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

COURT (CHAMBER)

CASE OF GASUS DOSIER- UND FÖRDERTECHNIK GmbH v. THE NETHERLANDS

(Application no. 15375/89)

JUDGMENT

STRASBOURG

23 February 1995

In the case of Gasus Dosier- und Fördertechnik GmbH v. the Netherlands[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. GÖLCÜKLÜ,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr S.K. MARTENS,
Mr I. FOIGHEL,
Mr G. MIFSUD BONNICI,
Mr P. JAMBREK,
Mr K. JUNGWIERT,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 22 September 1994 and 24 January 1995,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 December 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15375/89) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) on 6 July 1989 by a limited liability company possessing legal personality under German law (Gesellschaft mit beschränkter Haftung), Gasus Dosier- und Fördertechnik GmbH.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was

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[1] The case is numbered 43/1993/438/517. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 1 of Protocol No. 1 (P1-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant company indicated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30) but declined to appear at the Court's hearing. The German Government, having been informed by the Registrar of their right to intervene (Article 48 (b) of the Convention and Rule 33 para. 3 (b)) (art. 48-b), indicated by a letter of 27 December 1993 that they did not intend to do so.

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 January 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr C. Russo, Mr N. Valticos, Mr I. Foighel, Mr G. Mifsud Bonnici, Mr P. Jambrek and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently Mr F. Gölcüklü, substitute judge, replaced Mr Valticos, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Netherlands Government ("the Government") and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant company's memorial on 16 May 1994 and the Government's memorial on 15 June 1994. Additional documents were received from the applicant company on 19 August 1994 and from the Government on 24 August. The Delegate did not submit any observations in writing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 19 September 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr K. de VEY MESTDAGH, Ministry of Foreign Affairs, *Agent*,
Mr H.D.O. BLAUW, Rijksadvocaat, *Counsel*,
Mr A. VAN VLIET, Ministry of Finance,
Mr A. VAN EIJSDEN, Ministry of Finance, *Advisers*;

- for the Commission

Mrs G.H. THUNE, *Delegate*.

The Court heard addresses by Mrs Thune and Mr Blauw, and also replies to questions put by the Court and by several of its members.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

6. The applicant company, Gasus Dosier- und Fördertechnik GmbH (hereinafter "Gasus"), are a limited liability company under German law with their registered office in Würzburg, Germany.

A. Background to the case

7. On 17 June 1980 Gasus's agent in the Netherlands received an order from a Netherlands company, Atlas Junior Beton B.V. (hereinafter "Atlas") of Leiderdorp, for a concrete-mixer and ancillary equipment. The order was confirmed in writing by Gasus themselves on 18 June 1980. Gasus appended to their letter their general conditions of sale, which contained the following passages:

> "We retain ownership of the goods delivered until all amounts due, both present and future, including ancillary claims arising from business with the customer, have been settled in full."

and

> "In the case of foreign business (Auslandsgeschäfte), only the law of the German Federal Republic shall apply."

Gasus subsequently received an order for additional ancillary equipment and confirmed it in writing on 21 July 1980, again appending their general conditions of sale.

It was understood, inter alia, that Atlas would provide lifting equipment and some of the manpower needed for assembling the machine, the main part of which weighed five tonnes.

Between 25 July and 28 August 1980 Gasus sent Atlas invoices totalling 125,401.24 German marks (DEM), to which Atlas did not object. Gasus received only DEM 21,672 in payment before the events complained of.

B. Seizure of the concrete-mixer and bankruptcy of Atlas

8. The machine was installed on Atlas's premises by Gasus; the work took from 28 July until 2 August 1980.

9. On 31 July 1980 the Tax Bailiff (belastingdeurwaarder) seized all the movable assets on Atlas's premises for forced sale in pursuance of three writs of execution (dwangbevelen) issued by the Collector of Direct Taxes (Ontvanger der directe belastingen - the "Tax Collector") totalling 67,741.59 Netherlands guilders (NLG). The official record (proces-verbaal)

contains a mention of the concrete-mixer. Notice of the seizure was served on Atlas but not on Gasus.

10. Being unable to meet their financial obligations, Atlas sought a moratorium (surséance van betaling) which was granted by the Hague Regional Court (arrondissementsrechtbank) on 16 October 1980.

11. The receiver (bewindvoerder), a lawyer appointed by the Regional Court, saw that it was not possible for Atlas to continue their activities independently and managed to interest another company, Van Baarsen Wandplaten B.V. ("Van Baarsen"), in taking them over.

Under pressure from Atlas's clients, who insisted that a satisfactory arrangement for continuing production should be reached by 23 October 1980, Atlas, the receiver and Van Baarsen reached an agreement on that date for a takeover by Van Baarsen. This agreement was only able to come about with the co-operation of Atlas's mortgagees - two banks who had financed Atlas and had stipulated that the ownership of certain of its movable assets should be fiduciarily transferred as a security - and the Tax Collector, who had seized all the movable assets present on Atlas's premises. The agreement was subject to the condition that no third parties could assert a better right to the goods covered by it.

Van Baarsen would pay a lump sum of NLG 500,000 for taking over Atlas's machines and inventory goods. Half that sum would be paid to the tax authorities and the other half to a bank, NIB, which was the fiduciary owner of certain goods not subject to seizure by the tax authorities.

Van Baarsen continued Atlas's activities on the latter's premises from 27 October, using what had been Atlas's workforce and machines.

12. On 21 October 1980 Gasus sent a letter to Atlas's receiver, which reached him on 24 October. In it they stated that of the moneys due to them from Atlas they had received only DEM 21,672 and they requested payment of the remainder. They also gave notice that the concrete-mixer would be taken back on 30 October if sufficient guarantees for payment were not provided by 28 October.

No payment was made but it does not appear that Gasus took any action.

13. Atlas were declared bankrupt on 30 October 1980, at the request of their receiver and with the agreement of their management, and the receiver was reappointed as trustee in bankruptcy (curator).

The bankruptcy proceedings were terminated on 20 June 1990 for lack of any further assets to distribute. None of Atlas's unsecured creditors recovered any part of their claims.

14. On 4 March 1981 the Commissioner of Direct Taxes (directeur der directe belastingen) received a letter from Gasus in which they, being by then aware of the fact that the machine had been seized, filed an administrative objection (bezwaarschrift) to the seizure. By a letter of 15 May 1981 the Commissioner declared the administrative objection inadmissible because it had not been filed within seven days of the seizure

as required by section 16 (1) of the 1845 Tax Collection Act (Invorderingswet 1845, "the 1845 Act" - see paragraph 29 below), adding that in any case he saw no reason to rescind the seizure order and that in deciding not to do so, he had not been influenced by the fact that the administrative objection was out of time.

C. Proceedings before the Utrecht Regional Court

15. On 22 May 1981 Gasus brought proceedings against Atlas's trustee in bankruptcy and Van Baarsen before the Utrecht Regional Court to obtain an order for the concrete-mixer to be returned. In the proceedings before the Commission Gasus stated that both the trustee and Van Baarsen had acknowledged Gasus's ownership but had refused to give up the machine as it was still being held by the tax authorities. These proceedings appear not to have been pursued to a conclusion.

16. On 17 September 1981 Gasus sued the Tax Collector, the trustee in bankruptcy and Van Baarsen in the Hague Regional Court, objecting to the seizure and seeking an order to the Tax Collector to release the concrete-mixer from seizure and another order to the trustee and Van Baarsen not to hinder the exercise of Gasus's rights.

Gasus's position may be summarised as follows. Their objection to the seizure (verzet) was based on the argument that the concrete-mixer had not been operational on 31 July 1980, so that it could not have been part of the "furnishings of a house or farmstead" within the meaning of section 16 (3) of the 1845 Act (see paragraph 29 below). In the alternative, the seizure was, on various grounds, wrongful in civil law (onrechtmatig). Finally, the fact that section 16 (3) prevented third parties from challenging a seizure affecting their own goods amounted to a denial of "access to court" as guaranteed by Article 6 para. 1 (art. 6-1) of the Convention.

17. The Tax Collector filed lengthy pleadings in reply. The trustee and Van Baarsen did not themselves make any submissions on the merits but requested that the Tax Collector's statements in defence (conclusie van antwoord) and subsequent rejoinder (conclusie van dupliek) be treated as their own.

18. The Regional Court delivered its judgment on 21 December 1983. Taking the same view as the Tax Collector, it held that the fact that the concrete-mixer had not been operational at the time of the seizure did not invalidate the seizure itself. Since the proceedings concerned an objection to seizure under section 16 (3) of the 1845 Act, the court could not entertain Gasus's complaint that the seizure was unlawful; the only permissible purpose of such proceedings was to examine whether the requirements of section 16 (3) were met. Furthermore, Article 6 para. 1 (art. 6-1) of the Convention did not apply - and had therefore not been violated - because section 16 related to the imposition and collection of taxes, empowering

State authorities to make decisions in the normal discharge of their duties under public law, and thus did not concern "civil rights and obligations".

D. Proceedings before the Hague Court of Appeal

19. Gasus appealed to the Hague Court of Appeal, summoning Atlas's trustee in bankruptcy on 19 March 1984 and the Tax Collector and Van Baarsen on 20 March.

Gasus's first ground of appeal (grief) was that the Regional Court had erred in holding that the seizure was valid even though the concrete-mixer had not been operational at the time. The second and third grounds of appeal were founded on the Regional Court's refusal to deal with Gasus's allegations of unlawfulness and to accept their arguments based on Article 6 para. 1 (art. 6-1) of the Convention.

The Tax Collector replied that Gasus's complaints concerning section 16 (3) of the 1845 Act amounted to an allegation of deprivation of their possessions in violation of Article 1 of Protocol No. 1 (P1-1). He denied, however, that there had in fact been such violation.

20. Following the exchange of pleadings by the parties to the proceedings, a hearing was held on 16 September 1986.

At this hearing counsel for Gasus continued to rely on Article 6 para. 1 (art. 6-1) of the Convention. In his view, what was decisive for that provision (art. 6-1) to be applicable was whether the plaintiff sought protection of a right that was to be classed as "civil" within the meaning of the provision (art. 6-1). Since Gasus sought to be protected against infringement by the Tax Collector of their ownership of the concrete-mixer, undoubtedly a "civil" right within the meaning of the provision (art. 6-1), Article 6 para. 1 (art. 6-1) applied; it had, moreover, been violated since section 16 (3) of the 1845 Act amounted to a limitation of access to court with respect to assets of the kind mentioned in it.

While agreeing that Gasus had been deprived of one of their possessions and had suffered damage as a result, Gasus's counsel expressly declined to rely on Article 1 of Protocol No. 1 (P1-1). Contrary to what the Tax Collector had suggested both at first instance and on appeal, section 16 (3) had nothing to do with deprivation of property but barred access to court for those who sought to be protected from the seizure and sale of their property. That was clear from its wording. That also followed, incidentally, from Article 14 of the Constitution, which prohibited expropriation without compensation: if section 16 (3) were a provision concerning deprivation of property, it would contravene Article 14 of the Constitution. On the principle that a provision of Netherlands legislation could not be construed so as to be incompatible with the Constitution, section 16 (3) therefore had to be construed as merely barring access to court. The questions raised by section 16 (3) were thus of a "procedural", not a "substantive" nature, and

therefore the more appropriate Convention provision was Article 6 para. 1 (art. 6-1) and not Article 1 of Protocol No. 1 (P1-1).

Since section 16 (3) obviously violated Article 6 para. 1 (art. 6-1), it should - pursuant to Article 94 of the Constitution - not be applied. This meant that section 456 and the following sections of the Code of Civil Procedure applied without restriction, and this in turn meant that Gasus could rely on their right of ownership of the concrete-mixer, which was therefore not subject to seizure.

21. The Court of Appeal gave judgment on 3 December 1986.

Like the Regional Court, it held that the seizure was not vitiated by the fact that the concrete-mixer had not been fully operational at the time; the concrete-mixer's intended use had already been established and all efforts had been directed towards making it operational and ensuring that it would serve Atlas on a lasting basis. The concrete-mixer thus qualified as "furnishings" of Atlas's factory building. The first ground of appeal therefore failed.

The second and third grounds of appeal were also dismissed.

After establishing that the right claimed by Gasus was a "civil right" for the purposes of Article 6 para. 1 (art. 6-1), the Court of Appeal went on to hold:

> "The question is therefore whether in the present case access to a tribunal and due process were sufficiently secured to Gasus. To answer this, it is necessary to ascertain what provisions, in so far as relevant to the present case, govern ownership and the procedure connected with it.
>
> In the Articles of ... section I [of the Convention] apart from the aforementioned Article 6 (art. 6), a number of fundamental rights are laid down and - where necessary - defined. The right of ownership is not one of them. This is provided for in Protocol No. 1 (P1) to the Convention ...
>
> [Article 1 of Protocol No. 1 (P1-1)] does therefore authorise national legislatures to pass laws restricting the enjoyment of possessions or even entirely depriving the individual of that enjoyment for specific purposes relating to the general interest; however, when it comes to the question of whether such a law has been properly applied in a specific case, the owner concerned remains entitled, as provided in Article 6 (art. 6) of the Convention, to access to a tribunal and to due process in order to have the application of the law assessed.
>
> One such provision of domestic law which is authorised by Article 1 of Protocol No. 1 (P1-1) is section 16 (3) of the 1845 Act. The rule laid down therein implies that seizure levied by the tax authorities in order to collect a tax debt in fact deprives a third party of his ownership of an item of movable property provided that when the seizure was effected the item of property was on the tax debtor's premises and served as 'furnishing' of them. Whether, when judged by this condition, the seizure of his property was rightly effected is a matter which any affected third party can have reviewed by the ordinary civil courts in proper legal proceedings. In assessing the lawfulness of the seizure, the court may not take into account whether or not the relevant property is owned by the tax debtor, because precisely this point is not

relevant - save for certain exceptions which are of no consequence here - in view of the scope of the subsection. This also reveals the meaning of the provision that third parties may 'never bring an action to challenge seizures for tax purposes'. It means not that they may not bring an action before the courts but rather that, having brought an action in the courts, they may not successfully submit, as a basis for their action, that the seizure is unlawful because the goods seized belong to them and not to the tax debtor. Consequently, the provisions of section 456 (1) of the Code of Civil Procedure are of no avail to them in this respect because section 16 (3) of the 1845 Act derogates from them as a lex specialis.

It follows from the above that there has been no violation of Article 6 (art. 6) of the Convention and that the Regional Court was correct in not dealing with the allegation that the Collector acted unlawfully by seizing the concrete-mixer belonging to Gasus ..."

E. Proceedings before the Supreme Court

22. Gasus entered an appeal on points of law (beroep in cassatie) with the Supreme Court (Hoge Raad) on 3 March 1987. They filed grounds (middelen van cassatie) that were each subdivided into a large number of parts. The Advocate-General (advocaat-generaal) noted that several grounds and many of their component parts were merely variations on a single theme.

The Court of Appeal had erred in considering the matter under Article 1 of Protocol No. 1 (P1-1). Section 16 (3) of the 1845 Act was a "procedural" provision, not a "substantive" one, and should therefore have been examined only in the light of Article 6 (art. 6); the fact that lack of access to a tribunal could lead to loss of property indicated only that the interests protected by Article 6 (art. 6) were very real.

Gasus went on to submit that section 16 (3) violated Article 6 (art. 6) as it only allowed third parties to challenge seizure of their goods on the premises of another by the tax authorities on the ground that those goods were not "fruit", or "furnishings", or intended for the "cultivation or use of land". If the goods concerned fell into one of those categories, there was no other ground on which to base an action. Section 16 (3) had been inspired by the need to prevent tax evasion, but had been rendered obsolete by developments in business practice and commercial law, retention of title now being a generally accepted and quite legal form of security. The Tax Collector had acted unlawfully in seizing the concrete-mixer since Gasus had not actually been conniving at tax evasion.

In any event, even if Article 1 of Protocol No. 1 (P1-1) applied (which Gasus submitted it did not), it only allowed States to interfere with the tax debtor's peaceful enjoyment of his possessions to secure payment of the taxes he owed. It did not allow them to deprive third parties of their possessions.

It was not to be assumed that Article 1 of Protocol No. 1 (P1-1) legitimised greater interferences with citizens' rights than did Article 14 of the Constitution, which forbade expropriation without compensation. If section 16 (3) of the 1845 Act were seen as a "substantive" provision, it clearly amounted to a provision making deprivation of property by the State possible in the public interest.

Finally, the Tax Collector had not at any time informed Gasus of the seizure as he should have done.

23. Following the advisory opinion (conclusie) of its Procurator-General (procureur-generaal), the Supreme Court rejected the appeal on 13 January 1989. Its reasoning was as follows:

> "3.1. The purport of grounds of appeal I-III is to argue that the provisions of section 16 (3) of the 1845 Act of 22 May 1845 ... are incompatible with Article 6 (art. 6) of the Convention and/or Article 1 of Protocol No. 1 (P1-1). In the assessment of this argument, the following is of importance:
>
> (a) Section 16 of the 1845 Act, in particular the third paragraph thereof, implies that the Tax Collector has a right of recovery against third parties' goods listed in that paragraph and `situated on the premises of the tax debtor at the time of the seizure'.
>
> (b) The objection which third parties may make before the civil courts to the seizure of their goods is in principle limited to the question whether the conditions for its applicability described in section 16 (3) have been satisfied; in other respects, third parties may file an administrative objection to the Commissioner of Direct Taxes by means of the complaint procedure referred to in subsection 1 of that section ...
>
> (c) It follows from the provisions of chapter V of the General State Taxes Act (Algemene wet inzake rijksbelastingen) and section 5, opening words and subsection (m), of the Administrative Decisions Appeals Act (Wet administratieve rechtspraak overheidsbeschikkingen) that no appeal lies to an administrative tribunal against the Commissioner's decision on the administrative objection. Consequently, the third party may bring an action against such a decision in the civil courts, possibly in summary proceedings (kort geding), on the basis that there has been an unlawful act. In so doing, the third party may also base his claim of unlawfulness on the allegation that the Commissioner has acted in breach of a general principle of good governance (algemeen beginsel van behoorlijk bestuur).
>
> (d) The provisions of the 1961 Tax Collection Guidelines (Leidraad invordering - Resolution of 8 December 1961, no. B 1/18516), in particular paragraph 30, are also of importance in this connection. Although the 1961 Guidelines do not contain rules of law, principles of good governance imply that the Commissioner may not deviate to the disadvantage of a third party from the rules laid down in the Guidelines, as the court considers they should be interpreted. If he does depart from them, he is in principle acting unlawfully vis-à-vis the third party.
>
> (e) As regards the content of paragraph 30 of the Guidelines, the following features of the provisions contained in sub-paragraph 9 should be mentioned briefly. It is in keeping with the Commissioner's policy that the third party's title will in principle be respected in cases of `real ownership'. But recovery against the goods of a third party is generally justified if `the circumstance that the goods legally belong to another

person has mainly been brought about to exclude the possibility of recovery against such goods for debts of the taxpayer or to ensure that the third party has a priority right to recover against such goods'. One of the examples quoted here is where a supplier of goods reserves the ownership of them. It has been established that Gasus did this as supplier of the goods which are the subject of the litigation.

(f) It is also provided in paragraph 30, sub-paragraph 8, of the 1961 Guidelines that an administrative objection made by a third party shall be dealt with even if it is not filed in time, i.e. within the said period of seven days from the date of seizure as referred to in section 16 (1) of the 1845 Act. It follows that a third party who files an administrative objection out of time is entitled to have it dealt with. As the third party need not be aware that the seizure has occurred and thus that time has started to run - neither the law nor the Collection Guidelines require service on, or any other form of warning to, a third party - it must be assumed - partly in the light of Article 6 (art. 6) of the European Convention - that the third party may have recourse to the civil courts in this case in the manner described above under (c) and (d).

3.2. Against this background, the arguments advanced in grounds of appeal I-III cannot be accepted as correct.

A third party whose goods have been seized has opportunities for redress against the acts of the Tax Collector or the Commissioner as the case may be, before an independent and impartial tribunal established by law such that the requirements of Article 6 para. 1 (art. 6-1) of the Convention are met.

Nor can it be said that the recovery, on the basis of section 16 (3) of the 1845 Act, of goods belonging to a third party such as Gasus - who as supplier of the goods has reserved title to them - is not compatible with Article 1 of Protocol No. 1 (P1-1). That is because section 16 (3) is to be regarded as a statutory provision which the State regards as necessary in order to secure the payment of taxes in such a manner as to ensure that this payment is not frustrated by reservation of title by a third-party supplier.

Grounds of appeal I-III fail in view of the above, irrespective of the validity of the arguments set out by the Court of Appeal, which these grounds attack.

3.3. As, according to the explanation given of it, ground of appeal IV builds on the previous grounds, it must fail likewise. In so far as it is suggested that section 16 (3) should not be applied as it has been `rendered obsolete by developments in business practice and commercial law', the ground is unfounded.

3.4. Ground of appeal V takes issue with the Court of Appeal's opinion that the Tax Collector does not have a duty to give notice, in the sense that he should have given notice to Gasus after the seizure of the goods that they had been seized. The ground fails.

As already indicated at 3.1. (f) above, neither the 1845 Act nor the Tax Collection Guidelines contain any such obligation to provide a warning. Although such an obligation may in special circumstances be inferred from unwritten law, no such special circumstances have been alleged by Gasus in this connection.

3.5. Since none of the grounds of appeal justifies overturning the judgment appealed against, the appeal must be dismissed."

The above judgment of the Supreme Court was published in the Rechtspraak van de Week, (Weekly Law Reports - RvdW) 1989, 28; in the Vakstudie Nieuws (Professional Studies News) 1989, p. 363; in the Nederlandse Jurisprudentie (Netherlands Law Reports - NJ) 1990, 211, and in the Beslissingen in Belastingzaken (Reports of Decisions in Taxation Cases - BNB) 1989/129. It was welcomed by commentators as providing clarity as to the scope of judicial protection available against use by the tax authorities of section 16 (3) (commentaries on the Supreme Court's judgment in the present case, by E.A. Alkema in NJ 1990, 211, and by H.J. Hofstra in BNB 1989/129; commentary by W.H. Heemskerk of the Supreme Court's judgment of 26 May 1989, NJ 1990, 131).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Netherlands Constitution

24. The 1983 Constitution does not, in terms, guarantee a right to property. Article 14 reads:

> "1. Expropriation may only be ordered in the general interest and against compensation determined in advance, in accordance to rules laid down by statute or delegated legislation.
>
> 2. ...
>
> 3. In the cases indicated by statute or delegated legislation there is a right to compensation or partial compensation for damage if property is destroyed or rendered unusable in the general interest by the competent authorities or if the exercise of the right of ownership is curtailed."

Article 104 reads:

> "The Kingdom's taxes shall be levied pursuant to statute. Other charges levied by the Kingdom shall be governed by statute."

Under Netherlands constitutional law, courts may not examine statutes for compliance with the Constitution. Article 120 reads:

> "The courts shall not judge the constitutionality (grondwettigheid) of statutes and treaties."

B. Relevant provisions of the Civil Code (Burgerlijk Wetboek), the Commercial Code (Wetboek van Koophandel) and the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering)

25. At the material time the 1838 Civil Code was still in force. In so far as it concerned property law it was succeeded in 1992 by a new Civil Code; a number of provisions of the Commercial Code and the Code of Civil Procedure were changed or repealed at the same time. The following relates to the law as it stood at the time of the events complained of.

26. According to section 1177 of the Civil Code, debts could in principle be recovered against all goods belonging to the debtor, whether movable or immovable. Statutory provisions elsewhere allowed of certain limited exceptions not relevant to the present case.

Section 1178 added the principle of paritas creditorum: all creditors were entitled to recover debts against the property of the debtor in proportion to the size of their claims, unless any one of them could claim a right to preferential payment. Such a right derived, inter alia, from specific legal provisions granting a priority right (privilege). These priority rights were based on the nature of the debt (section 1180) and their order of precedence was laid down by law. Most priority rights were to be found in the Civil Code, but not those of the tax authorities, for which the Civil Code referred to specialist legislation (section 1183 (1)).

A priority right might concern a particular asset or all goods belonging to the debtor; in general, priority rights of the former type took precedence over priority rights of the latter (section 1184).

Section 1185 enumerated debts covered by a priority right to certain assets belonging to the debtor. These included, inter alia, rent owed under a tenancy agreement and the price owed to a vendor of movable property.

Section 1186 read as follows:

> "1. The landlord may exercise his priority right [by recovery against] fruit still attached to the trees by branches, or to the ground by roots, as well as fruit, whether harvested or not, present on the premises (die zich op den bodem bevinden), and all things present on the premises serving either as furnishings of the rented property or farm or for cultivation of the land, such as cattle, agricultural implements and the like, regardless of whether or not the above-mentioned objects belong to the tenant.
>
> 2. However, if the tenant has goods in his possession under a hire-purchase agreement, the landlord shall not be entitled to exercise his priority right against the vendor if the hire-purchase agreement relates to seeds or implements or if it is proved that the landlord knew of the hire-purchase agreement.
>
> 3. ..."

Section 1190 read as follows:

"The vendor of movable goods which have not yet been paid for may exercise his priority right against the sale price of those goods if they are still in the debtor's possession, irrespective of whether a time has been specified for the sale."

Section 1191 read as follows:

"1. If no time has been specified for the sale, the vendor shall even be entitled to reclaim the goods as long as these are in the possession of the purchaser, and to prevent the resale thereof, provided that they are reclaimed within thirty days of delivery.

2. Sections 231, 233, 234, 236 and 237 of the Commercial Code shall apply by analogy."

It should be noted that section 1191 did not concern a priority right but granted the vendor the right to rescind the sale by means of a statement made to the purchaser and to recover the ownership of the goods previously sold and delivered. The vendor might then reclaim his goods, even - within certain limits - from third parties. Sections 231 et seq. of the Commercial Code regulated the use of a similar right in case of bankruptcy of the debtor (see paragraph 35 below).

27. Sections 439 and following of the Code of Civil Procedure laid down rules for recovery against a debtor's movable property. As a rule, such recovery started with seizure, which usually required a court judgment (although the law provided for exceptions, for example in tax cases, see paragraph 28 below). Section 456, which was referred to in section 16 of the 1845 Act, is of relevance:

"1. He who claims to be the owner, in whole or in part, of the seized goods, may file an objection to the sale thereof by means of a summons containing the grounds of the objection addressed to the party for whom the seizure has been effected (arrestant) and the person against whom it is directed, and served on the custodian: all on pain of nullity.

2. ...

3. ..."

C. Seizure by the tax authorities of goods belonging to third parties and present on the premises of the tax debtor (bodembeslag)

28. At the material time, pursuant to section 12 of the 1845 Act, tax debts took priority over all other debts with the exception of the court costs and other costs involved in forced sale of goods and debts secured by a mortgage. Goods belonging to third parties seized pursuant to section 16 (3) (see paragraph 29 below) were also subject to this priority (judgment of the Supreme Court of 5 October 1979, NJ 1980, 280).

Section 14 of the 1845 Act entitled the tax authorities to seize a tax debtor's movable and immovable assets and sell them to recover the debt. A

prior judgment establishing the debt and ordering the debtor to pay was not required. Seizure pursuant to this provision was based on a writ of execution made out by the Tax Collector. Such a writ was served on the debtor and seizure and forced sale of his goods followed in the event of failure to pay. Section 14 explicitly stipulated that such a writ had the same legal effects as a judgment. Accordingly, section 14 (2) laid down that the Tax Collector's writ of execution would be executed under the provisions of the Code of Civil Procedure governing the execution of judgments (see paragraph 27 above).

Section 15 gave the tax debtor the right to file an objection in the civil courts against a writ of execution, although the grounds on which such an objection might be based were limited. It also specified that such an objection had no suspensive effect, although it was possible to seek an order for the suspension of execution in summary proceedings (kort geding).

29. Complementing the right to oppose the writ of execution granted the debtor by section 15, section 16 granted a similar right to third parties claiming ownership of movables seized on the debtor's premises. Section 16 should be read in light of section 14, which stated that the relevant provisions of the Code of Civil Procedure are applicable. Its purpose was to limit the rights of third parties under section 456 (see paragraph 27 above). Section 16 read:

> "1. Third parties claiming to be fully or partially entitled to movable goods which have been seized in connection with a tax debt can address an administrative objection to the Commissioner of Direct Taxes, provided that the administrative objection be submitted before the sale and no later than seven days from the day of the seizure. The administrative objection shall be submitted to the Tax Collector, who shall acknowledge receipt. The Commissioner shall decide as soon as possible. The sale shall not take place within eight days of the service of this decision to the objector and to the person against whom the seizure is directed, [the service] again indicating a day for the sale.
>
> 2. The interested party shall not forfeit his right to submit his objection to the ordinary courts by filing an administrative objection in accordance with the preceding paragraph.
>
> 3. However, apart from the right to reclaim their property granted them by ... section 230 and following of the Commercial Code, third parties may never bring an action to challenge seizure in connection with taxes, with the exception of land tax, if the fruit, whether harvested or not, or movable goods serving either as furnishings of a house or farmstead or for the cultivation or use of land are located on the premises of the tax debtor concerned at the time of the seizure."

"Premises" was interpreted as meaning a plot of land or part of a plot of land which is in actual use by the tax debtor and which he has at his disposal independently of others (see, inter alia, judgment of the Supreme Court of 18 October 1991, NJ 1992, 298; see also paragraph 30, sub-paragraph 4, of the 1961 Guidelines).

"Furnishings" were all objects destined to make possible such use of the premises as was in conformity with the purpose for which the tax debtor actually intended to use them. They were held to include movable machines (see, inter alia, the judgment of the Haarlem Regional Court of 18 February 1964, NJ 1965, 402, and the judgment of the Amsterdam Court of Appeal of 7 December 1979, quoted in the judgment of the Supreme Court of 9 January 1981, NJ 1981, 656; see also paragraph 30, sub-paragraph 4, of the 1961 Guidelines) but not stocks of raw materials, finished products or vehicles (judgment of the Supreme Court of 11 March 1927, NJ 1927, p. 494; 1961 Guidelines, ibid.).

The right of the tax authorities to seize all movables found on the premises of the tax debtor, including goods belonging to third parties, implied the right of recovery on the latter goods (paragraph 30, sub-paragraph 1, of the 1961 Guidelines and the Supreme Court's judgment in the present case - see paragraph 23 above).

Recovery was normally by public auction of the goods (section 14 (2) of the 1845 Act read in conjunction with section 463 of the Code of Civil Procedure). It was nonetheless considered permissible, if the tax debtor was bankrupt, for the Tax Collector to agree to allow the trustee to sell them privately (judgment of the Supreme Court of 26 May 1989, NJ 1990, 131).

30. To promote the uniform application of the law, the Minister of Finance established, by decision of 8 December 1961, the 1961 Guidelines. These were official instructions to the tax authorities, who were subordinate to him, indicating the way in which the law should be interpreted and applied. The 1961 Guidelines were published; individuals were entitled to rely on them in legal proceedings against the tax authorities because they were binding on the latter pursuant to general principles of good governance. The Supreme Court, in its judgment of 28 March 1990 (NJ 1991, 118), later confirmed this by ruling that guidelines such as these were to be applied in relation to interested parties as rules of law.

Paragraph 30 of the 1961 Guidelines concerned the interpretation and application of section 16. Sub-paragraph 9 gave further instructions relating to the way in which administrative objections under section 16 (1) and (2) (see paragraph 29 above) were to be dealt with. Sub-paragraph 9 read:

> "The decision of the Commissioner should not only be governed by legal considerations. Once sufficient clarity has been obtained in respect of the legal relations at issue, considerations of fairness (billijkheid) and the requirements of proper policy should be given great importance. It is in accordance with such a policy that the property rights of a third party are spared where a personal tax or social-security contribution debt is to be collected and also where genuine property (reële eigendom) of a third party is involved, provided, however, that the following is taken into account.

...

> The above does not alter the fact that there can be no grounds for any reticent policy in clear cases of connivance between the tax debtor and the third party to create a sham property situation in an attempt to prevent recovery on goods.
>
> From the point of view of fairness and good policy recovery on goods of a third party is generally justified in cases of recovery of commercial tax and social-security contribution debts and when the economic relationship between the tax debtor and the goods provides reason to consider these goods as his and the circumstance that legally the goods belong to someone else has been created mainly to exclude recovery at the expense of the tax debtor or to enable the third party to obtain a preferential right of recovery on these goods.
>
> Examples of this are cases of goods delivered under a hire-purchase agreement or under various forms of leasing or other forms in which the supplier of the goods retains the ownership thereof.
>
> In addition, one might consider in this connection those cases in which ownership of the goods has been transferred to a third party as a security.
>
> ..."

31. In its judgment of 9 January 1981 (NJ 1981, 656), the Supreme Court rejected the proposition that section 16 (3) applied only to goods on the tax debtor's premises the ownership of which had been transferred to a third party in order to prevent the tax authorities from recovering tax debts by the forced sale of those goods. Although it did appear from the drafting history of that provision that it had been prompted at the time (1845) by the desire to counter certain abuses, this did not mean that the occurrence of an abuse had been made a requirement for the provision's applicability, section 16 being derived from the landlord's priority right as defined in section 1186 of the Civil Code (see paragraph 26 above). Section 16 had afterwards several times been the subject of debate between the Government and Parliament and this debate supported the idea that the purport of section 16 was, in the words of the Supreme Court, "to afford the tax authorities the possibility of recovery against the goods seized, notwithstanding any third-party rights, as if they belonged to the tax debtor".

32. It was not possible for suppliers of goods to obtain information from the tax authorities as to whether their clients had any outstanding tax debts and whether there was accordingly any risk of seizure. According to section 67 (1) of the General Act on State Taxes (Algemene wet inzake rijksbelastingen) tax officials were, and are, under an obligation to keep such information secret.

33. A right similar to that of the Tax Collector under section 16 of the 1845 Act was enjoyed by the customs authorities. They were empowered by section 151 of the General Customs and Excise Act (Algemene wet inzake de douane en de accijnzen) to recover import duties and excise against the goods for which these were due, along with any administrative fines or interest, irrespective of who could claim rights to the goods concerned.

D. Consequences of bankruptcy of the purchaser

34. When a natural or legal person was declared bankrupt, all seizures affecting his property lapsed (section 33 (2) of the Bankruptcy Act (Faillissementswet)). This included the seizure of his property by the tax authorities, but not the seizure pursuant to section 16 (3) of the 1845 Act of the goods of third parties.

35. In cases in which movable goods had been sold and delivered but not paid for in full, section 230 of the Commercial Code allowed the vendor to reclaim the goods if the purchaser went bankrupt, provided that the goods could still be identified (section 231) and that the vendor exercised his right within thirty days of delivery to the purchaser (section 232). The vendor had then to refund any payment he might already have received as well as certain expenses that might in the meantime have been incurred (sections 233 and 235). The purchase agreement was then considered rescinded and ownership of the goods was deemed always to have remained with the vendor (judgment of the Supreme Court of 12 June 1970, NJ 1971, 203).

The vendor's rights under sections 230 and following of the Commercial Code had to be respected by the tax authorities (section 16 (3) of the 1845 Act - see paragraph 29 above).

E. Procedural provisions

36. As followed from section 16 (1) of the 1845 Act, third parties claiming a title to goods seized on the premises of the tax debtor could submit an administrative objection to the Tax Collector, who forwarded it to the Commissioner of Direct Taxes. Although section 16 (1) contained a seven-day time-limit, administrative objections submitted after its expiry nevertheless were dealt with and the Tax Collector was required to suspend the forced sale of the seized goods if that was still possible (paragraph 30, sub-paragraph 8, of the 1961 Guidelines).

There were no restrictions as to the grounds on which an administrative objection to the tax authorities might be based.

37. After obtaining a decision from the Commissioner or - if preferred - without first obtaining such a decision, a third party could bring an action before the Regional Court under section 456 of the Code of Civil Procedure (see paragraph 27 above).

However, section 16 (3) of the 1845 Act limited the grounds for such an action to the question whether the seized goods were in fact "fruit, whether harvested or not, or movable goods serving either as furnishings of a house or farmstead or for the cultivation or use of land" (judgment of the Supreme Court of 9 January 1981, NJ 1981, 656, and the judgment of the Supreme Court in the present case - see paragraph 23 above).

38. The possibilities of redress by the civil courts were clarified by the Supreme Court's judgment in the present case (see paragraph 23 above). That judgment made it clear that in bringing a case before the civil courts a third party did not have to confine himself to the questions outlined in paragraph 37 above but could also base his action on a wrongful act in civil law (section 1401 of the Civil Code) committed by the Tax Collector, thus enabling the courts to review compliance with the 1961 Guidelines by the Tax Collector in authorising the seizure and by the Commissioner of Direct Taxes in rejecting the third party's objections.

F. Retention of title

39. Section 455 of the German Civil Code (Bürgerliches Gesetzbuch) reads as follows:

> "If the vendor of a movable good has retained ownership until the price has been paid, it should be assumed in case of doubt that the transfer of ownership takes place subject to a suspensive clause of full payment of the price and that the vendor is entitled to rescind the contract if the purchaser comes to be in default of payment."

According to section 346 of the German Civil Code, in the event of rescission each party had to return to the other everything already received under the contract.

At the time of the events complained of, there was no statutory provision in Netherlands law similar to section 455 of the German Civil Code but retention of title was frequently resorted to and upheld by the courts in disputes between private parties.

G. Developments with regard to the right of the tax authorities to seize goods belonging to third parties and present on the premises of the tax debtor

40. In 1974 a report was published by a government committee (the "Houwing Committee") set up to review the law on priority rights (see paragraph 26 above). With regard to the right granted the tax authorities by section 16 (3) of the 1845 Act the report expressed the opinion that this right should be limited to cases in which other creditors besides the tax authorities had stipulated rights wholly or essentially amounting to security for debts; this would broadly correspond to the policy followed by the tax authorities themselves as laid down in the 1961 Guidelines (see paragraph 30 above). It also suggested extending the right of seizure to all movable goods intended for permanent professional use by the enterprise concerned.

41. The right of the tax authorities pursuant to section 16 (3) came under increasing criticism. For this reason, the Government, when introducing legislation aimed at modernising the law on the collection of tax debts, did

not - for the time being - propose any significant changes to the priority right of the tax authorities or the right of seizure. They stated, when introducing the relevant Bill, that that required further study, for which an Interdepartmental Working Party was to be set up. This position was criticised in Parliament, particularly by those parties which considered the wide powers of seizure enjoyed by the tax authorities unjustified, but the Government maintained their position. Nevertheless, the submission to Parliament of the new Bill led once more to critical debate both within Parliament and outside it.

42. The Bill referred to in the previous paragraph became the new Tax Collection Act, which entered into force on 1 June 1990 (Invorderingswet 1990 - "the 1990 Act").

For all practical purposes, it retains intact the arrangement of the 1845 Act as regards the priority of tax debts, even extending the time-limit involved. It also contains a provision (section 22) which is in practice almost identical to section 16 of the 1845 Act (see paragraph 29 above), the only real difference being that in the third paragraph an exhaustive list is given of the taxes concerned.

According to section 70 of the 1990 Act section 22 would cease to operate on 1 January 1993, unless by that date a Bill had been introduced for its replacement or for prolonging its validity for up to one year; in fact, a Bill (no. 22,942) meeting these requirements was submitted to the Lower House of Parliament on 30 November 1992.

43. The Interdepartmental Working Party (see paragraph 41 above) published its report in 1990. Bill no. 22,942 - which is based on, and closely follows, the report of the above-mentioned Interdepartmental Working Party - proposes to amend the Civil Code and the 1990 Act in such a way as to grant the tax authorities a right of recovery against all goods not belonging to the tax debtor but intended for his permanent use in the exercise of his profession. Third parties would not be able to oppose to the Tax Collector any negotiated right which served essentially as a security. The Tax Collector would, however, be required to enquire of the tax debtor whether any of the seized goods belonged to third parties.

PROCEEDINGS BEFORE THE COMMISSION

44. Gasus applied to the Commission on 6 July 1989. They alleged that they had not had access to an independent and impartial tribunal, in violation of Article 6 para. 1 (art. 6-1), and that they had been deprived of their possessions in violation of Article 1 of Protocol No. 1 (P1-1).

45. On 21 October 1992 the Commission declared the application (no. 15375/89) admissible as regards the complaints under Article 1 of Protocol

No. 1 (P1-1) and inadmissible as to the remainder. In its report of 21 October 1993 (Article 31) (art. 31), the Commission expressed the opinion, by six votes to six with the casting vote of its President, that there had been no violation of Article 1 of Protocol No. 1 (P1-1). The full text of the Commission's opinion and of the four separate opinions contained in the report is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

46. The Government concluded their memorial by stating the opinion that Gasus's application based on a violation of Article 1 of Protocol No. 1 (P1-1) should be declared inadmissible since domestic remedies had not been exhausted (Article 26 of the Convention) (art. 26), and that the application was in any event unfounded.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

47. The applicant company essentially complained of a violation of Article 1 of Protocol No. 1 (P1-1). According to the Government, however, the applicant company had not, or not sufficiently, raised this complaint in the national courts. The Government relied on Article 26 (art. 26) of the Convention, which provides:

> "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."

They pointed to the fact that in the domestic proceedings the applicant company had based their arguments, in so far as they related to the Convention, on Article 6 (art. 6) only. Before the Court of Appeal and the Supreme Court Gasus had actually denied that Article 1 of Protocol No. 1 (P1-1) was applicable.

In the opinion of the Commission, the entire proceedings at national level had concerned the question whether or not the applicant company had been unlawfully deprived of its possessions. Besides, both the Court of Appeal

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[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 306-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

and the Supreme Court had examined this question under Article 1 of Protocol No. 1 (P1-1).

48. The Court reiterates that the purpose of the requirement that domestic remedies must be exhausted is to afford the Contracting States the opportunity of preventing or putting right - normally through the courts - the violations alleged against them before those allegations are submitted to the Convention institutions (see, as the most recent authority, the Hentrich v. France judgment of 22 September 1994, Series A no. 296-A, p. 18, para. 33). This means that the complaint which it is intended to bring before the Commission must first be raised, at least in substance and in compliance with the relevant requirements of domestic law, before the appropriate national courts (see, inter alia, the Saïdi v. France judgment of 20 September 1993, Series A no. 261-C, p. 54, para. 38).

49. It is true that Article 1 of Protocol No. 1 (P1-1) was referred to for the first time by the Tax Collector; it is also the case that the applicant company consistently denied its applicability and argued it before the Supreme Court only in an alternative submission. Nevertheless, in the event both the Court of Appeal and the Supreme Court were able to deal with the allegation of a violation of that provision (P1-1) and in fact did so.

Accordingly, the applicant company did provide the Netherlands courts, and more particularly the Netherlands Supreme Court (see paragraph 23 above), with the opportunity of preventing or putting right the alleged violation of Article 1 of Protocol No. 1 (P1-1). The preliminary objection therefore fails.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

50. The applicant company complained about the seizure by the tax authorities and subsequent sale with their connivance of the concrete-mixer. They relied on Article 1 of Protocol No. 1 (P1-1), which reads:

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

The Government maintained that there had been no violation of that provision (P1-1). In its report the Commission came to the same conclusion.

A. Whether there was an interference with the applicant company's "peaceful enjoyment of [their] possessions"

51. The applicant company pointed out that they had sold the concrete-mixer to Atlas subject to retention of title until the full price had been paid. Since at the time of the seizure the full price had not been paid, the ownership of the concrete-mixer still remained with Gasus. This, in their contention, meant that the seizure and subsequent selling of that machine by the Netherlands tax authorities had interfered with their right of ownership.

The Commission also considered that there had been an interference with Gasus's "peaceful enjoyment of [their] possessions".

52. The Government argued that retention of title was more in the nature of a security right in rem than of "true" ownership and that the "enjoyment" of it was limited to security for payment of the purchase price. "True" or "economic" ownership was vested in the purchaser, who stood to lose by damage to or loss of the goods purchased and stood to gain by their use or resale. At the time of the events complained of, the concrete-mixer was thus no longer a "possession" whose "peaceful enjoyment" was guaranteed to Gasus by Article 1 of Protocol No. 1 (P1-1).

53. The Court recalls that the notion "possessions" (in French: biens) in Article 1 of Protocol No. 1 (P1-1) has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions", for the purposes of this provision (P1-1). In the present context it is therefore immaterial whether Gasus's right to the concrete-mixer is to be considered as a right of ownership or as a security right in rem. In any event, the seizure and sale of the concrete-mixer constituted an "interference" with the applicant company's right "to the peaceful enjoyment" of a "possession" within the meaning of Article 1 of Protocol No. 1 (P1-1).

B. The applicable rule

54. The Court will usually confine its attention, as far as possible, to the issues raised by the specific case before it. In the present case, however, it must examine section 16 (3) of the 1845 Act since the interference complained of resulted from the application of that provision.

55. As the Court has often held, Article 1 (P1-1) guarantees in substance the right of property. It comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled

to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among many other authorities, the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, para. 48).

56. The applicant company based their entire argument on the premise that they had been deprived of their possessions.

57. In the Commission's opinion, sale under retention of title created a "special legal situation" in which the respective rights of the vendor and the purchaser depended on the domestic legal rules applicable to the transaction. Normally, the vendor and the purchaser would both be holders of a limited property right protected by Article 1 of Protocol No. 1 (P1-1), but the exact scope of the right enjoyed by each party might be different according to the legal system involved. In particular, it depended on domestic law to what extent retention of title protected the vendor's property against claims by other creditors. If these other creditors were entitled to have the property seized and sold in settlement of their claims, the result was that the vendor was deprived of his property right. This, in the Commission's view, was what had happened to the applicant company in the present case. The applicable rule was therefore the one contained in the second sentence of the first paragraph.

58. The Government denied that the applicant company had been deprived of their possessions. Firstly, what the tax authorities had done was to seize the concrete-mixer, not to confiscate it; the seizure had left Gasus's property rights intact. Secondly, although the concrete-mixer had eventually been sold and although the sale had been made possible by the seizure, it had been effected under a private contract entered into by Atlas and Van Baarsen. Thirdly, they argued that the expression "deprivation" implied that the natural or legal person concerned was left empty-handed; in fact, Gasus had retained their claim against Atlas for payment of the balance of the purchase price, and the Government were not to be blamed if recovery turned out to be impossible as a result of Atlas's subsequent bankruptcy.

59. The Court considers that the interference complained of in this case was in fact the result of the tax authorities' exercise of their powers under section 16 (3) of the 1845 Act. The purpose of that Act was to regulate the collection of direct taxes within the Netherlands, and section 16 (3) formed part of the provisions concerning the enforcement of unpaid tax debts. Like all other creditors, the tax authorities could recover unpaid tax debts against all the tax debtor's seizable assets; under section 16 (3) they were, moreover, empowered to seize and recover against all movable property

found on the tax debtor's premises which qualified as "furnishings", irrespective of whether or not these goods belonged to the tax debtor (see paragraphs 29 to 31 above). It was in the exercise of this power that the tax authorities seized the concrete-mixer to which Gasus claimed title, in partial enforcement of Atlas's unpaid tax debts.

Against this background, the most natural approach, in the Court's opinion, is to examine Gasus's complaints under the head of "securing the payment of taxes", which comes under the rule in the second paragraph of Article 1 (P1-1). That paragraph explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure the payment of taxes. The importance which the drafters of the Convention attached to this aspect of the second paragraph of Article 1 (P1-1) may be gauged from the fact that at a stage when the proposed text did not contain such explicit reference to taxes, it was already understood to reserve the States' power to pass whatever fiscal laws they considered desirable, provided always that measures in this field did not amount to arbitrary confiscation (see Sir David Maxwell-Fyfe, Rapporteur of the Committee on Legal and Administrative Questions, Second Session of the Consultative Assembly, Sixteenth Sitting (25 August 1950), Collected Edition of the Travaux préparatoires, vol. VI, p. 140, commenting on the text of the proposed Article 10A, ibid., p. 68).

The fact that current tax legislation makes it possible for the tax authorities, on certain conditions, to recover tax debts against a third party's assets does not warrant any different conclusion as to the applicable rule. Neither does it suffice in itself to describe section 16 (3) of the 1845 Act as granting powers of arbitrary confiscation.

Conferring upon a particular creditor the power to recover against goods which, although in fact in the debtor's possession, are legally owned by third parties is, in several legal systems, an accepted method of strengthening that creditor's position in enforcement proceedings. Under Netherlands law as it stood at the material time, landlords had a comparable power with respect to unpaid rent, as they did also under French and Belgian law; the Government have also cited several provisions in the tax laws of other member States that give similar powers to the tax authorities in special cases. Consequently, the fact that the Netherlands legislature has seen fit to strengthen the tax authorities' position in enforcement proceedings against tax debtors does not justify the conclusion that the 1845 Act, or section 16 (3) of it, is not aimed at "securing the payment of taxes", or that using the power conferred by that section constitutes a "confiscation", whether "arbitrary" or not, rather than a method of recovering a tax debt.

C. Compliance with the conditions laid down in the second paragraph

60. As follows from the previous paragraph, the present case concerns the right of States to enact such laws as they deem necessary for the purpose of "securing the payment of taxes".

In the present case the Court is not called upon to ascertain whether this right, as the wording of the provision may suggest, is limited to procedural tax laws (that is to say: laws which regulate the formalities of taxation, including the enforcement of tax debts) or whether it also covers substantive tax laws (that is to say: laws which lay down the circumstances under which tax is due and the amounts payable); the 1845 Act, which is at issue in the present case, was plainly a procedural tax law.

In passing such laws the legislature must be allowed a wide margin of appreciation, especially with regard to the question whether - and if so, to what extent - the tax authorities should be put in a better position to enforce tax debts than ordinary creditors are in to enforce commercial debts. The Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation.

61. Section 16 (3) of the 1845 Act gave the tax authorities the power to recover tax debts against certain goods which, although in fact in the possession of their debtor - since they were on his premises and served as "furnishings" - were owned, as a matter of law, by a third party. It thus dispensed the tax authorities from having to consider whether these goods were actually the property of the tax debtor. The purpose of the provision was obviously to facilitate the enforcement of tax debts, which in itself is clearly in the general interest.

It is true that the 1961 Guidelines curtailed the tax authorities' powers under section 16 (3). As restricted by those guidelines, section 16 (3) empowered the tax authorities to recover only certain tax debts - including those such as the ones owed by Atlas - against "furnishings" owned by third parties where third-party ownership was intended solely to frustrate recovery against the tax debtor or to afford the third party a preferential right of recovery over the goods concerned (see paragraph 30 above). This, however, did not affect the essential aim of section 16 (3), which remained, as was stressed by the Government, to secure tax revenue in the general interest.

62. According to the Court's well-established case-law, the second paragraph of Article 1 of Protocol No. 1 (P1-1) must be construed in the light of the principle laid down in the Article's (P1-1) first sentence (see, among many other authorities, the above-mentioned AGOSI judgment, ibid.). Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to

achieve this balance is reflected in the structure of Article 1 (P1-1) as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued.

63. Gasus stressed that they had been deprived of their property in payment of a tax debt owed by a third party, the Netherlands company Atlas.

They pointed out that they were in no way responsible for causing the tax debt. Moreover, they could not possibly have been aware of it, since in the Netherlands the tax authorities were not allowed to give such information to anyone but the actual debtor.

Finally, the fact that the fiduciary title - to goods not considered "furnishings" - of one of Atlas's bankers, NIB, had been respected, whereas Gasus's retention of title had not, demonstrated that the interference with Gasus's rights had been arbitrary. In their submission, retention of title was closer to "true" ownership than fiduciary title was. The latter involved transfer of ownership from a borrower, who remained entitled to use and often even to sell the goods, to a lender who had never had any interest of his own in the goods. Retention of title, on the other hand, was the continuation of the ownership of the former owner until the purchaser had fulfilled his obligations.

64. In the opinion of the Commission, the measure in issue had been taken in accordance with specific rules of Netherlands law. Consequently, the applicant company could have taken these rules into account, if need be with appropriate legal advice; they could have decided not to sell the concrete-mixer at all, or they could have limited their risk by negotiating "specific security" in addition to the retention of their title or by taking out insurance.

65. The Government preferred to view the case as one concerning the conflicting interests of creditors faced with a common debtor whose assets were insufficient to satisfy them all. Although Netherlands law theoretically recognised the principle of paritas creditorum, it had, like other legal systems, created priority rights favouring certain creditors over others and had ranked the rights of the tax authorities very high.

According to the report of the Interdepartmental Working Party (see paragraph 43 above), which the Government submitted to the Court, both the high rank of the tax authorities' priority right and their extensive rights of seizure were justified by, inter alia, the following differences between the tax authorities and private creditors: the tax authorities did not choose their debtors; they were expected to show greater leniency than other creditors and were enabled by their priority right (which ensured that tax debts would be paid in any case) to be flexible as regards both the timing of assessments and the collection of the amount due; they were obliged to grant credit; and they were not able to make allowance for the risk that the parties they dealt

with might prove insolvent. In addition commercial creditors could in many cases obtain a higher preference by entering into agreements like fiduciary transfer of ownership and retention of title, and the right to seize goods nominally belonging to third parties served to correct the imbalance thereby created.

Contrary to what Gasus had suggested, their position and that of NIB were not comparable. While it was true that NIB's merely fiduciary ownership had been respected whereas the applicant company's retention of title had not, the reason for this was precisely that the goods to which NIB's ownership related were not "furnishings" for the purpose of section 16 (3) of the 1845 Act and therefore not subject to seizure. There was therefore no arbitrary distinction in this respect.

In any event, according to the 1961 Guidelines, "true" ownership (i.e. ownership not merely negotiated as a security right in rem) had to be respected by the tax authorities. In the Government's view, Netherlands law was free to define its understanding of the concept of ownership and could therefore restrict certain forms in the general interest. Other Contracting States limited the protection afforded by retention of title even further than did the Netherlands.

Finally, the Government recalled that Gasus had retained their claim against Atlas for payment of the purchase price. This meant that Gasus had not been left empty-handed. Although Atlas's bankruptcy had deprived the claim of its value, that was not a state of affairs for which the Government could be held responsible.

66. The Court notes at the outset that the grant to the tax authorities of a power to recover tax debts against goods owned by certain third parties - such as a seller of goods who retains his title - does not in itself prompt the conclusion that a fair balance between the general interest and the protection of the individual's fundamental rights has not been achieved. The power of recovery against goods which are in fact in a debtor's possession although nominally owned by a third party is a not uncommon device to strengthen a creditor's position in enforcement proceedings; it cannot be held incompatible per se with the requirements of Article 1 of Protocol No. 1 (P1-1). Consequently, a legislature may in principle resort to that device to ensure, in the general interest, that taxation yields as much as possible and that tax debts are recovered as expeditiously as possible. Nonetheless, it cannot be overlooked that, quite apart from the dangers of abuse, the character of legislation by which the State creates such powers for itself is not the same as that of legislation granting similar powers to narrowly defined categories of private creditors. Consequently, further examination of the issue of proportionality is necessary in this case.

67. In this connection, the Court also notes that in assessing the proportionality of the powers under section 16 (3) and their use in the present case it is immaterial that Gasus were a limited company with legal

personality under German law and had their registered office in Germany. Gasus had sold and delivered their concrete-mixer to a purchaser based in the Netherlands and installed it on his premises. Gasus could therefore not have expected otherwise than that the effectiveness of their retention of title in the face of seizure depended on Netherlands law. It consequently makes no difference whether a seller who retains title and who finds himself a victim of use by the tax authorities of their power under section 16 (3) has his domicile or registered office in the Netherlands or elsewhere. In either case the essential question must be whether as a consequence of the tax authorities' actions against the goods to which title has been retained the vendor has had to bear "an individual and excessive burden" (see particularly the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, p. 34, para. 50).

68. Whatever the nature of retention of title compared with "true" or "ordinary" property rights - a question on which the Court discerns no common ground among the Contracting States - it is apparent that whoever sells goods subject to retention of title is not interested so much in maintaining the link of ownership with the goods themselves as in receiving the purchase price. A State may therefore legitimately, within its margin of appreciation, differentiate between retention of title and other forms of ownership.

It matters little whether such differentiation takes the form of substantive limitations of the right of ownership or is expressed in terms of procedural law; as the Court pointed out in its Fayed v. the United Kingdom judgment of 21 September 1994, such a distinction may be no more than a question of legislative technique (Series A no. 294-B, p. 50, para. 67).

69. It cannot be ignored that in general the cases in which the tax authorities will make use of their high-ranking priority rights and their powers under section 16 (3) of the 1845 Act are precisely those where the tax debtor is unable to satisfy all his creditors. This necessarily implies that in these cases commercial creditors will not be fully paid if they receive any payment at all.

The Court therefore does not agree with the Government that the fact that the applicant company's claim against Atlas was rendered worthless is not a consequence of the action taken by the tax authorities.

70. It is nonetheless true, as observed by the Commission, that the applicant company were engaged in a commercial venture which, by its very nature, involved an element of risk (see, mutatis mutandis, the Pine Valley Developments Ltd and Others v. Ireland judgment of 29 November 1991, Series A no. 222, p. 26, para. 59). The facts of the case show that Gasus were in fact sufficiently aware of their risk to take steps to limit it.

Having allowed Atlas to pay the purchase price of the concrete-mixer in instalments, and being aware of the danger that Atlas might default on its payments, Gasus reserved their title to the concrete-mixer until the full price

had been paid. This, under Netherlands law, provided them with a considerable degree of security, as their claims to the concrete-mixer thus took priority over those of all other creditors except the tax authorities, who were entitled under section 16 (3) of the 1845 Act to seize it and take the proceeds for the State.

Like the Commission, the Court considers that Gasus could have eliminated their risk altogether by declining to extend credit to Atlas: they could have stipulated payment of the entire purchase price in advance or else refused to sell the concrete-mixer in the first place. It also accepts that the applicant company might have obtained additional security, for example in the form of insurance or a banker's guarantee, which pass the risk on to another party.

It is therefore unnecessary for the Court to establish whether the applicant company could have ascertained the existence and extent of Atlas's tax debts, this point being in dispute. Nor is it material that the applicant company bore no responsibility for the tax debt.

In the present context it is not without relevance that the owners of goods subject to seizure under section 16 (3) of the 1845 Act had knowingly allowed them to serve as "furnishings" of the tax debtor's premises. They might therefore well be held responsible to some extent for enabling the tax debtor to present a semblance of creditworthiness.

71. Furthermore, whether or not the tax authorities are under any legal or other obligation to be more flexible in respect of tax debtors in temporary financial difficulties, they do not have the same means at their disposal as commercial creditors for protecting themselves against the consequences of their debtors' financial problems. Nor have they any other means of protecting themselves against their debtors' attempts to solve such problems by vesting the title to their "furnishings" in another party as a device for borrowing against a security.

72. The Court accepts the Government's argument that the fact that the concrete-mixer to which Gasus had reserved title was seized while goods subject to NIB's fiduciary ownership rights were spared does not suffice to demonstrate that the seizure of the concrete-mixer was arbitrary. Whereas the concrete-mixer supplied by Gasus qualified as "furnishings", this was not the case with the goods over which NIB could claim rights. This distinction was based on the law, as elucidated by a long-established body of case-law, and accorded with the stated policy of the Minister of Finance.

73. Finally, in the Court's opinion, it should be taken into account that, as was made clear by the Supreme Court in its judgment in this case, under Netherlands law third parties whose goods are seized under section 16 (3) of the 1845 Act may have the use that has been made of the powers conferred by that section adequately reviewed by a tribunal under a procedure which meets the requirements of Article 6 para. 1 (art. 6-1) of the Convention.

74. In view of the above, the Court comes to the conclusion that the requirement of proportionality has been satisfied. Accordingly, there has been no violation of Article 1 of Protocol No. 1 (P1-1).

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;

2. Holds by six votes to three that there has been no violation of Article 1 of Protocol No. 1 (P1-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 February 1995.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the dissenting opinion of Mr Foighel, joined by Mr Russo and Mr Jungwiert, is annexed to this judgment.

R. R.
H. P.

DISSENTING OPINION OF JUDGE FOIGHEL, JOINED BY JUDGES RUSSO AND JUNGWIERT

I agree with the majority that the present case comes under the rule contained in the second paragraph of Article 1 of Protocol No. 1 (P1-1). I also agree that this rule must be construed in the light of the principle laid down in the first sentence of that Article (P1-1), i.e. that an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights and that there must be a reasonable relationship of proportionality between the means used and the aim pursued (see paragraph 62 of the judgment).

I regret, however, that I cannot share the majority's opinion that the requirements of a "fair balance" and of proportionality have in the instant case been satisfied.

The reasons for my dissent are the following:

1. The right of the tax authorities under section 16 (3) of the 1845 Act (the bodemrecht), which gives them the power to recover tax debts against certain goods which - as a matter of law - are owned by a third party, is a specific right enjoyed by the tax authorities only. This cannot be compared with the situation in which a group of competing creditors divide the assets of a debtor who has not enough to satisfy them all and it is generally accepted that some privileged creditors may invoke a priority right. In this latter situation the assets in question are all owned by the debtor and not - as in this case - by a third party.

2. The bodemrecht must be evaluated in the light of the fact that according to Netherlands commercial law "retention of title" in sales on credit must be respected by all other creditors; it is a recognised means of protecting the property interests of the vendor, who retains ownership of the goods until they have been fully paid for.

3. The present case therefore concerns a genuine conflict between the tax authorities and a third party who has nothing to do with the amount of tax due to the State by the buyer of the goods. Furthermore, there is not the slightest evidence that "retention of title" was anything other than a normal condition of trade negotiated by the third party, nor that the arrangement was made to defraud the tax authorities or that the third party otherwise acted in bad faith.

4. Even if one accepts that States enjoy a wide margin of appreciation in collecting taxes, in checking statements, in acting on presumptions and in requiring convincing proof if a tax debtor claims that property on his premises belongs not to him but to a third party, there is a limit to what a government may do in this regard.

There is certainly a need to define this limit in cases such as the present, where the tax authorities seize goods which unquestionably belong to third party to recover a tax debt owed by another person.

The limit is to be found above all in the test of proportionality, which is an important element of Article 1 (P1-1). In my opinion, the bodemrecht as applied in this case is not indispensable to the tax authorities and therefore does not meet this test.

5. In the first place, the sum recovered annually by the tax authorities by setting aside the property rights of third parties is negligible. As appears from the documents submitted by the Government themselves, the sums recovered in this way by the forced sale of goods sold under "retention of title" total no more than 1 million Netherlands guilders, compared to a total budget for 1995 of 233 billion.

Furthermore, the more general issue of verification is of no relevance to the present case as there is undisputed contractual evidence that the concrete-mixer was sold under "retention of title" and therefore - according to provisions of commercial law applying also in the Netherlands - belonged to a third party.

Finally, I do not accept that a third party, if he is a private person, should bear the risk that the person with whom he enters into an agreement has not paid all his taxes. Normally the third party will know nothing about his business counterpart’s tax status as it is in most countries a punishable act for persons in government employ to disclose information of this nature to any private party, bank or credit information service.

6. In weighing up the conflicting interests of the tax authorities in collecting taxes and the business community in upholding the validity of "retention of title", I come to the conclusion that in this case there has been a violation of Article 1 of Protocol No. 1 (P1-1).