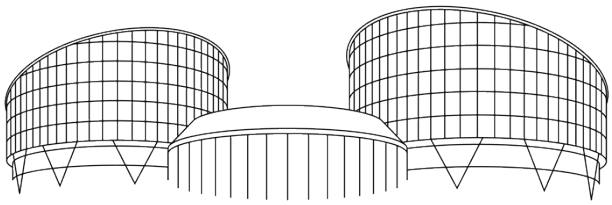

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF PERDIGÃO v. PORTUGAL

(Application no. 24768/06)

JUDGMENT

STRASBOURG

16 November 2010

This judgment is final but may be subject to editorial revision.

In the case of Perdigão v. Portugal,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President,*
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Josep Casadevall,
Ireneu Cabral Barreto,
Karel Jungwiert,
Elisabet Fura,
Alvina Gyulumyan,
Sverre Erik Jebens,
Ján Šikuta,
Ineta Ziemele,
Mark Villiger,
Giorgio Malinverni,
George Nicolaou,
Zdravka Kalaydjieva,
Mihai Poalelungi, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 17 March 2010 and on 6 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 24768/06) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Portuguese nationals, Mr João José Perdigão and Mrs Maria José Queiroga Perdigão ("the applicants"), on 19 June 2006.

2. The applicants were represented by Mr A.C. Miranda and Mr J. Perdigão, lawyers practising in Lisbon. The Portuguese Government ("the Government") were represented until 23 February 2010 by their Agent, Mr J. Miguel, Deputy Attorney-General, and thereafter by Mrs M.F. Carvalho, also Deputy Attorney-General.

3. The applicants complained in particular of a violation of their property rights because the compensation for expropriation awarded to them had ultimately been fully absorbed by the amount they had to pay to the State in court fees.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 24 April 2008 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. On 4 August 2009, ruling on admissibility and the merits, a Chamber of that Section composed of Françoise Tulkens, Ireneu Cabral Barreto, Vladimiro Zagrebelsky, Danutė Jočienė, Dragoljub Popović, András Sajó and Işıl Karakaş, judges, and also of Françoise Elens-Passos, Deputy Section Registrar, declared, by a majority, the application admissible in respect of the complaints under Article 1 of Protocol No. 1 and the remainder of the application inadmissible. It held by five votes to two that there had been a violation of Article 1 of Protocol No. 1. Judge Zagrebelsky expressed a dissenting opinion, in which he was joined by Judge Sajó.

6. On 10 December 2009 a panel of the Grand Chamber decided, on an application by the Government, to refer the case to the Grand Chamber, as provided for in Article 43 of the Convention.

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. At the final deliberations, Mihai Poalelungi, substitute judge, replaced Giovanni Bonnello, who was unable to attend (Rule 24 § 3).

8. On 19 January 2010 the Grand Chamber decided to dispense with a hearing in this case, being of the opinion that the discharging of its functions under Article 38 § 1 (a) of the Convention did not require one to be held (Rule 59 § 3 *in fine*). The parties were invited to file memorials on the merits of the case, but only the Government did so.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born in 1932 and 1933 respectively and live in Lisbon.

A. The expropriation

10. The applicants owned a piece of land measuring 128,619 m² in the region of Evora. By order of the Ministry of Public Works, published in the Official Gazette on 11 September 1995, the land was expropriated in favour of BRISA – Auto-Estradas de Portugal S.A. (“BRISA”), a publicly owned company at the time, to build a motorway.

11. As no agreement was reached between the applicants and the authorities, the case was submitted, in accordance with the applicable legislation, to the President of the Evora Court of Appeal, who appointed an arbitration committee to value the land. The committee assessed its value at 177,987.17 euros (EUR)[1].

12. On 3 March 1997 the Evora first-instance court issued an order notifying the applicants of the arbitration committee's decision.

13. On 21 March 1997 the applicants lodged an appeal against the arbitration decision with the Evora court. In their opinion the experts had underestimated the value of their farmland and omitted to place a value on a quarry located on the land. They argued that the potential profit from exploiting the quarry should be taken into account when calculating the amount to be paid in compensation for the expropriation. In their opinion they were entitled to EUR 20,864,292 in compensation.

14. BRISA also challenged the arbitration value, which they considered too high. They thought the value should not exceed EUR 72,643. Their appeal was initially rejected by the Evora court as being out of time, but it was later admitted after the Evora Court of Appeal had delivered a judgment on 11 December 1997 setting aside the initial decision.

15. On 7 April 1997 the Evora court registry calculated the total court fees due in the applicants' case to be EUR 158,381.

16. On 24 April 1998 the Evora court decided that no compensation should yet be paid to the applicants as the court fees might well be higher than the minimum sum that might be awarded to the applicants in compensation according to the appeals lodged by the parties, BRISA having requested that the sum be fixed at EUR 72,643. The court then appointed a new arbitration committee made up of three experts appointed by the court and two appointed by the parties (one each). On 11 March 1999, by a majority, the arbitrators set the compensation at EUR 191,116. The arbitrator appointed by the applicants expressed the view that they should be paid EUR 4,040,897.

17. By an order of 25 March 1999 the court, of its own motion, requested a new expert report, restricted this time to the question of the economic potential of the quarry located on the land. Three geologists from the University of Evora were accordingly appointed as experts. They submitted their report on 9 February 2000, concluding that the maximum amount the exploitation of the quarry could be expected to yield was EUR 9,704,113.

18. By a judgment of 30 June 2000 the court dismissed both parties' appeals. Considering that the potential gain from the quarry was not to be

[1] Although some of the sums were expressed in Portuguese escudos at the time (the euro having been introduced on 1 January 2002), for the sake of simplicity all sums mentioned in this judgment will be expressed in euros.

taken into account, it fixed the compensation for the expropriation at EUR 197,236.25.

19. On 14 July 2000 the applicants lodged an appeal against that judgment with the Evora Court of Appeal.

20. In a judgment of 10 July 2003 the Court of Appeal upheld the judgment in full.

21. On 11 November 2003 the applicants appealed to the Supreme Court but, in an order dated 30 September 2004, the judge rapporteur of the Supreme Court declared the appeal inadmissible.

22. On 26 October 2004 the applicants lodged a constitutional appeal, which the Constitutional Court declared inadmissible by a summary decision on 20 December 2004.

23. On 26 January 2005 the file was transmitted to the Evora court.

B. Court fees

24. On 4 February 2005 the applicants received notice from the Evora court of the court fees owed for the expropriation proceedings. The sum they were expected to pay amounted to EUR 489,188.42.

25. On 22 February 2005 the applicants filed a complaint about the fees, alleging in particular that they violated the principles of fair compensation and the right of access to a court. They considered that the sum to be paid, if it was to be proportionate, should not exceed EUR 15,000. They also pointed out what they considered to be various inaccuracies and miscalculations in the court fees. They challenged the basis used before the Evora court to calculate the court tax (which they claimed should have been that stipulated in Article 18 § 2 of the Court Fees Code), as well as the legitimacy of being required to pay anything at all in respect of costs and expenses (*custas de parte*) to BRISA, which, as a State enterprise, was exempt from paying court fees.

26. On 1 April 2005, acting on information provided by the registry, the Evora court judge acknowledged the mistakes the applicants had pointed out and ordered their rectification. The amount owed was thus reduced to EUR 309,052.71 so, once the compensation awarded to the applicants had been deducted, they still owed the State EUR 111,816.46. The judge dismissed the applicants' complaint regarding the alleged violations of the principles of fair compensation and the right of access to a court.

27. The applicants appealed to the Evora Court of Appeal. In a judgment of 13 December 2005, of which they were notified on 19 December 2005, the court dismissed the appeal.

28. On 12 May 2006 the applicants lodged a constitutional appeal against that decision, alleging that the interpretation of the relevant provisions of the Court Fees Code, particularly Article 66 § 2, was contrary to the principles of fair compensation and the right of access to a court

guaranteed in the Constitution. In their view, court fees should on no account exceed the sum awarded in compensation for an expropriation.

29. In a judgment of 28 March 2007 the Constitutional Court dismissed their appeal. After noting that it could only examine the constitutionality of Article 66 § 2 of the Court Fees Code, the only provision the courts below had applied, it went on to hold that the provision concerned was not contrary to Articles 20 (access to a court) and 62 § 2 (fair compensation) of the Constitution. Concerning access to a court, it pointed out that while excessively high court fees could in some circumstances be an obstacle to access to a court, this was not the case in this instance as the applicants had been required to pay only EUR 15,000, a sum it considered reasonable. On the subject of fair compensation, the Constitutional Court found that compensation for the loss suffered as a result of expropriation was quite unrelated to the matter of court fees, and that there was accordingly no reason why court fees should not exceed the sum awarded in compensation.

30. On 20 April 2007 the applicants filed a request to have that judgment rectified, claiming that the Constitutional Court had made a factual mistake, in so far as it had considered in its reasoning that the applicants owed EUR 15,000 in court fees when they were in fact expected to pay EUR 111,816.46.

31. In a judgment of 25 September 2007 the Constitutional Court acknowledged its mistake and the need to rectify the judgment in respect of Article 20 of the Constitution. It found that EUR 111,816.46 was a large enough sum to have affected the right of access to a court. It accordingly declared Article 66 § 2 of the Court Fees Code, as interpreted by the lower courts, contrary to Article 20 of the Constitution. In respect of Article 62 § 2 of the Constitution concerning fair compensation, however, it held that its earlier decision needed no rectification.

32. On 6 November 2007 the applicants, wishing to know the exact sum they owed in court fees, filed a request for clarification of the judgment of 25 September 2007.

33. In a judgment of 13 November 2007 the Constitutional Court rejected that request, considering that it was for the lower court to determine the sum to be paid.

34. In an order of 4 January 2008, the Evora court, to which the case had been referred back, decided, without giving reasons, that the fees should not exceed the compensation awarded by more than EUR 15,000.

35. On 20 February 2008 the applicants paid the outstanding sum of EUR 15,000.

C. Application no. 12849/05 to the European Court of Human Rights

36. On 7 April 2005 the applicants lodged an application (no. 12849/05) with the Court complaining about the lack of compensation in respect of the

quarry. The application was rejected by a committee on 30 August 2005, as being out of time.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

37. Article 20 of the Constitution guarantees the right of access to a court. Article 62 of the Constitution guarantees the right of property and the right to fair compensation in the event of expropriation.

B. The Code of Civil Procedure

38. The general rule governing court fees is set forth in Article 446 of the Code of Civil Procedure, under the terms of which it is in principle for the unsuccessful party to pay the court fees.

C. The Expropriations Code

39. At the time of the expropriation in issue, the applicable Expropriations Code was that introduced by Legislative Decree no. 438/91 of 9 November 1991.

40. The expropriation procedure at the time took the following form: if no agreement could be reached between the expropriating authority and the expropriated owner, the President of the Court of Appeal with jurisdiction over the area in which the property to be expropriated was located appointed an arbitration committee to value the property. The owner could appeal against the arbitration decision before the court of first instance, and a new valuation would be ordered if necessary. The decision of the first-instance court was open to appeal before the Court of Appeal, whose decision was final (legislative precedent (*assento*) of the Supreme Court of 30 May 1995, binding on all courts and published in the Official Gazette of 15 May 1997).

D. Court fees

41. In Portugal court fees are likened to taxes. The Supreme Court considers that the obligation for litigants to pay court fees is the same as the obligation for taxpayers to pay taxes. The State, as the "active subject" of the fiscal obligation concerned, thus has the right to collect the fees; in exchange, it must give people (the "passive subjects") access to judicial services (judgment of the Supreme Court of 5 February 2004, in case no. 03B3809).

42. At the material time court fees were regulated by the Court Fees Code, as embodied in Legislative Decree no. 224-A/96, of 26 November 1996, before it was amended by Legislative Decree no. 324/2003, of 27 December 2003.

43. The relevant provisions of the Code read as follows:

Article 1 (Notion of court fees)

"1. Court fees shall include the court tax (*taxa de justiça*) and the other charges (*encargos*).

2. Unless otherwise prescribed by law, all proceedings are subject to court fees."

Article 2 (Subjective exemptions)

"1. Without prejudice to the provisions of special laws, the following shall be exempted from court fees:

a) The State and all its services and bodies, even if they have their own legal personality;

..."

Article 6 (Special rules)

"1. In the cases mentioned below, the value of the litigation, for the purposes of calculating court fees, shall be as follows:

...

s) in appeals concerning expropriations, the difference between the compensation for expropriation fixed by the arbitration committee and the sum claimed by [the expropriated party] ...

..."

Article 13 (Court tax calculation scale)

"1. Without prejudice to the following provisions, procedural costs shall be taxed on the basis of the table below and calculated according to the value of the actions, applications and appeals.

...

Value up to ... euros	Court tax (in euros)
149.64	29.93
299.28	39.90
498.80	49.88
784.20	59.86

997.60	69.83
1,246.99	79.81
1,496.39	89.78
1,745.79	99.76
1,995.19	109.74
2,244.59	119.71
2,493.99	129.69
2,743.39	139.66
2,992.79	149.64
3,242.19	159.62
3,491.59	169.59
3,740. 98	179.57
3,990.38	189.54
4,239.78	199.52
4,489.18	209.50
4,738.58	219.47
4,987.98	229.45
5,985.57	239.42
6,983.17	249.40
7,980.77	259.37
8,978.36	269.35
9,975.96	279.33
11,472.35	299.28
12,968.75	319.23
14,465.14	339.18
15,961.53	359.13
17,457.93	379.09
18,954.32	399.04
20,450.71	418.99
21,947.11	438.14
23,443.50	458.89
24,939.89	478.85
27,433.88	498.80
29,927.87	518.75
32,421.86	538.70
34,915.85	558.65
37,409.84	578.61
39,903.83	598.56
42,397.82	618.51
44,891.81	638.46
47,385.80	658.41
49,879.79	678.37
In excess of 49,879.79	49.88 per step of 4,987.98 euros

Article 18 (Court tax in appeal courts)

"...

2. In all types of appeals against decisions pronounced in any action or application ... the court tax shall be half the amount shown in the tax column in the table [in Article 13].

..."

Article 29 (Dispensation from advance and subsequent payments)

"...

2. No advance payment shall be required in expropriation proceedings ..."

Article 66 (Payment of fees out of sums payable to the party concerned by order of the court)

"1. A party ordered to pay court fees who is awarded a sum of money by decision of the court may request, within the time-limit for voluntary payment, that the court fees owed be deducted from the sum awarded.

2. Court fees owed by an expropriated party shall be deducted from the compensation awarded for the expropriation."

44. The *custas de parte* (costs and expenses) are sums payable to the successful party at the end of the proceedings. Under Article 33 of the Court Fees Code as applicable at the material time, they included the sums the successful party had been obliged to spend in connection with the proceedings.

E. The new Court Fees Code

45. On 24 February 2008 a new Court Fees Code was introduced (Legislative Decree no. 34/2008). The explanatory memorandum includes the following passage:

"According to the new scale, the court tax is not calculated simply on the basis of the value in dispute. It has been found that the sum in dispute is not a decisive factor in assessing the complexity of the proceedings or in the costs generated for the legal system. The search for a better way to calculate the court tax has led to the establishment of a mixed system based on the value in dispute up to a certain limit, with the possibility of correcting the amount where the proceedings are complex, independently of the economic value considered to be at stake."

46. Under the new system there is therefore an upper limit on the amount that can be charged in court fees. At present, for proceedings at first

instance, that amount equals 60 units of account[1] for ordinary proceedings or 90 units of account if the proceedings are particularly complex. The charge for appeals is 20 units of account. Applications made during the proceedings continue to be taxed, of course, at a rate of up to 20 units of account, depending on the type of application (see tables appended to Legislative Decree no. 34/2008 and Articles 6, 7, 8, 11, 12, 13 and 17 of that text).

III. COMPARATIVE LAW

47. The Court undertook a comparative law study concerning the payment of court fees in a number of member States of the Council of Europe.

48. The study revealed that, generally speaking, the court fees charged vary according to the sum claimed (except in countries where fees charged are not based on the sum in dispute). The fees may represent a percentage of that sum, a lump sum, or a combination of the two. In many States where the fees charged are linked to the value of the claim, there is an upper limit on how much one party can be charged, but in some States there is no such limit.

49. In general the unsuccessful party is required to pay the costs of the other party. Where a claim is allowed only in part, most of the States covered by the study leave it to the discretion of the courts to decide who pays what fees. In some States special rules apply to expropriation proceedings. In one such State, for example, when fees are calculated as a percentage of the compensation offered, the principle is that the expropriated owner must nevertheless be repaid in full; in other words, all the costs effectively incurred by that party must be reimbursed, as he normally has a right to full reparation for the prejudice suffered.

50. In many States there is no guarantee that a complainant will not be charged costs and expenses in excess of the sum likely to be awarded in respect of his claim, especially when only a small part of the claim is allowed. No such risk exists in those States where court fees are calculated only at the end of the proceedings and based on the sum effectively awarded by the court.

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[1] The unit of account used to calculate court fees was fixed at EUR 102 for 2010 (Article 5 § 2 of the new Court Fees Code and Order no. 1458/2009 of the Ministers of Finance and of Labour and Social Solidarity, of 31 December 2009).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

51. The applicants complained that the compensation for expropriation awarded to them had ultimately been fully absorbed by the amount they had to pay to the State in court fees. They considered this to be a violation of Article 1 of Protocol No. 1, which reads as follows:

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

A. The Chamber judgment

52. In its judgment the Chamber noted that the lack of compensation the applicants complained of was caused by the application of the rules governing court fees, which were "contributions" within the meaning of the second paragraph of Article 1 of Protocol No. 1, and that this provision concerned particular instances of interference with the right to peaceful enjoyment of property. In this case, however, the Chamber considered it more appropriate to examine the situation complained of in the light of the rule set forth in the first sentence of paragraph 1 of Article 1 of Protocol No. 1, which was a general rule guaranteeing the right to peaceful enjoyment of property. It noted that the applicants disputed neither the lawfulness of the expropriation as such nor that of the regulations governing court fees as applied to them. Nor was there anything to indicate that the impugned interference was at all arbitrary, the applicants having had the opportunity, *inter alia*, to put their arguments to the domestic courts. Unlike the Government, the Chamber considered that the applicants could not be blamed for trying, by the procedural means available to them, to persuade the court to include in the compensation figure elements they considered essential. It considered that it was not the Chamber's role to examine, generally, Portugal's method of calculating and fixing court fees, but noted that in the instant case the concrete application of that method had led to a complete lack of compensation for the expropriation of the applicants' property. It found that, in the circumstances, the compensation conditions –

or more precisely the lack of compensation – had placed an excessive burden on the applicants, upsetting the fair balance which must be struck between the general interest of the community and the fundamental rights of the individual.

B. The Government's submissions to the Grand Chamber

53. Concerning the subject of the application, the Government pointed out that it was not the expropriation as such that the Court was required to examine. The applicants had lodged an application in that respect, but the Court had rejected it as being out of time. The only issue here was the compatibility with Article 1 of Protocol No. 1 of the sum the applicants had been expected to pay in court fees.

54. Next, turning to the Portuguese method of calculating court fees applicable at the time and that in place since 2008, the Government pointed out that the Convention did not require judicial services to be provided free of charge. It did, on the other hand, provide for the States to exercise their margin of appreciation in introducing legislation to secure the payment of "taxes" or other "contributions" within the meaning of Article 1 of Protocol No. 1 and, according to the well-established case-law of the European Commission of Human Rights, court fees were just such "contributions" (*Agis Antoniades v. the United Kingdom*, no. 15434/89, Commission decision of 15 February 1990, Decisions and Reports (DR) 64, p. 237).

55. The Government criticised the Chamber judgment, considering it methodologically inappropriate and legally incorrect to confuse compensation for an expropriation and the court fees to be paid. Referring to the dissenting opinion attached to the judgment (see paragraph 5 above), the Government considered that the Chamber's conclusions confused two legally different things: "the credit and the debt, [which were] two completely separate things". The Government gave the example of a situation where a creditor lodged a claim to recover a certain sum, and the debtor filed a counter claim for a sum higher than that claimed by the creditor; if the court allowed the counterclaim, the creditor would receive nothing and, in addition, would have to pay the costs, without there being, the Government argued, any interference with the peaceful enjoyment of possessions.

56. According to the Government, the alleged violation of the applicants' rights related only to the court fees they were ordered to pay. However, those fees had been fixed in accordance with the applicable provisions of the Code of Civil Procedure and the Court Fees Code, on the one hand, and with the principle of proportionality on the other. The total amount the applicants had paid – amounting to 1.02% of the amount they had claimed – had been calculated, the Government argued, taking into account the

considerable procedural activity in which they had engaged and the actual amount claimed, which had clearly been unrealistic.

C. The Court's assessment

1. Applicability of Article 1 of Protocol No. 1

57. The Court reiterates that Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among other authorities, *James and Others v. the United Kingdom,* 21 February 1986, § 37, Series A no. 98, which reproduces in part the analysis given by the Court in its judgment in *Sporrong and Lönnroth v. Sweden* (23 September 1982, § 61, Series A no. 52), and *Depalle v. France* [GC], no. 34044/02, § 77, 29 March 2010).

58. It is not in dispute between the parties that in the instant case the situation complained of falls within the scope of that provision. The Government disagreed with the Chamber's conclusion, however, that the applicants' complaint was to be examined in the light of the general rule enunciated in the first sentence. Stressing that the expropriation as such was not in issue, they contended that the only question to be examined was whether the sum the applicants were ordered to pay in court fees was compatible with Article 1 of Protocol No. 1.

59. While it is true that there is no need for the Court to examine the expropriation as such (see paragraphs 36 and 53 above), the fact remains that it was because the applicants were deprived of their property by the State that the dispute over court fees at the origin of the present application arose. This has a definite effect on the way in which the alleged interference with the applicants' right must be analysed: the Court's case-law requires that in the event of deprivation of property in the public interest, the owners be paid compensation bearing a reasonable relation to the value of the expropriated property (see *Papachelas v. Greece* [GC], no. 31423/96, § 48, ECHR 1999-II). The Court reiterates in this connection that when it examines whether there has been a violation of the right to the peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No. 1, it must

look beyond appearances and investigate the realities of the situation complained of, since the Convention is intended to guarantee rights that are "practical and effective" (see *Depalle*, cited above, § 78).

60. That said, there is no denying that the applicants' complaint concerns the way in which the regulations governing court fees were applied in their case. The Government emphasised that the second paragraph of Article 1 of Protocol No. 1 acknowledged the right of the States, in exercising their margin of appreciation, to enforce laws to secure the payment of "taxes" and other "contributions". They referred to the well-established case-law of the European Commission of Human Rights, according to which the costs to be paid in connection with judicial proceedings are "contributions" within the meaning of that provision (see *Agis Antoniades*, cited above; see also *Aires v. Portugal*, no. 21775/93, Commission decision of 25 May 1995, DR 81, p. 48, cited in the Chamber judgment; *X. and Y. v. Austria*, no. 7909/74, Commission decision of 12 December 1978, DR 15, p. 160; and *X. v. F.R.G.*, no. 7544/76, Commission decision of 12 July 1978, DR 14, p. 60).

61. Like the Chamber, the Grand Chamber considers it necessary to confirm the decisions of the Commission to the effect that court fees are to be considered as "contributions" within the meaning of the second paragraph of Article 1 of Protocol No. 1. Indeed, charging litigants court fees pursues various aims, including financing the judicial system and increasing public revenue. And although collecting these fees in Portugal is not the role of the tax authorities, the obligation to pay them is clearly one of a fiscal nature (see paragraph 41 above). According to the information available to the Court, that also seems to be the case in other Council of Europe member States. So, the obligation to pay court fees – and the corresponding regulations – is covered by the second paragraph of Article 1 of Protocol No. 1, as the fees are "contributions" within the meaning of that provision. In the circumstances of the instant case this raises the question whether and to what extent the order to pay the court fees concerned can be considered to have amounted to an interference with the applicants' right to the peaceful enjoyment of their possessions (see, *mutatis mutandis*, *Aires*, cited above), as the money the applicants were required to pay in court fees absorbed fully the compensation awarded for the expropriation, which amounted to a "possession" within the meaning of Article 1 of Protocol No. 1.

62. In the light of the foregoing, the Grand Chamber considers that the applicants' complaint should be examined under Article 1 of Protocol No. 1 taken as a whole, especially as the situations envisaged in the second sentence of the first paragraph and in the second paragraph are only particular instances of interference with the right to peaceful enjoyment of property as guaranteed by the general rule set forth in the first sentence (see *Beyeler v. Italy* [GC], no. 33202/96, § 106, ECHR 2000-I). However, this approach, made necessary by the particular circumstances of the case, does

not alter the fact that court fees are "contributions" within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see paragraph 61 above).

2. Compliance with Article 1 of Protocol No. 1

63. The Court reiterates that to be compatible with Article 1 of Protocol No. 1 any interference with the peaceful enjoyment of possessions should be lawful and not arbitrary (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II). A "fair balance" must also be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Sporrong and Lönnroth*, cited above, § 69).

64. This "fair balance" must exist even when States exercise their right "to enforce such laws as they deem necessary ... to secure the payment of taxes or other contributions". Indeed, as the second paragraph is to be construed in the light of the general principle enunciated in the opening sentence of Article 1 of Protocol No. 1, there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised; in other words, the Court must determine whether a fair balance has been struck between the demands of the general interest and the interest of the individuals concerned (see *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 60, Series A no. 306-B; see also *AGOSI v. the United Kingdom*, 24 October 1986, § 52, Series A no. 108).

a) Requirement of lawfulness

65. The Grand Chamber notes that the applicants disputed neither the lawfulness of the expropriation as such, nor that of the regulations governing court fees as applied to them. The Chamber, moreover, found no indication of arbitrariness as the applicants had had the opportunity, *inter alia*, to put their arguments to the domestic courts.

66. Even without knowing the reasons behind the Evora court order of 4 January 2008 fixing the court fees at a level that exceeded the compensation awarded for the expropriation by no more than EUR 15,000, the Court considers that there is no need for it to examine this question further, bearing in mind, *inter alia*, the considerations set out below concerning the question of a "fair balance".

b) Fair balance

67. The Court reiterates that the search for this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, regardless of which paragraphs are concerned in each case; there must always be a reasonable relationship of proportionality between the means employed and the aim

pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of the measures taken are justified in the general interest for the purpose of achieving the object of the interference in question. The requisite balance will not be achieved if the person concerned has had to bear an individual and excessive burden (see *Depalle*, cited above, § 83).

68. Ascertaining whether such a balance existed requires an overall examination of the various interests in issue. The Court considers that two important factors must be taken into account. First, as the Court has already pointed out, the situation complained of arose because the applicants were deprived of their property. In such situations, a "fair balance" requires the payment of a sum reasonably related to the value of the property, failing which there is an excessive interference with the individual's rights. The Court further points out that the Convention is intended to guarantee rights that are "practical and effective" rather than theoretical and illusory (see paragraph 59 above). The Court must also examine the conduct of the parties to the dispute, including the means employed by the State and their implementation (see *Beyeler*, cited above, § 114).

69. In the instant case the applicants were awarded EUR 197,236.25 in compensation for the expropriation. However, when the amount they owed in court fees was determined, they in fact received nothing. Instead, they had to pay the State an additional EUR 15,000, even after the initial sum had been substantially reduced.

70. The Grand Chamber notes that its task is not to examine in the abstract the Portuguese method of calculating and fixing court fees. As the Chamber pointed out, the States must be able to take the measures they consider necessary to protect the balanced funding of their justice systems in the general interest. In such matters, the States enjoy a wide margin of appreciation.

71. The Court must therefore consider how that method was applied in the concrete case before it. Clearly the intended outcome of Article 1 of Protocol No. 1 was not achieved here: not only were the applicants deprived of their land, but in addition they had to pay the State EUR 15,000.

72. The Government stressed that the obligation for the State to pay compensation for expropriation and the obligation for litigants to pay court fees were legally two different things. Court fees had nothing to do with expropriation proper and, as such, they had no bearing on the question of compliance with Article 1 of Protocol No. 1. The Court accepts that the legal purpose of each of the above obligations is not the same. Indeed, the Court takes this difference into account when it classifies court fees as "contributions" within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see paragraph 61 above). It notes, however, that in the present case the applicants were parties to legal proceedings against the

State concerning the fixing of compensation for an expropriation carried out by the State in the exercise of its public-authority functions. The Court considers that this case is to be distinguished, when examining the question of proportionality, from those where court fees are charged in private-law disputes. In the particular circumstances of the case it might appear paradoxical that the State should take away with one hand – in court fees – more than it has awarded with the other. In such a situation, the difference in legal nature between the obligation for the State to pay compensation for expropriation and the obligation of litigants to pay court fees does not constitute an obstacle to the overall examination of the proportionality of the impugned interference.

73. Concerning the proportionality of the interference, the Government also described the applicants' behaviour in the proceedings as reckless, contending that the sum the applicants had been required to pay was the consequence of the manifestly unrealistic sum they had claimed, and of the considerable procedural activity they had set in motion.

74. The Court notes that the applicants did indeed claim a sum well in excess of the sums suggested in the various expert reports produced in the course of the proceedings. Having regard to the relevant Portuguese legislation, of which the applicants were aware, claiming such a large sum affected the final amount of the court fees. However, the Court points out that the question was, *inter alia*, whether the potential profits from the economic exploitation of the quarry located on the property should be taken into account in the compensation for the expropriation. When the applicants put the question to the domestic courts it was given in-depth consideration, the Evora court going as far as to order a third expert report of its own motion, after the reports required by law had already been produced. While the applicants' conduct certainly contributed to the high court fees, that was not sufficient justification for the fees to be so high as to result in a total lack of compensation, particularly in a case involving expropriation.

75. As to the applicants' conduct, which the Government criticised, the Court notes that the proceedings were indeed marked by a large number of appeals and applications. It observes, however, that not all the procedural steps were attributable to the applicants, and that the conduct concerned related mainly to the determination of the court fees. The matter of the actual deprivation of property had been resolved by the Evora first-instance court and Court of Appeal, even if the Supreme Court and the Constitutional Court did deliver inadmissibility decisions in respect of appeals lodged by the applicants. What gave rise to the subsequent decisions of the Evora first-instance court and Court of Appeal and also, on three occasions, of the Constitutional Court, was the fact that the applicants challenged the quantum of the court fees they were ordered to pay by the domestic courts.

76. The Court accordingly finds that neither the applicants' conduct nor the procedural activity set in motion can justify such high court fees, having regard to the amount awarded in respect of the expropriation.

77. Lastly, the Court notes the enactment, on 24 February 2008, of the new Court Fees Code, which placed an upper limit on the sums that could be charged in court fees. If the new rules had been applied in the instant case, the court fees imposed would have been considerably lower (see paragraphs 45 and 46 above). The new rules thus seem less likely to give rise to a situation such as that which arose in the present case.

78. In view of the above, the Court considers that the applicants had to bear an excessive burden which upset the fair balance which must be struck between the general interest of the community and the fundamental rights of the individual.

79. There has accordingly been a violation of Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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 Chamber judgment

81. When fixing the level of compensation for the pecuniary damage sustained, the Chamber took into account the court fees the applicants had been ordered to pay. It accordingly considered it equitable to award the sum of EUR 190,000 in respect of pecuniary damage.

2. The parties' submissions

82. Before the Chamber the applicants claimed EUR 197,236.25 in respect of pecuniary damage, corresponding to the compensation awarded by the Portuguese courts for the expropriation of their land. They also claimed EUR 100 in respect of non-pecuniary damage.

83. The Government had considered that the sum claimed in respect of pecuniary damage had no bearing on the subject of the application, arguing that to award such a sum would deprive the national justice system of payment for the considerable procedural activity to which the applicants'

case had given rise. Concerning the claim in respect of non-pecuniary damage, the Government had left the matter to the Court's discretion.

3. The Court's assessment

84. As the applicants have submitted no additional claims, the Grand Chamber will examine those made before the Chamber.

85. It reiterates in this connection 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 make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000-XI). If domestic 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 it deems appropriate. The Court enjoys a certain discretion in the exercise of that power, as the adjective "just" and the phrase "if necessary" attest. Among the matters which the Court takes into account when assessing compensation are pecuniary damage, that is the loss actually suffered as a direct result of the alleged violation, and non-pecuniary damage, that is reparation for the anxiety, inconvenience and uncertainty caused by the violation. In addition, 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).

86. In the Court's opinion the situation in dispute here calls for an assessment on an equitable basis, as provided for in Article 41. In making its assessment, the Court takes into account the fact that the applicants have had to pay court fees, and have indeed already paid out EUR 15,000 under that head. It considers it reasonable to award the applicants a total of EUR 190,000 in respect of all heads of damage combined.

B. Costs and expenses

87. As the applicants made no claim for costs and expenses, the Court makes no award under this head.

C. Default interest

88. The Court considers it appropriate that the default interest 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

1. *Holds* by fourteen votes to three that there has been a violation of Article 1 of Protocol No. 1;

2. *Holds* by fourteen votes to three
   (a) that the respondent State is to pay the applicants, within three months, EUR 190,000 (one hundred and ninety thousand euros) in respect of all heads of damage, plus any tax that may be chargeable;
   (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* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 November 2010.

Johan Callewaert	Jean-Paul Costa
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Joint concurring opinion of Judges Ziemele and Villiger;
(b) Joint dissenting opinion of Judges Lorenzen, Casadevall and Fura.

J.-P.C.
J.C.

JOINT CONCURRING OPINION OF JUDGES ZIEMELE AND VILLIGER

1. We voted with the majority in this case, finding a violation of Article 1 of Protocol No. 1 on the understanding that, on the one hand, States continue to enjoy a large margin of appreciation in determining their systems of court fees and, on the other hand, that the case is rather exceptional.

2. Indeed, as the judgment makes it quite clear, the European Commission of Human Rights explained in the *Aires v. Portugal* case (no. 21775/93, Commission decision of 25 May 1995, Decisions and Reports no. 81, p. 48) that the costs of judicial proceedings are 'contributions' within the meaning of Article 1 of Protocol No. 1, and the question may arise 'whether and to what extent the order to pay the court fees concerned can be considered to have amounted to an interference with the applicants' right to the peaceful enjoyment of their possessions' (paragraphs 60-61). Taking into consideration that the second paragraph of Article 1 of Protocol No. 1 cannot be applied in isolation from the whole Article, and having regard in particular to the general principle enunciated in the first sentence, i.e., the peaceful enjoyment of possessions, the question whether the amount of court fees as determined in this particular case was disproportionate can be answered only by having due regard to all the circumstances of the case. For us, it was decisive that the dispute over the sum charged in court fees arose in the context of expropriation proceedings between a State and the applicants in which the State not only expropriated the property but also ended up paying no compensation, as the full amount awarded in compensation plus EUR 15,000 was paid by the applicants in court fees. This is not to say that from now on States cannot have systems in which court fees exceed the level of damages claimed. We do not think that this particular judgment deals with that issue. It is, however, established case-law that expropriation requires adequate compensation (*Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 89, ECHR 2000-XII; *Platakou v. Greece*, no. 38460/97, § 55, ECHR 2001), and this is something the structure of Article 1 requires the Court to take into account also when assessing claims about court fees.

3. Finally, we would note that issues of disproportionate court fees have typically been considered by the Court in the context of Article 6, as an element of access to court. Interestingly, in the present case the Portuguese Constitutional Court did consider that the court fees interfered with the applicants' access to court (paragraph 31). In our view, this also shows the disproportionate character of the court fees charged.

JOINT DISSENTING OPINION OF JUDGES LORENZEN, CASADEVALL AND FURA

In the present case the majority found a violation of Article 1 of Protocol No. 1. We are unable to agree with this conclusion for the following reasons:

It may be useful first to recall that the factual background of the case began with the expropriation of a piece of land belonging to the applicants. The value of the land was assessed by an arbitration committee at about EUR 178,000. As the applicants were not satisfied with the amount – mainly because it did not include compensation for the possible exploitation of a quarry located on the land – they instituted court proceedings claiming almost EUR 21,000,000. Shortly after the proceedings were initiated, they were informed by the court that the court fees would amount to a little more than EUR 158,000. During the proceedings various expert opinions were commissioned, and if the quarry was to be taken into account the expertise most favourable to the applicants concluded that the maximum amount the exploitation of the quarry could be expected to yield was some EUR 9,700,000. The expert appointed by the applicants estimated that the compensation should be fixed at approximately EUR 4,000,000. The Portuguese courts all found that the potential gain from the quarry should not be taken into account, and fixed the compensation at a little more than EUR 197,000.

The case before the Court does not concern whether the compensation was incorrectly fixed because it excluded the possible earnings from the quarry, because a complaint of a violation of Article 1 of Protocol No. 1 on that ground was rejected as being out of time (§ 35 of the judgment). The issue to be decided is solely whether the court fees the applicants had to pay – about EUR 212,000 – were so excessive as to amount to a breach of the Convention.

The Court has often found that high court fees may in the particular circumstances of a case constitute a restriction to "the right to a court" in a manner contrary to Article 6 § 1 of the Convention (cf. the leading case *Kreuz v. Poland,* no. 28249/95, ECHR 2001-II, followed by many later judgments). It was also on that ground that the Portuguese Constitutional Court considered it necessary to reduce the amount of the court fees the applicants had been ordered to pay (§ 16 of the judgment). However, the applicants have never made a complaint before this Court that their right to a court under Article 6 § 1 was violated, and we can agree that it is not for the Court to examine a possible violation of that Article of its own motion.

The question whether court fees may be so excessive as to amount to a violation of Article 1 of Protocol No. 1 has not been addressed by the Court before (cf. §§ 60 and 61 of the judgment). The majority endorses the

opinion of the Commission that Article 1 of Protocol No. 1 is applicable to court fees, which must be considered as contributions within the meaning of the second sentence of § 1 of that Article. In our opinion this conclusion is not obvious – at least not as a general one. It can be argued that the obligation to pay court fees is linked to the voluntary use of a public service – the court system – and that this distinguishes it from the obligation to pay taxes and various other charges. We have noted that court fees under Portuguese law are of a fiscal nature (§ 41 of the judgment), but the majority seems not to have limited the applicability of Article 1 of Protocol No 1 to situations where this is the case. The judgment leaves it open to what extent other payments for public services must similarly be considered as "contributions" within the meaning of Article 1 of Protocol No. 1, and thus gives rise to uncertainty about its scope. Furthermore, the judgment does not clearly indicate whether the applicability of that Article is limited to court fees in expropriation proceedings or whether such fees in all kinds of proceedings may now give rise to complaints about an interference with property rights.

However, we need not enter further into these questions as in any event – even assuming that Article 1 of Protocol No. 1 is applicable and there was an interference with the applicants' possession – there has in our opinion been no violation of that Article.

The majority accepts in principle the Government´s argument that the obligation for the State to pay compensation for expropriation and the obligation for the applicants to pay court fees were legally two different things and that "court fees had nothing to do with expropriation proper and, as such, they had no bearing on the question of compliance with Article 1 of Protocol no 1" (§ 72 of the judgment). However, the majority failed, in our opinion, to draw the right conclusion from this acceptance.

It is clear from the judgment that the majority, when assessing the court fees the applicants had been ordered to pay, placed considerable weight on the fact that they concerned expropriation proceedings (§§ 68 and 72, for example). Like the dissenting opinion to the Chamber judgment, we find that the majority of the Grand Chamber too has confused two different things: the compensation for the expropriation and the court fees the applicants had to pay.

The Court has in its case-law so far maintained that the imposition of taxes as a general rule is for the States to decide and that only if the system or the way it has been applied in a particular case is arbitrary should the Court interfere. Similarly, the calculation of court fees must be for the States to decide and in that field they should have a large margin of appreciation. As the comparative study shows, the revenue from court fees is used for a variety of purposes, and it must in our opinion be left to each State to decide how it chooses to finance its court system, as long as it does not become a hindrance to access to court, or put an unacceptable burden on a specific

category of litigants, in which case it would become discriminatory. Such situations must, however, as stated above, be assessed under Article 6 of the Convention or Article 14 combined with Article 6. This judgment can therefore be interpreted as a first step towards abandoning a principle which has so far been followed constantly in our case-law, namely that the imposition of taxes and contributions cannot as a rule be challenged under Article 1 of Protocol No 1. In our opinion such a development is not recommendable.

In the present case it has not been argued that the Portuguese rules on court fees lacked clarity or foresee ability. Article 6 § 1.s) taken together with Article 13 of the former Court Fees Code thus gave precise guidelines on how court fees in expropriation cases were to be calculated. The applicants have not disputed that. The only reason they had to pay court fees that exceeded the compensation they had been awarded was that they claimed an exorbitant amount in the court proceedings which was not supported by any of the expert opinions commissioned. Furthermore the applicants were informed by the first-instance court at an early stage in the proceedings that the court fees would be close to the amount awarded by the arbitration committee. Their situation was in no way different from that of any other litigant claiming an amount largely exceeding what is found justified. We fail to see that litigants in expropriation proceedings should be treated more favourably than, for example, litigants claiming excessive compensation for an accident or a breach of contract – be it against the State or a private defendant.

Finally, unlike the majority, we cannot attach any importance to the fact that the Portuguese legislature later changed the system of calculation of court fees. There is no evidence that this was based on any recognition that the earlier system did not comply with Article 1 of Protocol No 1.

In conclusion, we find that there has been no violation of that Article.