the principal judgment. There were other aspects, such as the domestic courts' lack of impartiality and independence, that had adverse effects on the applicant company's property interests but which are impossible to quantify.

91. The Court accepts that the prolonged impossibility for the applicant company to use the money it was entitled to had negative consequences for its business activities. However, the Court finds it equally impossible to calculate the loss of enjoyment in exact terms, particularly given that the present case concerns the commercial activities of a company, which implies the taking of risks and a degree of uncertainty as to the use and the profitability of the possessions in question (see *Basarba OOD v. Bulgaria*, cited above, § 26).

92. The Court also considers that the violations it has found of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in the instant case must have caused the applicant company prolonged uncertainty in the conduct of its business (see *Rock Ruby Hotels Ltd v. Turkey* (just satisfaction), no. 46159/99, § 36, 26 October 2010, and *Centro Europa 7 S.R.L. and di Stefano v. Italy* [GC], no. 38433/09, § 221, ECHR 2012).

93. Having regard to the lapse of time, the large number of imponderables involved and the impossibility of quantifying the applicant company's pecuniary and non-pecuniary losses in exact terms, the Court considers that it must rule in equity and make a global assessment, taking as a starting point the award under the HAC ruling of 2 July 1998 (see paragraph 84 above).

94. In view of the above, the Court considers it reasonable to award the applicant company an aggregate sum of EUR 27,000,000, covering all heads of damage, plus any tax that may be chargeable on that amount.

95. The Court has decided to allow payment of this sum by instalments and has fixed time-limits for settlement accordingly (Rule 75 § 3 of the Rules of Court).

B. Costs and expenses

1. The parties' submissions

96. The applicant company claimed EUR 490,395.15 in respect of the costs incurred for legal services provided by its Ukrainian and French lawyers. This amount comprised the following sums:

- fees for the legal services rendered – EUR 468,294.94;
- expenses incurred for business trips – EUR 16,883.33;
- other pertinent costs (telephone charges, postage, and so on) – EUR 5,216.88.

97. In substantiation of these claims, the applicant company submitted invoices from the law firms representing its interests in the LyNOS insolvency proceedings between 2000 and 2004, for a total of UAH 568,054.20 (in December 2004, the equivalent of EUR 76,435). The applicant company also submitted invoices from Cabinet Lucas-Delvolle, Salkom, and Trillat and Associés for a total of EUR 390,388.76, in respect of its representation in the proceedings before the Court from 2003 to 2012. According to the time-sheets submitted, the companies' lawyers spent about 1,200 working hours on the case.

98. The Government pointed out that the difference between the amount of costs and expenses initially claimed by the applicant company in 2010 (EUR 253,878.95 – see § 176 of the principal judgment) and the amount they claimed in 2012 was EUR 200,000. In their opinion, the applicant company could not have reasonably incurred such expenses in the preparation of the just satisfaction claims alone.

99. Furthermore, the Government submitted that the applicant company's claims were excessive and not supported by sufficient documentary evidence.

2. The Court's assessment

100. The Court reiterates that in order for costs and expenses to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Amihalachioaie v. Moldova*, no. 60115/00, § 47, ECHR 2004-III).

101. In the present case, the Court considers that not all the legal costs claimed were necessarily and reasonably incurred, given that there was some duplication in the work carried out by the foreign and the domestic lawyers, as can be seen from the relevant time sheets. Making its own estimate on the basis of the information available, the Court awards the applicant company EUR 30,000 in respect of costs and expenses.

C. Default interest

102. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds

(a) that the respondent State is to pay the applicant company in two instalments the total sum of EUR 27,000,000 (twenty-seven million euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, namely:

(i) EUR 13,500,000 (thirteen million five hundred thousand euros) within twelve months and

(ii) the remaining EUR 13,500,000 (thirteen million five hundred thousand euros) within twenty-four months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention;

(b) that from the expiry of the above-mentioned time-limits until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

2. Holds

(a) that the respondent State is to pay the applicant company EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 25 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President