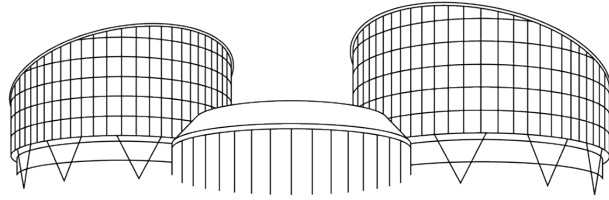

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 28502/08
by TRANSPETROL, a.s.
against Slovakia

The European Court of Human Rights (Third Section), sitting on 15 November 2011 as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Mihai Poalelungi, *judges,*
and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 9 June 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant company,

Having deliberated, decides as follows:

# THE FACTS

1. The applicant, TRANSPETROL, a.s. ("the applicant company"), is a joint-stock company established in 1993 under the laws of Slovakia with its head office in Bratislava.

At various stages of the proceedings before the Court the applicant company was or has been represented by Mr J. Drgonec, Ms E. Csekes,

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Mr Ľ. Novák, Mr O. Korec and Mr M. Krivák, lawyers practising in Bratislava.

2. The Government of the Slovak Republic (“the Government”) were represented by their Agent, Ms M. Pirošíková.

### A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

#### *1. The applicant company*

3. The applicant company specialises in transporting, storing, buying and selling oil. It has a registered capital of 100,843,372 euros.

4. In the past, including at the time of the contested judgment (*nález*) of the Constitutional Court (see paragraphs 21 and 55 below), the State, in the person of the Ministry of the Economy (“the Ministry”), owned 51% of the shares in the applicant company. The remaining shares were owned by private parties.

5. At present all of the shares in the applicant company are owned by the State, in the person of the Ministry.

6. The status and functioning of the applicant company are subject to provisions of the Commercial Code (see paragraph 50 in the “Relevant domestic law” section below). It is subject to the jurisdiction of the ordinary courts.

7. Under the Securing of State Interests on the Privatisation of Strategically Important State-owned Enterprises and Joint-stock Companies Act (“the Strategic Interests Act” – see paragraph 48 in the “Relevant domestic law” section below), the shares in applicant company which were held or owned by the State could not be subject to privatisation.

8. Under the Large-scale Privatisation Act (“the Privatisation Act” – see paragraph 49 in the “Relevant domestic law” section below), the applicant company is listed among a list of entities having the character of a natural monopoly (*prirodzený monopol*).

#### *2. Background*

9. Since 1998 a number of companies and individuals have claimed that they have obtained title to 34% of the shares in the applicant company by way of purchase in the context of a forced sale, carried out pursuant to the enforcement of an adjudicated claim for damages by a third party company against the State.

One such company is a limited liability company, A.

10. The ownership, possession and other rights in respect of the above-mentioned shares have been subject to numerous private-law transactions and a large amount of litigation of various kinds.

11. Various persons involved in the transactions mentioned above, including the representative of company A, a judicial enforcement officer and an advocate, were put on trial on charges of money laundering and fraud. The proceedings appear to be still pending, following a judgment convicting the defendants at first instance.

12. More details are summarised in the Court's decision of 13 November 2003 in the application of *Šándor and Others v. Slovakia* (no. 52567/99).

### *3. Authorisation to call a general meeting of the applicant company*

#### (a) Petition of 4 November 2002

13. On 4 November 2002 company A. lodged a petition with the Bratislava I. District Court (*Okresný súd*) arguing that it was the owner of 5.78% of the shares in the applicant company, which was above the statutory 5% threshold for being entitled to have an extraordinary general meeting ("EGM") of shareholders in the applicant company called.

Company A. argued that the applicant company had ignored a previous request it had made to call an EGM and sought judicial authorisation to do so itself.

The applicant company was the defendant in those proceedings.

14. On 18 November 2004 the District Court allowed the petition and authorised company A. to call an EGM, having found it established that company A. was the owner of 110 shares in the applicant company.

15. On 27 July 2005, exercising his discretionary power, the Prosecutor General challenged the decision of 18 November 2004 in the Supreme Court (*Najvyšší súd*) by way of an extraordinary appeal on points of law (*mimoriadne dovolanie*).

16. Relying on Articles 4 and 20 § 2 of the Constitution (see paragraphs 44 and 45 in the "Relevant domestic law" section below) and on the relevant provisions of the Strategic Interests Act and the Privatisation Act – see paragraphs 48 and 49 in the "Relevant domestic law" section below), the Prosecutor General argued, *inter alia*, that at the relevant time the acquisition of shares in the applicant company by company A. had been excluded by law. Company A. was accordingly not a shareholder in the applicant company and had no power to call an EGM of its members.

17. On 28 June 2006 the Supreme Court determined the extraordinary appeal for the first time (see below) by allowing it, quashing the decision of 18 November 2004 and remitting the case to the District Court for re-examination.

18. Company A. subsequently challenged the judgment of the Supreme Court of 28 June 2006 by way of a complaint under Article 127 of the Constitution (see paragraph 46 in the "Relevant domestic law" section below).

The Supreme Court was named as the defendant in this complaint. The applicant company had no standing in the constitutional proceedings.

19. On 19 August 2006 the proceedings on the merits of the 2002 petition of company A. (see paragraph 13 above) were terminated following the withdrawal by company A. of its petition on the grounds that the EGM had already taken place and that, consequently, the petition had become moot.

20. The further course of the proceedings, as described below, thus merely concerned the extraordinary appeal of the Prosecutor General (see paragraph 15 above) and the constitutional complaints of company A. (see the preceding paragraph and paragraphs 26 and 30 below).

21. On 11 December 2007 the Constitutional Court (*Ústavný súd*) found that the Supreme Court had violated the right of company A. to a fair trial.

Consequently, the Constitutional Court quashed the judgment of 28 June 2006 and remitted the case to the Supreme Court for re-examination of the Prosecutor General's extraordinary appeal.

22. In its reasoning, the Constitutional Court held that "[company A.] had obtained the shares and had done so in the course of enforcement proceedings" and that "it was justified and lawful for [company A.] to assume that it had legitimately become the owner of the shares, which had provided a basis for it to have the power to call the general meeting".

23. The Constitutional Court also held that it had been wrong for the Supreme Court to have re-examined the question of the lawfulness of the acquisition by company A. of the shares in question. To that end, the Constitutional Court observed that, in the case at hand, the Supreme Court had dealt with proceedings concerning the calling of an EGM and that the acquisition in question had taken place in the course of enforcement proceedings falling within the jurisdiction of the enforcement courts and having been concluded with final and binding effect.

24. On 28 May 2008 the Supreme Court ruled on the extraordinary appeal by the Prosecutor General for the second time. It again quashed the decision of 18 November 2004 and remitted the case to the District Court for re-examination.

25. The Supreme Court disagreed with the legal views of the Constitutional Court and considered that, thereby, the Constitutional Court had unconstitutionally interfered with its jurisdiction.

26. Company A. then challenged the judgment of the Supreme Court of 28 May 2008 by way of a complaint under Article 127 of the Constitution.

27. On 15 January 2009 the Constitutional Court quashed the judgment of 28 May 2008 and remitted the case to the Supreme Court for a fresh determination of the extraordinary appeal by the Prosecutor General.

The Constitutional Court found the contested judgment to be arbitrary, devoid of adequate reasoning and contrary to the Supreme Court's being bound by legal reasoning expressed by the Constitutional Court (see paragraph 47 in the "Relevant domestic law" section below).

28. On 23 November 2009 the Supreme Court ruled on the extraordinary appeal by the Prosecutor General for the third time. It again quashed the decision of 18 November 2004 and remitted the case to the District Court for re-examination.

29. The Supreme Court considered the judgment of the Constitutional Court of 15 January 2009 to be incomprehensible and pointed out that the handling of the petition at first instance had been chaotic and riddled with numerous irregularities.

30. Company A. challenged the Supreme Court's judgment of 23 November 2009 under Article 127 of the Constitution. Its complaint (registered under file no. IV. ÚS 161/2010) was declared admissible on 8 April 2010 but the proceedings were eventually discontinued on 3 June 2010 further to the withdrawal by company A. of its complaint.

**(b) Petition of 4 February 2008**

31. On 4 February 2008 company A. again sought judicial authorisation to call an EGM of the applicant company's members.

32. On 30 March 2009 the District Court allowed a fresh petition, following which company A. called the EGM for 29 April 2010.

33. The applicant company was the defendant in those proceedings, being assisted by the State in the person of the Ministry, acting as an intervenor for the defendant (*vedľajší účastník*).

34. In its decision, the District Court relied, *inter alia*, on the judgment of the Constitutional Court of 11 December 2007 (see paragraph 21 above).

35. On 23 April 2009, upon motion of the State in the guise of the Ministry of the Economy, the Prosecutor General challenged the decision of 30 March 2009 in the Supreme Court by way of an extraordinary appeal on points of law. At the same time, the Prosecutor General requested that the legal effect of the challenged decision be suspended pending the outcome of the proceedings on the merits.

36. On 27 April 2009 the Supreme Court suspended the legal effect of the decision of 30 March 2009 pending the outcome of the proceedings.

37. Nevertheless, on 29 April 2009, the EGM took place.

38. On 20 May 2009 the Supreme Court quashed the decision of 30 March 2009 and remitted the matter to the District Court for re-examination.

39. The Supreme Court held, *inter alia*, that the legal views expressed by the Constitutional Court in its judgment of 11 December 2007 (see paragraph 21 above) had no directly binding legal effect upon the District Court.

40. On 9 September 2010, upon a complaint under Article 127 of the Constitution by company A., the Constitutional Court found a violation of the complainant's right to a fair trial under Article 6 § 1 of the Convention, quashed the judgment of the Supreme Court of 20 May 2009 and remitted the matter to the Supreme Court for a new determination of the extraordinary appeal by the Prosecutor General.

41. The Constitutional Court found that there had been irregularities related to the serving of a copy of the Prosecutor General's extraordinary appeal on company A. and that, in consequence, the Supreme Court could not be said to have ensured service of that appeal on company A. for observations, to the detriment of the latter's procedural rights.

42. The further course and outcome (if any) of the proceedings in this matter have not been made known to the Court.

#### 4. Repercussions of the Constitutional Court's pronouncements

43. The above-mentioned pronouncements of the Constitutional Court, and in particular those in its judgment of 11 December 2007 (see paragraph 22 above), had been relied on by various parties in a number of transactions and lawsuits concerning shares in the applicant company. These include purported transfers of the litigious shares from company A. and the other alleged shareholders (see paragraph 9 above) to company B., incorporated in the Czech Republic, and then to company C., incorporated in the United States of America, and proceedings before the Bratislava Regional Court file nos. 27 Cb 77/2002, 7Cbs 86/2005, 7Cbs 84/05 and before the Košice Regional Court file no. 2Cb 1272/2002.

### B. Relevant domestic law

#### 1. Constitution (Constitutional Law no. 460/1992 Coll., as amended)

44. Article 4 provides that:

> "Mineral resources, caves, underground waters, natural healing sources and streams are the property of the Slovak Republic."

45. The relevant part of Article 20 § 2 reads as follows:

> "An Act of Parliament shall determine which property other than that indicated in Article 4 of this Constitution, which is necessary for the safeguarding of the needs of society, development of the national economy and public interest, may only be owned by the State, a municipality or a specified legal entity."

46. Under Article 127:

> “1. The Constitutional Court shall decide complaints by natural or legal persons alleging a violation of their fundamental rights or freedoms ... unless the protection of such rights and freedoms falls within the jurisdiction of a different court.
>
> 2. If the Constitutional Court finds a complaint justified, it shall deliver a decision stating that a person’s rights or freedoms as set out in paragraph 1 have been violated by a final decision, specific measure or other act and shall quash such a decision, measure or act. If the violation that has been found is the result of a failure to act, the Constitutional Court may order [the authority] which has violated the rights or freedoms to take the necessary action. At the same time it may remit the case to the authority concerned for further proceedings, order that authority to refrain from violating the fundamental rights and freedoms ... or, where appropriate, order those who have violated the rights or freedoms set out in paragraph 1 to restore the situation to that existing prior to the violation.
>
> 3. In its decision on a complaint the Constitutional Court may grant appropriate financial compensation to a person whose rights under paragraph 1 have been violated.”

*2. Constitutional Court Act (Law no. 38/1992 Coll., as amended)*

47. Details concerning the status, structure and functioning of the Constitutional Court and procedures before it are defined in the Constitutional Court Act.

Pursuant to its section 56(6):

> “Should the Constitutional Court quash a final and binding decision, measure or other interference and remit the matter for further proceedings, the body which issued the decision, decided on the measure or carried out other interference shall be bound to e-examine the matter and to decide anew. In such proceedings or process that body shall be bound by the legal view expressed by the Constitutional Court.

*3. Strategic Interests Act (Law no. 192/1995 Coll., as amended)*

48. The Strategic Interests Act (*Zákon o zabezpečení záujmov štátu pri privatizácii strategicky dôležitých štátnych podnikov a akciových spoločností*) was adopted with effect from 14 September 1995 and remained in force until 12 October 1999. In the relevant part of section 2(3) it provides that:

> “Shares in [the applicant company], which are held or owned by the State or [the National Property Fund] cannot be subject to privatisation.”

*4. Privatisation Act (Law no. 92/1991 Coll., as amended)*

49. The Privatisation Act (*Zákon o podmienkach prevodu majetku štátu na iné osoby*) regulates the conditions for transfer of property of the State to legal entities and individuals. Under its section 10(2) the privatisation of enterprises or their parts as well as of proprietary interests in legal entities having the character of “natural monopolies” must always be decided upon by the cabinet after the matter has been debated in Parliament. The applicant

company is recognised as having the character of a "natural monopoly" (section 10(2)(i)).

### 5. *Joint-stock Companies*

50. The status, structure, organisation and functioning of joint-stock companies is regulated by the Commercial Code (Law no. 513/1991 Coll., as amended), in particular by sections (*Oddiel*) 1 and 5, chapter (*Hlava*) 1 of its Part (*Časť*) 2.

## C. Related applications

51. On 18 November 2008 and 20 April 2009 the Ministry of the Economy of the Slovak Republic lodged two applications with the Court, which were registered under application numbers 57425/08 and 22213/09 respectively.

52. In applications numbers 57425/08 and 22213/09 the Ministry was represented by Mr M. Kriväk, a lawyer practising in Bratislava (for comparison see paragraph 1 above).

53. Relying on Article 34 of the Convention, the Ministry complained that the course and outcome of the proceedings leading up to the Constitutional Court's judgment of 11 December 2007 (see paragraph 21 above) and a decision of 22 May 2008, by which the Constitutional Court had rejected the Ministry's complaint against the judgment of 11 December 2007, were contrary to its rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

54. On 9 June 2009 the Court, sitting in the formation of a Committee under former Article 28 of the Convention, declared applications numbers 57425/08 and 22213/09 inadmissible as being incompatible *ratione personae* with the provisions of the Convention, within the meaning of Article 34.

# COMPLAINT

55. The applicant company complained under Article 6 § 1 of the Convention that the proceedings before the Constitutional Court, leading up to its judgment of 11 December 2007, had been unfair in that:

(i) the Constitutional Court had given its own decision regarding ownership of the litigious shares, while this matter had fallen within the jurisdiction of the ordinary courts and outside the jurisdiction of the Constitutional Court; and

(ii) the applicant company had not been a party to the proceedings before the Constitutional Court and had had no impact on its decision despite having a direct interest in the outcome of the proceedings.

## THE LAW

56. The applicant company complained that the proceedings before the Constitutional Court leading up to its judgment of 11 December 2007 had been contrary to its rights under Article 6 § 1 of the Convention, the relevant part of which provides as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

57. The Court considers that, first of all, it has to establish whether the applicant company has standing to initiate proceedings on an individual application under Article 34 of the Convention, which provides that:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

58. On that point, the Government submitted that, although 100% of the shares in the applicant company are now owned by the State, at the time of the impugned judgment of the Constitutional Court the State had only owned 51% of the shares.

The applicant company was a private-law entity subject to the jurisdiction of the ordinary courts and to the same legal regime as any other commercial company in Slovakia. It did not have immunity, did not carry out any public-administration functions and did not participate in the exercise of public power.

The applicant company had professional management and its operations were of a commercial nature. The State carried no liability for the applicant company's obligations and the applicant company was subject to the normal rules and procedures concerning insolvency.

It was true that the applicant company was the sole oil-transporting company in Slovakia. However, the territory of Slovakia was so small that, in the free European market, it could not be considered competitive territory. The applicant company's market role had therefore to be assessed with reference to oil-transporting companies with the Czech Republic, Hungary, Austria and Ukraine as their centres of their interest.

The Government concluded that the question of the applicant company's standing under Article 34 of the Convention "raised serious questions of interpretation and application of the Convention".

59. The applicant company, in reply, emphasised that it was neither a public-law entity nor did it exercise any public-administration powers. It held no special position within the legal system of Slovakia and did not represent the Government in any aspect of public life. In conclusion, relying on the Court's case-law, the applicant company submitted that it had standing to bring an application under Article 34 of the Convention.

60. The Court reiterates that a legal entity "claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto" may submit an application to it, provided that it is a "non-governmental organisation" within the meaning of Article 34 of the Convention and that the idea behind this principle is to prevent a Contracting Party acting as both an applicant and a respondent party before the Court (see, for example, *Islamic Republic of Iran Shipping Lines v. Turkey*, no. 40998/98, § 81, ECHR 2007-V, and *State Holding Company Luganksvugillya v. Ukraine* (dec.), no. 23938/05, 27 January 2009).

61. The Court further reiterates that a company is "a non-governmental organisation" if it is governed essentially by company law, does not enjoy any governmental or other powers beyond those conferred by ordinary private law in the exercise of its activities and is subject to the jurisdiction of the ordinary rather than the administrative courts (see *Islamic Republic of Iran Shipping Lines*, § 81, cited above).

62. In the past, the Court has also taken into account the fact that an applicant company carried out commercial activities and had neither a public-service role nor a monopoly in a competitive sector. It has also held that it was not decisive that, at a certain time, that applicant company was wholly owned by the State (see *Islamic Republic of Iran Shipping Lines*, § 80, cited above).

63. The term "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities (see, for example, *Radio France and Others v. France* (dec.), no. 53984/00, ECHR 2003-X (extracts) and *State Holding Company Luganksvugillya*, cited above).

64. The Court observes that the applicant company in the present case has features of both a "governmental" and a "non-governmental organisation" within the meaning of Article 34 of the Convention and the case-law quoted above.

65. In particular, the Court notes that, on the one hand, the applicant company is a commercial joint-stock company operating exclusively under the private-law regime, governed by the Commercial Code (see paragraph 50 in the “Relevant domestic law” section above); with no privileges or special rights or rules concerning enforcement of judgments against it (for contrast, see *State Holding Company Luganksvugillya*, cited above); subject to the jurisdiction of the ordinary courts; not-participating in the exercise of any governmental power; and, in the past, having been partly owned by private entities (see paragraph 4 above).

66. The Court also notes that, on the other hand, the State has always been a majority shareholder and at present is the sole shareholder of the applicant company; that on account of its strategic importance for the national economy the applicant company used to be excluded by law from privatisation (see paragraph 48 in the “Relevant domestic law” section above); that the applicant company has been recognised in the domestic law as having the character of a “natural monopoly” (see paragraph 49 in the “Relevant domestic law” section above); and that – as admitted by the Government – the applicant company has an unrivalled market position in Slovakia (see paragraph 58 above).

67. However, rather than weighting the elements mentioned in the precedent two paragraphs against each other, the Court is of the opinion that the decisive considerations for the determination of the *locus standi* of the applicant company under Article 34 of the Convention in the present case lie in the assessment of the overall procedural and substantive context of the application and of its underlying facts.

68. For that matter, the Court observes at the outset that the contested judgment of the Constitutional Court was given on 11 December 2007 (see paragraphs 21 and 55 above) in the framework of the proceedings initiated by a petition by company A. seeking judicial authorisation for the calling of an EGM of the applicant company (see paragraph 13 above).

69. The Court also observes that the proceedings on the merits of that petition were terminated on 19 August 2006, that is to say, prior to the impugned judgment, following a withdrawal by company A. of its petition as the subject-matter of the proceedings had become moot in view of the EGM having already taken place (see paragraph 19 above).

70. The Court considers that, in these circumstances, rather than the formal subject-matter of the proceedings in question, that is to say, the calling of the EGM of the applicant company, the genuine issue behind this application appears to be the ownership of the shares in the applicant company (see also paragraph 20 above).

71. While the issue of the calling of the EGM could perhaps have involved the determination of the applicant company’s “civil rights and obligations” within the meaning of Article 6 § 1 of the Convention (for contrast and comparison, see, *mutatis mutandis*, *Novotný v. the Czech*

*Republic*, no. 36542/97, Commission decision of 1 July 1998), the Court is of the opinion that the question of ownership of the shares in the applicant company primarily concerns the rights and interests of other shareholders rather than the rights and interests of the applicant company itself.

72. The Court observes that its stance expressed in the preceding paragraph is supported, *inter alia*, by the fact that the State joined the applicant company as an intervenor for the defendant in proceedings involving the determination of essentially the same issues as those in the proceedings contested in the present application (see paragraph 33 above).

73. The Court further considers that the unity of interests of the applicant company, if any, and of the Government in the present case is demonstrated by the fact that the latter, through the Ministry, sought to contest the same judgment of the Constitutional Court in applications submitted in reliance on Article 34 of the Convention and dealt with by the Court under numbers 57425/08 and 22213/09 (see paragraphs 51 *et seq.* above).

74. Moreover, the Court is of the view that this unity of interests is also reflected in the tenor and content of the Government's arguments under Article 34 of the Convention (see paragraph 58 above) and the fact that the applicant company in the present case and the Government in its applications numbers 57425/08 and 22213/09 were represented by the same lawyer (see paragraphs 1 and 52 above).

75. The Court notes the incongruities of opinions of the Constitutional Court and the Supreme Court as regards the binding effect upon the latter of legal views expressed by the former in its judgments as well as of their opinions on the merits of the case at hand (see paragraphs 25, 27, 29 and 39 above).

76. The Court considers that, in the circumstances of the present case, the interest of the applicant company, if any, and the interest of the Government are the same, include the clarification of the jurisdictional and legal incongruities referred to in the precedent paragraph, and essentially involve the determination of the position of third parties, including company A., in respect of the shares in the applicant company.

77. The Court notes, however, that its jurisdiction under Article 34 of the Convention is limited to applications from "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation [...] of the rights set forth in the Convention and the Protocols thereto."

78. To the extent the application has been substantiated, the Court has found no indication that it strives to further interests other than those that are concurrently interests of the State. This is, however, not consonant with the principle of preventing "a Contracting Party acting as both an applicant and a respondent party before the Court" (see the case-law quoted in paragraph 60 above).

79. It follows that, in the circumstances, the application is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

This conclusion is without prejudice to the applicant company's *locus standi* under Article 34 should the relevant circumstances be different.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President