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

THIRD SECTION

CASE OF SACILOR LORMINES v. FRANCE

(Application no. 65411/01)

JUDGMENT

STRASBOURG

9 November 2006

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

In the case of Sacilor Lormines v. France,

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

Mr B.M. ZUPANČIČ, *President,*
Mr C. BÎRSAN,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON, *judges,*
Mr M. LONG, *ad hoc judge,*

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 12 May 2005 and on 11 July and 12 October 2006,

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

PROCEDURE

1. The case originated in an application (no. 65411/01) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a company incorporated in that State, Société des Mines de Sacilor Lormines ("the applicant"), on 18 October 2000.

2. The applicant was represented by Mr Schmitt, a lawyer practising in Strasbourg. The French Government ("the Government") were represented by their Agent, Ms E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant company alleged, in particular, that the proceedings before the *Conseil d'Etat* had been unfair, on the grounds that it was not an independent and impartial tribunal and that the Government Commissioner (*Commissaire du Gouvernement*) had participated in or attended the deliberation. It also complained about the length of the various proceedings, relying on Article 6 § 1 of the Convention.

4. The application was allocated to the Court's Third Section (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Following the withdrawal of Mr Costa, the judge elected in respect of France (Rule 28), the Government appointed Mr Marceau Long to sit as an *ad hoc* judge.

5. In a decision of 12 May 2005, the Court declared the application partly admissible. In a decision of 17 November 2005 it adjourned the

examination of the case pending the decision that was to be taken by the Grand Chamber in the case of *Martinie v. France* (no. 58675/00).

6. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a limited company (*société anonyme*), which, in accordance with a resolution of its general meeting of 3 March 2000, is in voluntary liquidation. It was represented by its liquidator Mr Jean-Luc Sauvage, who was appointed by a decision of the Nanterre Commercial Court dated 6 March 2000.

A. Background to the case

8. The company Société des Mines de Sacilor Lormines, a sub-subsidiary of Usinor, was set up in 1978 to take over, by virtue of a transfer decree of 28 March 1979, the concessions and leases of the Sacilor iron-ore mines in Lorraine.

9. The applicant subsequently took over other concessions, in particular those of the company Société des Mines du Nord-Est and its subsidiary Société de Droitaumont-Giraumont. It thus held a total of 63 iron-ore mining concessions in Lorraine on the date when it announced that it was to shut down its mining operations. Iron-ore mining had been in constant decline since 1963. The company was forced to discontinue its mining activity because worldwide competition meant that it was no longer profitable to mine iron-ore in Lorraine. The applicant company's iron-ore production had thus fallen from 13,940,000 tonnes in 1978 to 4,300,000 tonnes in 1991. As the demand for the applicant company's phosphoric pig iron had slowly dwindled away, it decided in 1991 to halt production. The closure of the various pits was staggered between 30 June 1992 and 31 July 1993. The applicant company had to stop all extraction operations in July 1993. It underwent privatisation in 1995 and in 1997.

10. With a view to the complete cessation of its activity, the applicant company initiated the appropriate procedures for the abandonment and renunciation of its concessions. The abandonment procedure, for the purpose of decommissioning and stabilising disused mining installations, entails the implementation of an order (*arrêté*) in which the requisite abandonment operations are stipulated by the prefect having territorial

jurisdiction. It ends when the authorities are able to confirm that the requirements have been fulfilled. The renunciation procedure terminates the concession with the result that its holder is no longer bound by the special mining regulations and is released from the presumption of liability in respect of any damage which occurs above ground. At the time when the cessation of the company's operations was announced, the abandonment and renunciation procedures were governed by Articles 83 and 84 of the Mining Code and by Decree no. 80-330 of 7 May 1980 concerning mining and quarrying regulations. Law no. 94-588 of 15 July 1994, amending certain provisions of the Mining Code, repealed Articles 83 and 84 and replaced them by Articles 79 and 84. Decree no. 95-696 of 9 May 1995, issued after consultation of the *Conseil d'Etat*, pertaining to the opening of mines and mining regulations, was adopted for the implementation of those provisions. Lastly, Law no. 99-245 of 30 March 1999 concerning liability for damage resulting from mining and the prevention of mining-related risks after discontinuance, brought about further amendments to mining law (see paragraphs 29 to 33 below).

11. Numerous regulatory measures (over twenty) were taken in this connection against the applicant company, which challenged them all in the Administrative Courts of Strasbourg and Nancy. The applicant company also lodged numerous appeals seeking the annulment of refusals by the Minister responsible for mining to accept its renunciation of a number of concessions; it requested that the Minister be ordered to accept the renunciation of those concessions and sought compensation for the loss it had sustained as a result of the refusals.

B. Inter-prefectoral orders of 26 May and 18 July 1997 laying down regulatory measures in the mining sector

12. The inter-prefectoral order (prefectures of the Lorraine region, the *département* of Moselle and the *département* of Meurthe-et-Moselle) of 26 May 1997, laying down regulatory measures in the mining sector, imposed certain obligations on the applicant company:

...

> "It is hereby decided as follows:
>
> Article 1: The company Lormines ... shall be required, in a prompt manner, to appoint a panel of three specialists from outside the company, having submitted the composition of the panel for the prior approval of the prefects, and having regard to the opinion of the Regional Director for Industry, Research and the Environment of Lorraine, to carry out the following assignment:
>
> - analysis of the parts of the mining installations referred to in the penultimate paragraph of the preamble, located between elevations NGF 115 and 172 in the municipalities (*communes*) of Auboue, Briey, Homecourt, Joeuf and Moutiers

(Meurthe-et-Moselle), Moyeuvre-Petite, Moyeuvre-Grande, Roncourt, Sainte-Marie-aux-Chênes and Saint-Privat-la-Montagne (Moselle);

- classification of the parts of the mining installations thus enumerated according to the presence of both aggravating instability factors and vulnerability related to the type of dwelling at risk.

The company Lormines shall make available to the specialists any technical documents and archives in its possession concerning the operations in question. The company shall transmit to the prefect, within a period of ten days after the notification of the present order, the report issued by the said specialists on the completion of their assignment.

Article 2: The company Lormines ... shall take all necessary measures to ensure the permanent availability of an adequate and sufficiently large network of surveyors, in order to be in a position to implement, upon the request of the prefects, any monitoring and observation measures that may be required by the situation."

Moreover, in an order of 18 July 1997, the prefects of Moselle and Meurthe-et-Moselle imposed the following on the applicant company:

...

"Having regard to the urgency;

Acknowledging the report of the experts appointed by the company Sacilor Lormines in accordance with the above-mentioned prefectoral order;

Recognising that, in the light of current knowledge, the appearance of cracks in buildings may be a preliminary indication of subsidence;

Upon the proposal of the Regional Director for Industry, Research and the Environment of Lorraine;

It is hereby decided as follows:

Article 1

The company Lormines ... shall take all necessary measures to ensure the permanent availability of an adequate and sufficiently large network of building experts, so that it is able to carry out, promptly and upon the request of the prefects, analysis of the cracks in buildings in the "yellow", "orange" and "red" zones, the lower parts of buildings included, within the perimeter of the iron-ore mining concessions held by the company Lormines ... in the municipalities of Auboue, Briey, Homecourt, Joeuf and Moutiers (Meurthe-et-Moselle), Moyeuvre-Petite, Moyeuvre-Grande, Roncourt, Sainte-Marie-aux-Chênes and Saint Privat (Moselle);

The assessments carried out by those experts shall be reported in writing to the prefects concerned, in the appropriate time-frame and form such as to be compatible with the triggering of the alert procedure, should that prove necessary, or within 48 hours in other cases.

..."

13. In letters of 2 July and 17 September 1997 the applicant company lodged administrative appeals with the Minister for Economic Affairs, Finance and Industry, requesting that he rescind the orders of 26 May and 18 July 1997 and seeking the reimbursement of the sums incurred in order to meet the requirements of those orders. The applicant company claimed that the order had failed to take account of the fact that it no longer operated the mines at issue and that the sites referred to in the order had undergone an abandonment and renunciation procedure.

14. On 29 September 1997, acting upon an application from the Secretary of State for Industry, the Public Works Division of the *Conseil d'Etat*, under the presidency of Mr Le Vert, the reporting judge being Mr de la Verpillière, gave an advisory opinion concerning the "work of stabilising and rehabilitating the sites of disused mines – Powers of the authority *vis-à-vis* the mine operator – application of the Law of 15 July 1994". ... That opinion was published in the annual report of the *Conseil d'Etat* for the year 1998 and reads as follows:

> "The *Conseil d'Etat* (Public Works Division), has been called upon by the Secretary of State for Industry to answer the following questions:
>
> 1. Does not the immediate application of the new Article 84 of the Mining Code impair the established rights of the holders of mining concessions or licences, in so far as work commenced prior to this legislation is at issue? Should or could a limit be set on the regulatory obligations that may be imposed on them, since the objectives now enshrined in the mining regulations were clearly not envisaged when the operations were first started?
>
> 2. Should the principle of the proportionality of acts of the administrative authorities be construed as requiring the prefect to take account of the human, financial or technical means available to the operator when he imposes specific measures on the latter?
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> To what extent, should it prove impossible for the mine operator to implement the prefect's instructions, would the obligations thus imposed be assumed by the State and then performed and financed by the latter?
>
> 3. Could the possible extension introduced by the use of the term "measures" rather than "work" in Article 84 of the Mining Code lead to the imposition of other requirements, apart from those whose result is attainable within a period that is consistent with the need to bring an end to the special mining regulations, for example a pumping requirement, which could only be fulfilled in the long term, or in a period that would be difficult to foresee?
>
> In the latter case, is there not a contradiction with Articles 46 and 49 § 2 of the decree of 9 May 1995, which seem, at least implicitly and for mines operated normally, to limit the imposition of mining regulations to the term of the mining concession?

Moreover, should the prefect confine himself to physical measures or is he entitled to impose financial measures such as payment to an organisation by way of performance?

4. Would it be feasible to arrange for part of the obligations imposed under mining regulations (for example those concerning the pumping of water or maintenance of equipment) to be assigned to a third party (company, consortium of public institutions, etc.)? Could the formal confirmation be issued once the prefect is able to observe that the operator has set up a structure providing for the performance of its obligations – or, on the contrary, can it only be issued once it has been observed that the prescribed measures have actually been carried out or completed?

5. In matters of *ordre public* (public policy), is the court entitled, and on the basis of what criteria, to consider that section 17 of the Law of 15 July 1994 has an immediate effect on contracts in progress? Would it be possible, if necessary, in the light of the Constitution, to enact legislation giving retrospective effect to the abovementioned section 17?

6. On the basis of what criteria is the court entitled to rule out the application of a clause releasing the mine operator from liability in respect of damage caused by its mining activity, in the event of transfer of ownership? In particular, is the court entitled to find such a clause null and void when the foreseeable or inevitable nature of the damage has been established? In such cases, is it necessary to prove that the operator was aware of the risk or does the existence of the risk suffice, in so far as the operator should have been aware of it? Moreover, may the seriousness of the damage be taken into account in the court's interpretation of the validity of such clauses?

[The *Conseil d'Etat*] is minded to answer the foregoing questions as follows:

1. As to the mining abandonment procedure (Article 84 of the Mining Code):

(a) A new legal rule will not apply to legal situations which have already become final on the date it enters into force. Accordingly, the abandonment of mining operations which began before the entry into force of the Law of 15 July 1994 will not be governed by the new Article 84 of the Mining Code, introduced by the said Law, if on that date the particulars of the work required for the stabilising and rehabilitation of the site have been irrevocably decided, pursuant to the former Article 83 of the Mining Code and to Articles 22 to 29 of Decree no. 80-330 of 7 May 1980, by the acceptance of the declaration of relinquishment or abandonment submitted by the operator, or by virtue of a prefectoral order prescribing the work to be carried out. In other cases the new Article 84 will be applicable, and it will of course govern the abandonment of mining work started after 15 July 1994.

(b) The principle of the “proportionality of acts of the administrative authorities” entails that the authorities require the operator to take only those measures that are necessary in order to fulfil the objectives and preserve the interests enumerated in Articles 79 and 84 of the Mining Code. In assessing what is necessary, the authorities are not bound by the human, financial or technical capacities of the operator.

(c) The authorities have an obligation to ensure compliance with the measures that they have prescribed pursuant to the abovementioned provisions. In the event of any failure to act on the part of the operator, for any reason whatsoever, they must assume their powers of substitution under the eighth and ninth paragraphs of Article 84.

Failing that, the State's responsibility may be totally or partially engaged in the event of non-performance.

(d) It follows from all the provisions of Article 84 of the Mining Code that, unless otherwise agreed by the operator, the authorities cannot impose measures without fixing a time-limit. The performance of such measures cannot be required to continue in the long term, after the mining concession has expired, except in the case provided for under Article 48 of the decree of 9 May 1995.

(e) In order to obtain formal confirmation, the operator must have performed the prescribed measures itself and is not entitled to have them performed by a third party, even if it provides that party with the requisite financial means.

2. As to the validity of clauses in property transfer agreements which exclude the liability of the mining or prospecting company (section 17 of the Law of 15 July 1994):

(a) Subject to the independent findings of the competent courts, it would appear that section 17 of the Law of 15 July 1994, which renders null and void on public policy grounds any clause, in property transfer agreements between mining companies and local authorities or natural persons outside the profession, which excludes the liability of the company for any damage related to its mining activity, does not apply to agreements entered into before the entry into force of the said Law. Unless retroactive effect is expressly stipulated by the legislature, a new law will not affect the terms and conditions of an agreement that has become final prior to the entry into force of that law.

(b) Except in penal matters, the principle of non-retrospectivity of laws is not binding on the legislature, which may therefore decide to give retrospective effect to section 17 of the Law of 15 July 1994.

(c) It is not possible to give a general answer to the question concerning the possibility for the court to rule out the application of clauses releasing the vendor from liability. It will be for the competent courts to assess such clauses on a case-by-case basis in the light of Article 1643 of the Civil Code."

15. On 31 December 1997 and 17 March 1998 the applicant company applied to the *Conseil d'Etat* for a judgment declaring *ultra vires* and annulling the above-mentioned prefectoral orders and the implied decisions of 3 November 1997 and 18 January 1998 by which the Minister had refused to withdraw those orders. The applicant company sought the reimbursement of the expenses that it had paid out for the implementation of those orders. It claimed, in particular, that it was for the authorities to bear the cost of missions for the monitoring and verification of the measures that they themselves had imposed on the operator for the closure of the mines. Moreover, it argued that it no longer operated the mines at issue since 1993 and that, having complied with the requirements laid down by the prefect with regard to the abandonment of mining operations, it had been released from its obligations as concession-holder. In this connection it pointed out that for two concessions the renunciation had been accepted (Valleroy and

Moutiers), whilst in the other cases, the abandonment had become effective after the completion of the work prescribed by the prefect in 1995 and 1996 or was still in progress. It lastly considered that, in respect of the former concessions in question, the declarations of abandonment and applications for renunciation had been filed with the prefecture before the entry into force of the Law of 15 July 1994 (see paragraph 31 below) amending certain provisions of the Mining Code and that those concessions could only therefore fall within the statutory and regulatory framework that existed prior to the entry into force of that Law (former Articles 83 and 84 of the Mining Code, see paragraph 29 below).

16. On 21 March 2000 the President of the Judicial Division of the *Conseil d'Etat* wrote to the director of legal affairs of the competent ministry to express his concern about the ministry's shortcomings in the preparation of judicial cases which had been set down on a list of the *Conseil d'Etat* for hearing on 20 March 2000 and which had had to be struck out at the very last minute on account of belated production by the ministry. He gave the following explanations:

> "As regards case no. 192947, you were notified of it on 9 March 1998. In the absence of any response on your part, you were again invited to adduce your observations on 16 July, 27 August and 29 September 1998 and on 8 April 1999.
>
> Since a case has to be heard even if the authority fails to reply, the case was entrusted to a reporting judge, examined at the preparatory stage, transmitted to a Government Commissioner and set down for hearing on 20 March, with notice of the hearing being issued on 13 March 2000.
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> It was not until after that notice of hearing that you produced observations which were received by facsimile in the *Conseil d'Etat* on 18 March.
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> As the principle of adversarial proceedings required that your observations be communicated to the applicant company, the striking-out of the case was inevitable. This also happened, with a few minor differences, in case no. 194925. Such a situation is difficult to accept. For the purposes of preparing the case properly the judge sets time-limits for the parties. In some cases, if requested, an extension of the time-limit may be granted.
>
> In the present case, however, it was only after two years and in spite of a number of reminders that you filed your observations, and you did so after the case had been set down for hearing, placing the *Conseil d'Etat* before the *fait accompli* and obliging it to strike out the case.
>
> In 1998 the Prime Minister adopted specific measures to ensure the defence of the State in good conditions and the proper operation of judicial proceedings. It is regrettable that in this case his instructions were disregarded so patently."

17. In a judgment of 19 May 2000 (nos. 192947 and 194925), notified on 20 June 2000, the *Conseil d'Etat*, after joining the two cases, ruled as follows:

"... Under the first paragraph of Article 34 of the ... decree [of 9 May 1995 pertaining to the opening of mines and mining regulations]: 'The prefect shall decide, by way of an *arrêté* (order), on regulations applicable to mining. Except in cases of urgency or imminent danger he shall first invite the mine operator to submit its observations and shall set a time-limit for that purpose'. In view of the seriousness of the subsidence which occurred on 14 October 1996, 18 November 1996 and 15 March 1997 above various mines that had been operated by the company Société des Mines de Sacilor Lormines and having regard to the report filed on 20 May 1997 by the scientific advisory board set up on 25 March 1997 for that purpose, the prefects of Moselle and Meurthe-et-Moselle were legally entitled to issue the urgent order of 26 May 1997 requiring the applicant company to entrust to a panel of experts the analysis and risk assessment of a number of mining sites, and to have a network of surveyors permanently available in order to carry out the requisite supervisory measures. They were also entitled, on account of the urgency, without consulting the mine operator and as soon as the report had been issued by the experts appointed in the order of 26 May 1997, to require the company, in the order of 18 July 1997, to ensure that a network of building experts was permanently available. Accordingly, the arguments to the effect that those orders were issued without complying with the lawful procedure, in breach of the provisions of Article 34 of the decree of 9 May 1995, cannot be upheld.

Article 79 of the Mining Code, in the version deriving from the Law of 15 July 1994, reads as follows: 'prospecting and mining work shall comply with the restrictions and obligations pertaining to ... / public health and safety, ... [and] to the solidity of public or private edifices ... / When the interests mentioned in the previous paragraph are put at risk by such work, the administrative authority may require the prospector or mine operator to take any measures for the purposes of ensuring the protection of those interests within a given time-limit'. The last paragraph of Article 84 of the Mining Code, which lays down the rules governing the discontinuance of mining operations, provides as follows: 'When the measures provided for by the present Article, or those prescribed by the administrative authority pursuant to the present Article, have been executed, the administrative authority shall issue the prospector or operator with its formal confirmation of completion ...'. Article 49 of the decree of 9 May 1995 provides: 'the administrative supervision and the mining regulations shall cease to take effect on the date that the operator is issued with formal confirmation that the work has been completed ... / However, the prefect shall be empowered ... to take ... any measures that may be rendered necessary by incidents or accidents that can be attributed to former mining work, when such events are capable of damaging the interests protected by Article 79 of the Mining Code, until the expiry of the mining concession'.

First, contrary to what has been contended, the Law of 15 July 1994 entered into force as soon as it was published; subsequently, and notwithstanding the fact that the applications for abandonment of operations were submitted before the entry into force of that Law, the prefects of Moselle and Meurthe-et-Moselle legally implemented it.

Secondly, it follows from the combination of the provisions cited above that the completion by the operator of the work prescribed by the administrative authority for the purposes of closing a mine does not suffice to exonerate if from all liability unless and until it has been issued with formal confirmation of completion and, as regards any incidents and accidents that may interfere with the protection of the interests provided for under Article 79 of the Mining Code, for as long as the operator holds the mining concession. It follows from the documents in the case file that, with the

exception of the concessions of Valleroy and Moutiers, the prefects of Moselle and Meurthe-et-Moselle had not issued formal confirmation of the completion of work in respect of the mines abandoned by [the applicant company], nor had they accepted the proposed renunciation of the concessions concerned. Subsequently, the prefects ... were lawfully entitled, except in respect of those parts of the municipalities that were located above the Valleroy and Moutiers concessions, to impose on the operator the necessary measures to prevent repetition of subsidence.

Under Articles 79 and 84 of the Mining Code, the administrative authorities are entitled to require the operator to take any measures for the purposes of guaranteeing public health and safety and the solidity of edifices, as provided for in Article 79 of the Code. These measures may consist both in studies for the assessment and enumeration of risks and in work to prevent or put an end to incidents.

It is hereby decided as follows:

Article 1: The implied decisions of 3 November 1997 and 18 January 1998 of the Minister for Economic Affairs, Finance and Industry and the orders of 26 May 1997 and 18 July 1997 are annulled in so far as they imposed on the [applicant company] measures of prevention, supervision and verification in respect of the areas of the municipalities located above the concessions of Valleroy and Moutiers of which the renunciation had been accepted by the authority.

Article 2: The State shall reimburse to Société des Mines de Sacilor Lormines, with interest, the sums pertaining to the sites in respect of which the decisions of the Minister are annulled by the present decision;

Article 3: The State shall pay to Société des Mines de Sacilor Lormines the sum of 20,000 francs under section 75-I of the Law of 10 July 1991.

...

After deliberation on 26 April 2000 in the presence of: Mrs Aubin, Deputy President of the Judicial Division, presiding; Mrs Moreau, Mr Durand-Viel, Section Presidents; Mr Dulong, Mr Pêcheur, Mr Levis, Senior Members of the *Conseil d'Etat*; and Miss Bonnat, *Auditeur-rapporteur*."

18. By a decree of 26 May 2000, the President of the Republic appointed Mr Pêcheur, a member of the *Conseil d'Etat* who had sat in the deliberation of 26 April 2000, to the post of Secretary General of the Ministry for Economic Affairs, Finance and Industry.

19. On 17 January 2001 the applicant company brought proceedings in the Paris Administrative Court seeking the annulment of the implied decision of rejection resulting from the failure by the Minister for Economic Affairs to respond to its request for payment of the sum of 20,000 francs pursuant to Article 3 of the judgment of the *Conseil d'Etat* of 19 May 2000. By an order of 28 February 2001, the president of the Administrative Court transmitted the application to the *Conseil d'Etat*.

20. Concurrently, the applicant company requested the *Conseil d'Etat* to order the State to pay a coercive fine of 2,000 francs per day to guarantee execution of the entire decision of 19 May 2000.

21. In a judgment of 5 April 2002 (nos. 229499 and 231060), notified on 23 May 2002, the *Conseil d'Etat* found that the execution in question was incomplete:

> "... the Minister for Economic Affairs, Finance and Industry ... ordered, on 23 July 2001, the payment of the sum of 71,745.60 francs for the reimbursement of the expenses incurred on the sites in respect of which the Minister's decisions had been annulled by the judgment of 19 May 2000. It follows from a calculation note produced by the authority that this sum consists of an indemnity of 66,000 francs, being the capital, which has not been disputed, and interest amounting to 5,745.60 francs. As regards the interest .... [it] should have run not from 19 May 2000, the date of the decision in which payment was ordered, but from the date on which [the applicant company] had actually paid the invoice of 31 October 1997 issued by the National Institute for the Industrial Environment and Risks. In view of the foregoing, [the applicant company] is justified in arguing that the judgment of 19 May 2000 has not been fully executed.
>
> In the circumstances of the case it is appropriate to require the State ... to take, within a period of two months from notification of the present decision, as regards the start date for calculation of interest at the statutory rate, the necessary measures in order to ensure full execution of Article 2 of the judgment of 19 May 2000, and to order it to pay a coercive fine of 10 euros per day from the expiry of the said period if it has not by then fulfilled the said obligation.
>
> ...
>
> After deliberation on 15 March 2002 in the presence of: Mr Labetoulle, President of the Judicial Division, presiding; Mr Durand-Viel, Mr Bonichot, Section Presidents; Mr Dulong, Mr Hoss, Mr Levis, Mr de Froment, Senior Members of the *Conseil d'Etat*; Mr Thiellay, *Maître des Requêtes* and Miss Vialettes, *Auditeur-rapporteur*."

C. Inter-prefectoral order of 24 July 1998

22. Further to the above-mentioned orders of 26 May and 18 July 1997 and other orders of 12 August 1997 requiring the analysis of the parts of mining installations that were located in several municipalities which had not been covered by the expert's report prescribed by the inter-prefectoral order of 26 May 1997, and the classification of the parts of mining installations thus enumerated according to the presence of both aggravating instability factors and vulnerability related to the types of dwelling, the prefects of Moselle, Meurthe-et-Moselle and Meuse made an order dated 24 July 1998 containing the following requirements:

> " ...
>
> Article 1

> The company Lormines ... shall take all necessary measures, promptly and at the request of the prefects for the places concerned, to carry out an analysis of cracks in buildings or facilities located within the "yellow, orange and red" zones, which are indicated as being at risk from significant soil movements in the maps issued showing degrees of potential delayed subsidence, and which are situated within the ground areas of the iron-ore mining concessions held by the company Lormines on parts of the *départements* of Moselle, Meurthe-et-Moselle and Meuse.
>
> The assessments shall be reported in writing to the prefects concerned, in the appropriate time-frame and form such as to be compatible with the triggering of the alert procedure, should that prove necessary, or within 48 hours in other cases.
>
> ..."

23. The applicant company was unable to execute this order (non-execution at Moyeuvre-Grande) and execution was thus initiated by the State at the company's expense. In respect of this execution the applicant company was required to pay the sum of 18,572 francs, by a payment order of 7 February 2000 which it disputed before the Strasbourg Administrative Court.

24. On 17 September 1998 the applicant company lodged with the *Conseil d'Etat* an application seeking the annulment of the inter-prefectoral order of 24 July 1998, for being *ultra vires*, and sought a stay of execution of that order.

25. On 23 March 1999 the company applied to the *Conseil d'Etat* seeking the annulment of the implied decision of rejection resulting from the Minister's failure to reply to its request for the withdrawal of the inter-prefectoral order of 24 July 1998 and for payment by the State of an indemnity of 450,455 francs to compensate for the expenses it had incurred in implementing the impugned order.

26. In its submissions of 21 February 2001 the applicant company asked to receive, prior to the hearing, copies of the mining-related opinions given by the administrative divisions of the *Conseil d'Etat* over the previous few years, as well as the submissions of the Government Commissioner.

27. On 25 April 2001 the applicant company stated that it did not wish to maintain its requests for the withdrawal of the Government Commissioner and for disqualification of the section of the *Conseil d'Etat* to which the case had been assigned.

28. In a judgment of 5 April 2002 (nos. 199686 and 205909), the *Conseil d'Etat* (with the same bench as for the above-mentioned judgment of 5 April 2002, nos. 229499 and 231060), after joining the two applications, dismissed the applicant company's clams:

...

> "...
>
> Concerning the submissions seeking the annulment of the inter-prefectoral order of 24 July 1998 laying down regulatory measures in the mining sector and the implied

decision of rejection by the Minister for Economic Affairs, Finance and Industry further to an administrative appeal against that order:

... Fifthly, Article 79 of the Mining Code, in the version deriving from the Law of 15 July 1994, reads as follows: 'Prospecting and mining work shall comply with the restrictions and obligations pertaining to ... / public health and safety, ... [and] to the solidity of public or private edifices ... : When the interests mentioned in the previous paragraph are put at risk by such work, the administrative authority may require the prospector or mine operator to take any measures for the purposes of ensuring the protection of those interests within a given time-limit'. The last paragraph of Article 84 of the Mining Code, which lays down the rules governing the discontinuance of mining operations, provides as follows: 'When the measures provided for by the present article, or those prescribed by the administrative authority pursuant to the present article, have been executed, the administrative authority shall issue the prospector or operator with its formal confirmation ...'. Article 49 of the decree of 9 May 1995 provides: 'The administrative supervision and the mining regulations shall cease to take effect on the date that the operator is issued with formal confirmation that the work has been completed ... / However, the prefect shall be empowered ... to take ... any measures that may be rendered necessary by incidents or accidents that can be attributed to former mining work, when such events are capable of damaging the interests protected by Article 79 of the Mining Code, until the expiry of the mining concession'. Article 119-4 of the Mining Code provides: 'renunciation, whether total or partial, of rights to mine or quarry prospecting or exploration shall become final only after being accepted by the minister responsible for mining'. Article 34 of the decree of 19 April 1995 provides: 'Applications for renunciation of a mining concession shall be lodged with the minister responsible for mining. / ... Acceptance of renunciation shall be given in an order of the minister responsible for mining'.

Contrary to what has been contended, the Law of 15 July 1994 entered into force as soon as it was published and was to be applied to all mining concessions currently valid at that date. Subsequently, and notwithstanding the fact that the applications for abandonment of work and renunciation of concessions were apparently submitted before the entry into force of that Law, the prefects of Moselle, Meuse and Meurthe-et-Moselle legally implemented it. The applicant company cannot, in any event, appropriately rely on an argument based on a breach of the principles of legitimate expectation and legal certainty when the order appealed against was not made for the purposes of implementing European Community law.

Moreover, it follows from the combination of the provisions cited above that the completion by the operator of the work prescribed by the administrative authority for the purposes of closing a mine does not suffice to release it from all liability unless and until it has been issued with formal confirmation of that completion. In addition, when, as in the present case, any incidents or accidents occur, such as subsidence capable of undermining the solidity of public or private edifices, the prefect remains empowered to intervene, even if he has already issued formal confirmation of completion of the work required for the closure of the mine, for as long as the operator holds the mining concession. It follows from the documents in the case file that, whilst some of the mines enumerated in Article 2 of the order appealed had been the subject of an abandonment procedure, as had been confirmed by the Regional Director for Industry, Research and the Environment, none of the corresponding concessions, at the date of the order appealed, had expired or had been the subject of a renunciation procedure accepted by the minister, such express acceptance alone being capable, contrary to what has been argued in a new memorial filed the day before the

hearing, regardless of the date of that acceptance, of giving full effect to any renunciation. Accordingly, the prefects of Moselle, Meuse and Meurthe-et-Moselle were lawfully entitled to require the operator to take the necessary measures to prevent repetition of land subsidence.

Sixthly, in accordance with Articles 79 and 84 of the Mining Code, the administrative authorities are entitled to require the operator to take any measures that may be required for the protection of the objectives of public health and safety and the solidity of edifices, as provided under Article 79 of that Code. Those measures may consist both of studies for the purpose of analysing and enumerating the risks of incidents and of work for the purposes of prevention or remediation.

...

The company Société des Mines de Sacilor Lormines is not justified in seeking the annulment of the inter-prefectoral order of 24 July 1998 and the Minister's implied decision of rejection ...”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Mining regulations and successive reforms of mining law

29. In 1991, when the discontinuance of the applicant company's mining operations was announced, the procedures of abandonment and renunciation were governed by Articles 83 and 84 of the Mining Code and Decree no. 80-330 of 7 May 1980 concerning mining and quarrying regulations. Article 83 of the Mining Code stipulated at the time as follows:

“When operations are abandoned on the expiry of a concession or of a prospecting or operating licence, or, in the case of segment-based operations, at the end of the operations in each segment, the holder of the concession or licence shall be required to carry out work for the purpose of protecting the interests mentioned in Article 84, as stipulated by the prefect on the proposal of the mining service after consultation of the municipal council for the locality concerned. The rehabilitation, in particular for agricultural purposes, of the sites and places affected by the work and by installations of any kind that have been erected for operations and prospecting, may be prescribed; this shall be mandatory in the case of quarries. These provisions shall be applicable to the work provided for in Article 80.

In the event of failure to carry out the prescribed work, it shall be completed on the initiative of the authorities and at the expense of the concession-holder or offender.

Municipalities and *départements* shall have a right of pre-emption in the event of the sale of disused quarries that have been operated on their territories.”

Article 84 of the Mining Code provided as follows:

“If work related to mine prospecting or operating is capable of undermining public health and safety, essential features of the surrounding environment, whether land or sea, the conservation of the mine or another mine, the security, health and safety of

mine workers, the conservation of communication routes, the solidity of public or private edifices, or the use, flow or quality of water of any kind, provision shall be made by the prefect, if need be of his own motion and at the expense of the prospector or operator."

30. Section 17 of the Water Act (Law no. 92-3) of 3 January 1992 amended Article 83 of the Mining Code by inserting, after its first paragraph, two paragraphs which read as follows:

"In all cases, the holder of the concession or licence shall make an assessment of the cumulative effects of the work on the presence, accumulation, emergence, volume, drainage and quality of water of any kind, shall assess the foreseeable consequences of the abandonment of the work or of the operations for the situation thus created and for the uses of the water, and shall indicate the remedial measures envisaged.

After consulting the local authorities concerned and hearing representations from the concession or licence holder, the prefect shall prescribe the work required of the holder in order to restore to their previous state, preserve in their current state or adapt as needed, the essential characteristics of the aquatic environment and the hydraulic conditions for the purposes of fulfilling the objectives provided for in section 1 of the Water Act (Law no. 92-3) of 3 January 1992."

In addition, the second paragraph of Article 83 of the Mining Code was supplemented by a sentence which read as follows:

"Payment into the hands of a public accountant of the sums necessary for the performance of the work imposed in accordance with the previous paragraph may be demanded under the conditions provided for in section 17 of the above-mentioned Law no. 92-3 of 3 January 1992."

31. Subsequently, Law no. 94-588 of 15 July 1994, amending certain provisions of the Mining Code, removed those two provisions and replaced them by Articles 79 and 84 as follows:

Article 79

"Prospecting and mining work shall comply with the restrictions and obligations pertaining to the health and safety of workers, public health and safety, the essential features of the surrounding environment, whether land or sea, the solidity of public or private edifices, the conservation of communication routes, the mine and other mines, and more generally archaeological interests and the interests enumerated in the provisions of section 1 of the Historic Monuments Act of 31 December 1913, section 4 of the Law of 2 May 1930 reorganising the protection of natural monuments and sites of an artistic, historical, scientific, legendary or picturesque nature, section 1 of Law no. 76-629 of 10 July 1976 concerning the protection of nature, section 2 of the Water Act (Law no. 92-3) of 3 January 1992, as well as to the agricultural interests attaching to sites and places affected by such work and by mining installations.

When the interests mentioned in the previous paragraph are put at risk by such work, the administrative authority may require the prospector or mine operator to take any measures for the purposes of ensuring the protection of those interests within a given time-limit.

In the event of failure to fulfil these obligations by the expiry of the allotted period, the administrative authority shall take the initiative of having the prescribed measures executed, at the expense of the prospector or operator."

Article 84

"If appropriate, at the end of each segment of work and, at the latest, when the operations are discontinued and the work halted, the prospector or operator shall give notice of the measures that he intends to take in order to protect the interests mentioned in Article 79, for the purpose of putting an end, in general terms, to any adverse effects, disorder or disturbances of any kind that may be generated by the said activities and to make provision, if appropriate, for the possible resumption of operations.

In all cases, the prospector or operator shall make an assessment of the effects of the work on the presence, accumulation, emergence, volume, drainage and quality of water of any kind, shall assess the consequences of the discontinuance of the work or of the operations for the situation thus created and for the uses of the water, and shall indicate the remedial measures envisaged.

The declaration shall be made no later than the date of expiry of the mining concession.

Failing that, the administrative authority shall remain empowered after the said date to prescribe the necessary measures.

Having regard to that declaration, and after consulting the municipal councils of the localities concerned and hearing representations from the prospector or operator, the administrative authority shall prescribe, as necessary, any requisite measures taken and conditions of execution that have not been sufficiently indicated or that have been omitted by the declarant ...

Any failure to take the measures provided for in the present article shall result in their execution on the initiative of the authorities, at the expense of the prospector or operator.

Payment into the hands of a public accountant of the sums necessary for that execution may be demanded and, if necessary, collected in the manner of debts other than those related to taxation or State property.

When the measures provided for by the present article, or those prescribed by the administrative authority under the present article, have been executed, the administrative authority shall issue the prospector or operator with its formal confirmation.

That formality shall put an end to the supervision of the mines, as provided for in Article 77.

However, as regards the activities governed by the present Code, the administrative authority may intervene, in the context of the provisions of Article 79, until the expiry of the mining concession."

32. Decree no. 95-696 of 9 May 1995, issued after consultation of the *Conseil d'Etat*, pertaining to the opening of mines and mining regulations, was adopted for the implementation of those provisions. Article 47, paragraph 3, and Article 49 of that decree provide as follows:

Article 47, paragraph 3

"After arranging for verification of the measures taken by the operator, and if appropriate indicating their compliance or prescribing additional measures, the prefect shall issue formal confirmation, by way of an order (*arrêté*), of the final discontinuance of the work and the decommissioning of the installations."

Article 49

"The administrative supervision and the mining regulations shall cease to take effect on the date that the operator is issued with formal confirmation that the work has been carried out, or when the work executed on the initiative of the authority has been completed.

However, the prefect shall be empowered, except in cases where activities other than those covered by the Mining Code are substituted in the place of the discontinued work or decommissioned installations, to take, in the context of the present part hereof, any measures that may be rendered necessary by incidents or accidents attributable to former mining work, when such events are capable of damaging the interests protected by Article 79 of the Mining Code, until the expiry of the mining concession."

Article 34 of Decree no. 95-427 of 19 April 1995 pertaining to mining concessions provided as follows:

"Applications for renunciation of a mining concession shall be lodged with the minister responsible for mining.

They shall be processed, depending on each case, as stipulated in Articles 26 and 27 above.

Acceptance of renunciation shall be subject, if appropriate, to the prior execution of the prescribed regulatory measures. Subject to this proviso, it shall be automatic in the event of total renunciation. Acceptance of renunciation shall be given in an order of the minister responsible for mining."

33. Lastly, under Law no. 99-245 of 30 March 1999 concerning liability for damage resulting from mining and the prevention of mining-related risks after discontinuance, the presumption of mining liability has been extended in so far as the permanent liability of the former concession-holder is now presumed. The said Law further imposes an obligation on the former mine operator to pay an equalising contribution to the financing of public expenses for a period of ten years. Article 75-1 of the Mining Code now provides as follows:

"The prospector or operator, or failing that the holder of the mining concession, shall be liable for any damage caused by its activity. It may, however, be released from liability if it can adduce evidence of an external cause. Such liability shall not be confined to the area covered by the mining concession, nor to the term of validity of that concession. In the event of the disappearance or default of the liable party, the State shall stand surety for the reparation of the damage mentioned in the first paragraph; it shall be subrogated to the rights of the victim against the liable party."

B. The *Conseil d'Etat*

1. Provisions governing status

34. The relevant domestic law and practice are partly described in *Kress v. France* ([GC], no. 39594/98, ECHR 2001-VI), and the status of members of the administrative courts is dealt with in some detail in paragraphs 31 to 37 of that judgment. The provisions governing their status are laid down in Book 1 of the Administrative Courts Code, Title III of which specifically concerns the *Conseil d'Etat*. Under that Title, Chapter 1, which is headed "General Provisions", provides as follows:

Article L. 131-1

"The status of members of the *Conseil d'Etat* shall be governed by the present Book, and, in so far as they are not in contradiction therewith, by the provisions governing the civil service."

Article L. 131-2

"No member of the *Conseil d'Etat* shall be entitled, in support of a political activity, to invoke his or her membership of the *Conseil d'Etat*."

Article L. 131-3

"All members of the *Conseil d'Etat*, whether serving in the *Conseil* or assigned to external duties, shall avoid expressing views of a political nature that are incompatible with the duty of discretion inherent in their functions."

Chapter 3 under the same Title is headed "Appointments" and codifies the rules concerning the recruitment of members of the *Conseil d'Etat* described in the *Kres*s judgment (§ 33). Articles L. 133-1, 133-2 and 133-3 restate that the Vice-President of the *Conseil d'Etat*, the division presidents and the senior members (*conseillers d'Etat*, who have to be at least 45 years of age) are appointed by a decree adopted in Cabinet, on the proposal of the Minister of Justice. Article L 133-7 concerns appointments directly from outside and reads as follows:

"Direct appointments from outside to positions of senior member (c*onseiller d'Etat*) and of *maître des requêtes* may be made only after the opinion of the Vice-President of the *Conseil d'Etat* has been obtained.

That opinion shall take into account the previous functions performed by the nominee, his or her experience, and the requirements of the institution, as reported on an annual basis by the Vice-President of the *Conseil d'Etat*; the substance of that opinion in respect of appointments made shall be published in the Official Gazette at the same time as the notice of appointment.

The opinion of the Vice-President shall be transmitted to the person concerned, at his or her request. ..."

Chapter 6 under the same Title is headed "Discipline" and stipulates in Article L. 136-2 that disciplinary measures are taken by the authority responsible for making appointments upon the proposal of the Minister of Justice, after obtaining the opinion of the advisory board. However, warnings and reprimands may be issued, without consulting the advisory board, by the Vice-President of the *Conseil d'Etat*.

The regulatory provisions concerning the status of members of the *Conseil d'Etat* are to be found in Articles R 131-1 et seq. of the Administrative Courts Code.

2. Functions

35. The relevant provisions of the Administrative Courts Code concerning the judicial, administrative and legislative functions of the *Conseil d'Etat* read as follows:

Article L. 111-1

"The *Conseil d'Etat* is the supreme administrative court. It shall rule independently on appeals on points of law lodged against last-instance decisions by the various administrative courts, and on appeals falling within its first-instance jurisdiction or jurisdiction to hear full appeals."

Article L. 112-1

"The *Conseil d'Etat* shall participate in the preparation of Acts (*lois*) and Ordinances (*ordonnances*). Draft texts emanating from the Government shall be referred to it by the Prime Minister. The *Conseil d'Etat* shall give its opinion on draft decrees and on any other draft texts in respect of which its intervention is required by constitutional, legislative or regulatory provisions, or which are submitted to it by the Government. When a draft text is submitted to it, the *Conseil d'Etat* shall give its opinion and propose any amendments that it may deem necessary. In addition, it shall prepare and draft texts in response to specific requests."

Article L. 112-2

"The *Conseil d'Etat* may be consulted by the Prime Minister or ministers on any difficulties that may arise in administrative matters."

Article L. 112-3

"The *Conseil d'Etat* shall be entitled, of its own motion, to draw to the attention of the executive any reforms of a legislative, regulatory or administrative nature that it may deem to be in the public interest."

Article L. 112-4

"The Vice-President of the *Conseil d'Etat* may, at the request of the Prime Minister or a minister, appoint a member of the *Conseil d'Etat* to carry out a fact-finding mission. The Vice-President may, at the request of ministers, appoint a member of the *Conseil d'Etat* to assist their officials in drafting specific texts."

3. Organisation

36. The relevant provisions of the Administrative Courts Code concerning the organisation and functioning of the *Conseil d'Etat* are as follows:

Article L. 121-1

"The presidency of the *Conseil d'Etat* shall be held by the Vice-President. The General Assembly of the *Conseil d'Etat* may be presided over by the Prime Minister, and, in his absence, by the Minister of Justice."

Article L. 121-3

"The *Conseil d'Etat* shall consist of a Judicial Division and administrative divisions."

Article R. 121-3

"Senior members (*conseillers d'Etat*) in permanent service shall be assigned to an administrative division or to the Judicial Division, or simultaneously to an administrative division and the Judicial Division, or simultaneously to the Report and Research Division and another administrative division, or to three divisions including the Judicial Division and the Report and Research Division. The deputy presidents and the presidents of sections of the Judicial Division shall be assigned solely to that Division; they may however be assigned to the Report and Research Division."

Article R. 121-4

"The *maîtres des requêtes* and *auditeurs* shall be assigned both to an administrative division and to the Judicial Division. However, (a) the *maîtres des requêtes* and

auditeurs responsible for running the documentation centre may, as appropriate, be assigned only to the Judicial Division or only to an administrative division; (b) the *maîtres des requêtes* and *auditeurs* who have served for less than three years in the *Conseil d'Etat* shall be assigned only to the Judicial Division."

Article R. 121-5

"The assigning of a member of the *Conseil d'Etat* to an administrative division shall entail, in addition to his or her contribution to the work of that division, his or her participation in the performance of the administrative activities referred to under Title III, Chapter 7, of the present Book."

Article R. 123-2

"The *Conseil d'Etat* shall consist of five administrative divisions:

Interior, Finance, Public Works, Social, and Report and Research."

Article R. 123-3

"Cases originating from the various ministries shall be distributed between the first four of those divisions in accordance with the provisions of an order of the Prime Minister and of the Minister of Justice.

All cases involving a particular ministry shall be referred to the same division.

However, the examination of certain categories of cases, in particular those concerning the civil service, may be assigned to a specific division, regardless of the ministry from which they originate."

...

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

38. The applicant alleged that there had been a number of violations of Article 6 § 1 of the Convention, which provides as follows:

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

A. The independence and impartiality of the *Conseil d'Etat*

39. The applicant company argued firstly that the *Conseil d'Etat* was not independent or impartial on account of the plurality of its functions, but also as a result of the appointment and status of its members. In particular, the applicant explained that the *Conseil d'Etat* had fully participated in the legislative reforms of mining law and that it could not be independent or impartial with regard to questions concerning the implementation of those reforms. The applicant further stated that this lack of independence and impartiality was illustrated by the fact that, on 26 May 2000, one of the members of the bench which delivered the judgment of 19 May 2000 had been appointed to the post of Secretary General in the ministry responsible for mining. Secondly, the applicant company complained that the *Conseil d'Etat* had consecutively exercised advisory and judicial functions, explaining that the Public Works Division had issued an advisory opinion in response to a request from the Secretary of State for Industry concerning various questions of mining law, whilst it had also been requested to rule on an administrative appeal against the order of 18 May 1997, and that the Judicial Division had then simply adopted the findings of the administrative division. The applicant company thus concluded that the *Conseil d'Etat*, in its judgments of 19 May 2000 and 5 April 2002, had not given an independent and impartial ruling.

1. The parties' submissions

(a) The independence and impartiality of the members of the *Conseil d'Etat*

(i) The applicant company

40. The applicant company drew attention to the growing importance in the Court's case-law of the notion of separation of powers between the executive and the judiciary (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV, and *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, ECHR 2003-VI), particularly in connection with proceedings between a litigant and executive authorities. The applicant company observed that the *Conseil d'Etat* concurrently exercised a number of functions – legislative, regulatory, administrative, judicial and that of adviser to the Government – and that it had been confronted with the exercise of all those functions.

41. Firstly, the *Conseil d'Etat* had been involved in the drafting of a number of bills, in accordance with Article 39 of the Constitution, which had resulted in major amendments to the Mining Code, and the applicant company considered that it had been particularly penalised by the new Article 84 of the Mining Code, stemming from the 1994 reform and enshrined in the Law of 30 March 1999. The function in question was

exercised by the largest formation, the General Assembly, made up at least of the six division presidents and thirty-five senior members (*conseillers d'Etat*). The applicant pointed out that it was not disputed by the Government that the members of the benches which delivered the judgments of 19 May 2000 and 5 April 2002 had also participated in the work of the administrative arm which prepared those legislative reforms. In the applicant's submission, it was realistic and pragmatic to consider that the position adopted by the administrative arm would inevitably have influenced the Judicial Division. The *Conseil d'Etat* could not be privy to government secrets and then rule as an independent and impartial tribunal on appeals against administrative decisions taken by the executive on the basis of legislation that it had helped to prepare. An institution which exercised a legislative function and prepared enactments that drastically amended the Mining Code, thereby imposing unforeseeable constraints and excessive burdens on the holders of mining concessions, could not then rule as an independent and impartial tribunal on questions concerning the implementation of such reforms. This was also the case where the institution intervened in secondary legislation: it considered itself to be the co-author of government decrees, as was apparent from legal writings and confirmed by the case-law of the *Conseil d'Etat* itself, since, where it had not been properly consulted, a decree would be set aside because of disregard for the "authority exercised by the *Conseil d'Etat* jointly with the Government" (see *Conseil d'Etat*, full court, 9 June 1978, *SCI Boulevard Arago*, *Recueil*, p. 237). Given the close relationship between the Government and the *Conseil d'Etat*, the applicant considered that the lack of independence and impartiality verged on failure to comply with the separation of powers (see *McGonnell v. the United Kingdom*, no. 28488/95, ECHR 2000-II) and went far beyond the basic lack of impartiality identified in *Procola v. Luxembourg* (judgment of 28 September 1995, Series A no. 326). In the present case, the *Conseil d'Etat* had itself decided, jointly with the French Government, on the regulatory measures applying to the legislation that it had prepared.

42. The applicant company argued that its foregoing analysis was confirmed by an examination of the careers of members of the *Conseil d'Etat*. Within the *Conseil d'Etat* there was no group of civil servants acting exclusively in a judicial capacity. During their careers, members of the *Conseil d'Etat* held other senior positions in the civil service. Decree no. 63-766 of 30 July 1963 concerning the organisation and functioning of the *Conseil d'Etat* provided for an intermingling of its members between the administrative divisions and the Judicial Division. This principle of operation meant that a litigant could not be guaranteed a truly independent judge. Thus, in the present case, Mr Bernard Pêcheur, a senior member of the *Conseil d'Etat* who sat on the bench which delivered the judgment of 19 May 2000, had been appointed, by a decree of 26 May 2000, to the post

of Secretary General in the Ministry for Economic Affairs, Finance and Industry, the very ministry which bore responsibility for mining policy, at a time when the judgment had not even been notified. In the applicant's submission, such a practice by the Government was likely to cast serious doubt on the independence of the *Conseil d'Etat* when ruling in its judicial capacity, thus undermining the necessary confidence that justice should inspire in the public. It could be inferred that, while the deliberation was in progress, one of the members of the bench had been under consideration for appointment to a particularly senior position in the ministry against which the concession-holder had brought proceedings. There had thus been a lack of separation between the executive and the *Conseil d'Etat* – a situation which, to be sure, constituted one of the essential features of the institution. The problem stemmed from the absence of any statutory definition of a status capable of guaranteeing the independence and impartiality of the members of the *Conseil d'Etat* when acting in their judicial capacity. That shortcoming constituted in itself a violation of Article 6 § 1 of the Convention (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98, ECHR 2000-VII).

43. Similarly, the applicant company asserted that the members of the *Conseil d'Etat* were not members of the national legal service (*magistrats*); they were appointed by the Cabinet and the only condition for appointment of senior members of the *Conseil d'Etat* was a minimum age of 45, without there being any particular requirement of competence in legal matters, unlike in the *Conseil d'Etat* of Luxembourg, whose mode of operation had been criticised by the European Court (see *Procola*, cited above). The applicant company argued that, generally speaking, members of the *Conseil d'Etat* were not protected by any particular safeguards against extraneous pressure.

(ii) The Government

44. The Government replied that the independence of the administrative court was guaranteed at the highest level in the hierarchy of domestic norms, the Constitutional Council having recognised it in 1980 as a constitutional principle by nature. As regards the members of the *Conseil d'Etat*, they enjoyed a status enshrined in legislative and regulatory provisions of the Administrative Courts Code which were underpinned by a strong tradition of independence. The Government referred to the guarantees of independence inherent in the status of the members of the French *Conseil d'Etat*, as described by the Court in the above-mentioned *Kress* judgment. They submitted that this status entailed sound safeguards that could be compared to those of the Council of State in the Netherlands, which the Court had examined in connection with the right to be heard by an independent tribunal in its above-mentioned *Kleyn and Others* judgment. In that judgment the Court held that “in the absence of any indication of a

lack of sufficient and adequate safeguards against possible extraneous pressure, [it had] found nothing in the applicants' submissions that could substantiate their concerns as to the independence of the Council of State and its members". *Mutatis mutandis*, the Government requested the Court to apply this case-law to the question of the status of member of the French *Conseil d'Etat*.

45. As regards the appointment of Mr Pêcheur, a senior member of the *Conseil d'Etat*, to duties in the Ministry for Economic Affairs and Finance, the Government did not consider that this revealed any lack of independence or impartiality on the part of the *Conseil d'Etat*. They firstly pointed out that "the personal impartiality of a judge [had to] be presumed until there [was] proof to the contrary" (see *Morel v. France*, no. 34130/96, § 41, ECHR 2000-VI). They explained, moreover, that the member in question was admitted to the *Conseil d'Etat* in 1985 and that he had initially acquired considerable experience within the administrative Finance Division, then as a member of the sixth section of the *Conseil d'Etat* responsible for supervising financial-market authorities, public finance courts, planning law and environmental matters. It was solely on the basis of this judge's experience that the new Minister for Economic Affairs, Finance and Industry proposed to the President of the Republic, in April 2000, that he be appointed to the newly-created post of Secretary General in the ministry concerned. The Government added that the process of judicial review in the *Conseil d'Etat* comprised a series of individual examinations (by the reporting judge, reviser, Government Commissioner and the president of the bench) and collegiate examinations (preparatory stage and judgment stage) which were spread over a period of time. Thus, in view of the safeguards arising from the actual organisation of this process and the secrecy of the voting in deliberations, a connection between the collegiate resolution of a dispute and the subsequent assignment of one of the members of the bench to a post outside the *Conseil d'Etat* could not be regarded as a factor capable of influencing the opinions of persons participating in that resolution. Lastly, and more generally, the Government claimed that the participation of members of the *Conseil d'Etat* in other public-service duties, far from undermining the independence or impartiality of the *Conseil d'Etat*, in fact enhanced its capacity for supervision of the executive as it gave its members precise knowledge of the workings of the civil service.

46. As to the advisory function of the *Conseil d'Etat*, in particular when consultation was mandatory, it consisted mainly in a preliminary review by which it ensured that any defects in legislative texts submitted to it would be removed prior to adoption. This function therefore provided an important safeguard for everyone to whom the proposed texts would be applicable. Moreover, it could not be inferred from the advisory role of the *Conseil d'Etat* that it was itself the author of the primary or secondary legislation

submitted to it for consideration. The Government pointed out that the *SCI Arago* precedent cited by the applicant company was no longer relevant and that more recent decisions had omitted reference to authority being exercised by the *Conseil d'Etat* jointly with the Government. The lack of proper consultation of the *Conseil d'Etat*, when mandatory, vitiated the very authority of the text's author (see *Conseil d'Etat*, full court, 15 April 1996, *Union nationale des pharmacies et autres*, *Recueil*, p. 127), thus maintaining the possibility for this ground to be raised *proprio motu* without any need to treat the *Conseil d'Etat* as a co-author of the text, which it was not. That position was consonant with two fundamental constitutional principles in a State upholding the rule of law: the independence of the judiciary and the separation of powers.

(b) The duality of the advisory and judicial functions of the *Conseil d'Etat* and the significance of the opinion of 29 September 1997

(i) The applicant company

47. As regards the opinion given on 29 September 1997 by the Public Works Division, the applicant company considered that its analysis, in particular concerning the extent of the administrative measures that could be imposed on holders of mining concessions, had been espoused by the Judicial Division in its judgments of 19 May 2000 and 5 April 2002. The applicant explained that the legal questions raised in that opinion coincided with those addressed by the *Conseil d'Etat* in its judicial capacity, with regard in particular to the interpretation of the Law of 15 July 1994 and the new Article 84 (of the Mining Code) which it had created. The applicant disputed the Government's argument as to the notion of a purely legal question, because such questions always related to factual situations. Moreover, according to the case-law of the administrative courts of appeal, a court which gave an opinion on a purely legal question put to it by a prefect (a similar procedure to that in which ministers sought an opinion on a legal question from the *Conseil d'Etat*) could not subsequently rule on an appeal concerning that same legal question (see Administrative Court of Appeal, 23 March 1999, *Sarran*; Administrative Court of Appeal, 4 March 2003, *département* of Deux-Sèvres).

48. The applicant company argued on this basis that the fact of having addressed a certain legal question in an advisory capacity, as advisor to the public authorities, precluded the possibility of subsequently ruling on claims in which that legal question was called into question. It considered that the Court's case-law was clear on that point (see *Procola* and *McGonnell*, both cited above).

49. The applicant company added that it had had no chance of winning its case since "conventionally ... a judicial bench [was] not entitled to take a contrary legal position to that of the administrative divisions except at its

highest level, when sitting as a Judicial Assembly" (*Le Conseil d'Etat*, *Notes et études documentaires*, 1988, La Documentation française, p. 78). This situation had moreover been implicitly confirmed by the Government because they had cited a judgment of 30 June 2000 in which it was precisely the Judicial Assembly that had set aside the provision of a decree issued after consultation of the *Conseil d'Etat*.

In the applicant's submission, the Government had not shown that the convention whereby the Judicial Assembly alone could depart from the solution adopted by an administrative division was no longer applicable at the time of the judgments of 19 May 2000 and 5 April 2002, because on that point they had only cited judgments of 2003 and 2005.

50. For the applicant company, the publication of the impugned opinion in the public annual report of the *Conseil d'Etat* for 1998 constituted an aggravating factor in the lack of impartiality and independence of the *Conseil d'Etat* when ruling in its judicial capacity. It referred in this connection to the *Conseil d'Etat*'s finding that the Court of Audit could not lawfully give a judicial ruling, for lack of impartiality, when it had previously referred in its public report to the underlying subject-matter (see *Conseil d'Etat*, full court, *Société Labor Métal*, 23 February 2000). Whether a factual or a legal question, once it had been mentioned in a public report without any judicial formalities having been observed, in particular the adversarial principle, it was difficult to see how the question could subsequently be adjudicated by the institution which had published the report without breaching the obligations of independence and impartiality.

51. Lastly, the applicant company was of the opinion that the circumstances of the *Kleyn and Others* judgment were different from those of the present case, where the *Conseil d'Etat* had participated in the preparation of laws amending the Mining Code, in the context of its mine closures, and in the imposition of regulatory measures for the implementation of that legislation. One of the members of the judicial bench had been appointed to the post of Secretary General at the Ministry for Economic Affairs, Finance and Industry, and the Public Works Division had issued an advisory opinion, as requested by the Minister, which directly concerned the measures of mining administration that could be imposed on holders of mining concessions upon the termination of their activity. The applicant company concluded that the *Conseil d'Etat* had thus become the co-author of mining policy and the Government's advisor in the drafting, implementation and interpretation of the texts arising from that policy. As a result, the *Conseil d'Etat* had not been an independent and impartial tribunal and the Government could not argue that the various functions of the *Conseil d'Etat* were inseverable because, by virtue of the principle of the separation of powers, a judicial body was to act first and foremost as a judicial body, without assuming additional functions of a different nature.

(ii) The Government

52. Concerning the consecutive exercise of advisory and judicial functions by the *Conseil d'Etat*, the Government pointed out that the Court assessed the right to an impartial tribunal by applying two tests, first seeking to ascertain the personal conviction of a particular judge, which was not at issue in the present case, and second, verifying that the court afforded sufficient safeguards to exclude any legitimate doubt as to its impartiality.

53. In this connection the Government principally emphasised that the impugned opinions given by the administrative divisions of the *Conseil d'Etat*, and cited in support of the complaint, only concerned the texts of primary and secondary legislation under which the decisions which gave rise to the dispute had been taken, not the impugned administrative orders. In those circumstances, and since it had not been argued that the advisory divisions had been called upon to examine the actual decisions taken against the applicant company and forming the subject-matter of the dispute, the applicant was not entitled to complain that it had been affected by a lack of impartiality on the part of the *Conseil d'Etat*.

54. In the alternative, the Government pointed out that neither the *Procola* judgment nor the *Kleyn* judgment had ruled out the idea that a single institution could exercise both advisory and judicial functions. As regards the French *Conseil d'Etat*, they explained that the role of the administrative divisions was to act as legal advisor to the Government (being competent to give an opinion on bills and certain decrees, and to respond to requests from the Government for an opinion on a difficult point of law or on the legal framework of decisions that the Government had to take). Through its opinions, the *Conseil d'Etat* in fact sought to prevent any illegality that, in any event, a court would only be able to condemn subsequently, once the administrative decisions had been taken and perhaps also implemented. The aim of such prior scrutiny of legality was to improve the quality of the decision and it was also a guarantee of greater stability in the legal rule.

55. In the Government's submission, the exercise by the *Conseil d'Etat* of advisory functions and the simultaneous assignment of its members to the two missions presented numerous advantages which did not call into question the impartiality of the institution.

56. In cases where the advisory opinions concerned purely legal questions, that is so say where the *Conseil d'Etat* was called upon to give an opinion on draft laws or decrees, as in the situation complained of by the applicant company, the compatibility of the subsequent judicial procedure could not be called into question. A member of the *Conseil d'Etat* who gave an opinion was no less independent and no more biased in favour of the authorities than a member who deliberated in a judicial capacity, as the unity of status was a guarantee of independence in the opinions given by the administrative divisions. The opinion would moreover lose any usefulness

in the eyes of the Government if it were not given by an independent and impartial body. In addition, Article 6 § 1 of the Convention did not prevent judges who had previously ruled once on a legal question from hearing any other dispute that raised the same question. This represented a guarantee of legal certainty.

57. Furthermore, the Government contended that the Judicial Division never considered itself bound by the content of the opinions given by the administrative divisions, and the case-law regularly provided examples of the annulment of acts further to an opinion by the *Conseil d'Etat* (see, for example, *Conseil d'Etat*, 30 June 2000, *Ligue française pour la défense des droits de l'homme et du citoyen*, *Recueil*, p. 253). The Government therefore considered that the submission of the same legal question first to an advisory division of the *Conseil d'Etat* and then to its Judicial Division could not give rise, in view of the independence of both types of division, to any objective doubt in the mind of an applicant that might undermine the impartiality of the court in question. The examination of such questions differed significantly between the context of the advisory function and that of the judicial function, and a difference of position between the two could not be seen as the overruling of one by the other. The Government quoted the President of the Judicial Division of the *Conseil d'Etat* from 1967 to 1976 who had stated that "the adversarial judicial procedure [brought] out more clearly all the aspects of a question that the unilateral procedure before the administrative divisions [did] not always reveal".

58. Lastly, the Government argued, with regard to the publication of the opinion of 29 September 1997 in the annual report of the *Conseil d'Etat*, that the position taken by its members in the advisory opinion did not concern the facts of the case which the applicant company had brought against the authorities, but rather a purely legal question (which distinguished the case from that of *Société Labor Metal*, cited above); unless it were to be rendered impossible for justice itself to be done, the taking of such a position could not be regarded as undermining the objectively impartial nature of the court.

2. The Court's assessment

(a) General principles

59. In order to establish whether a tribunal can be considered "independent" within the meaning of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against extraneous pressure and the question whether the body presents an appearance of independence (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 281, § 73, and *Brudnicka and Others v. Poland*, no. 54723/00, § 38, ECHR 2005-II). As to the question of independence

being defined as the separation of powers between the executive and the judiciary, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction (see *Kleyn and Others*, cited above, § 193). The Court would however emphasise that the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case-law (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV).

60. There are two aspects to the requirement of impartiality. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings (see *Kleyn and Others*, cited above, § 191).

61. In "civil matters", the mere fact that a judge has already taken pre-trial decisions cannot by itself be regarded as justifying concerns about his impartiality. What matters is the scope of the measures taken by the judge before the trial. Likewise, the fact that the judge has detailed knowledge of the case file does not entail any prejudice on his part that would prevent his being regarded as impartial when the decision on the merits is taken. Nor does a preliminary analysis of the available information mean that the final analysis has been prejudged. What is important is for that analysis to be carried out when judgment is delivered and to be based on the evidence produced and argument heard at the hearing (see *Morel*, cited above, § 45, and *Didier v. France* (dec.), no. 58188/00, 27 August 2002).

62. The concepts of independence and objective impartiality are closely linked and the Court will accordingly consider both issues together as they relate to the present case (see *Findlay*, cited above, § 73, and *Kleyn and Others*, cited above, § 192). The Court will then address the question whether, in the circumstances of the case, the *Conseil d'Etat* had the requisite "appearance" of independence, or the requisite "objective" impartiality (ibid., § 193).

63. Lastly, it should be borne in mind that in deciding whether in a given case there is a legitimate reason to fear that these requirements have not been met, the standpoint of a party is important but not decisive. What is decisive is whether the fear of the party concerned can be held objectively justified (see, *mutatis mutandis*, *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, § 48).

(b) Application to the present case

64. The Court notes that the applicant's fear of a lack of structural impartiality on the part of the *Conseil d'Etat* is based above all on an infringement of the principle of the separation of powers between the executive and the judiciary.

65. The Court observes that the status of the members of the administrative courts has been described in the *Kress* judgment (cited above) and is now provided for in Articles L. 131-1 and R. 131-1 of the Administrative Courts Code (see paragraph 34 above). The members are governed by the general rules on the civil service. They are recruited in one of two ways: through competitive examination or directly from outside (*au tour extérieur*). About one third of the members of the *Conseil d'Etat* are on release, engaged in outside activities. As regards the practice of recruiting directly from outside, the President of the Republic is empowered to appoint one third of the senior members (*conseillers d'Etat*), subject to a minimum age of forty-five (the prior opinion of the Vice-President of the *Conseil d'Etat* is required in such cases). Even though there is no written provision guaranteeing the irremovability of members of the *Conseil d'Etat*, that guarantee exists in practice, in the same way as their independence is guaranteed by longstanding conventions such as internal management by the Executive Committee (*bureau*) of the *Conseil d'Etat*, without outside interference (its members are not subject to the authority of the Minister of Justice, unlike the members of the public prosecution service), and promotion based on seniority, a practice which guarantees independence *vis-à-vis* both the political authorities and the authorities of the *Conseil d'Etat* themselves (ibid., §§ 31-35). Mention should also be made of the duty of discretion imposed on members of the *Conseil d'Etat* in their action and public representations (Article L. 131-3 of the Administrative Courts Code, see paragraph 34 above).

66. The Court notes that the particular status of the *Conseil d'Etat* among French institutions connects it organically to the executive. However, it is of the opinion that this situation is not sufficient to justify the argument that the *Conseil d'Etat* lacks independence. As the Court has already found in the *Kress* judgment, for other purposes, the specific nature of this institution does not preclude the existence of guarantees as to its members' independence (ibid., §§ 31-37 and 71).

67. Furthermore, the Court reiterates that the very fact that legal officers are appointed by a member of the executive, or in some cases by Parliament, does not render them subordinate to the authorities if, once appointed, they receive no pressure or instructions in the performance of their judicial duties (see *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, § 79; *Loyen v. France* (dec.), no. 46022/99, 27 April 2000; and *Filippini v. San Marino* (dec.), no. 10526/02, 26 August 2003). Similarly, whilst the irremovability of

judges during their term of office must in general be considered as a corollary of their independence, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present (see *Campbell and Fell*, cited above, § 80). It can be seen from the provisions of the Administrative Courts Code and from practice that this is indeed the case.

68. Whilst the Court thus has no cause, in general, to call into question the manner in which members of the *Conseil d'Etat* are appointed or the organisation of their career, it nevertheless remains for it to assess whether, in the present case, the Judicial Division possessed the "appearance of independence" required by the Court's case-law in terms of safeguards against extraneous pressure (see paragraph 59 above). In this connection, the applicant company claimed that the appointment of a senior member, who had participated in the deliberation of 26 April 2000, to the post of Secretary General of the Ministry for Economic Affairs, Finance and Industry (see paragraph 18 above), was capable of casting serious doubt on the independence of the bench of the *Conseil d'Etat* which delivered the judgment of 19 May 2000 (see paragraph 17 above).

69. The Court observes that the appointment of the senior member of the *Conseil d'Etat* in question was subsequent to its deliberation on 26 April 2000 in which he had sat. However, it takes note of the Government's statement that discussions concerning the appointment to a newly created post were already underway in April 2000 and had probably begun at least a certain time before the deliberation in view of the importance of the vacancy to be filled. The Court finds it likely that those discussions would have continued until a few days before the appointment decree was signed on 26 May 2000. It is of the opinion that the impugned appointment was capable of casting doubt on the impartiality of the *Conseil d'Etat*. At the time of the deliberation in question, or even perhaps well before, one of the members of the bench had been under consideration for appointment to a senior position in the very ministry with which the applicant had a large number of significant disputes (see paragraph 11 above). The Court thus finds that the said member could not have the appearance of neutrality *vis-à-vis* the applicant company, given the lack of safeguards against possible extraneous influence, since his appointment was already envisaged at the time he sat in his judicial capacity in April 2000. The applicant company, in the Court's opinion, thus had objectively justified misgivings *ex post facto* about the independence and impartiality of the bench on which the member in question had sat.

The Court therefore considers that there has been a violation of Article 6 § 1 of the Convention.

70. There remains the question of the independence and impartiality of the *Conseil d'Etat* having regard to the concurrent exercise of judicial and

administrative functions as provided for in Article L. 112-1 et seq. of the Administrative Courts Code (see paragraph 35 above).

71. As to the participation of the *Conseil d'Etat*, through its advisory opinions – which are not, however, binding on it – in the preparation of all draft legislation concerning mining policy and of implementing decrees, since the end of the mining activities in question, the Court acknowledges that such participation raises a purely structural question since, if the mandatory consultation of the *Conseil d'Etat* is dispensed with, the administrative court itself will not fail to declare the act void for *incompétence* (lack of authority), on grounds of public policy (*moyen d'ordre public*). However, the Court reiterates that the Convention does not require States to comply with any theoretical constitutional concepts regarding the permissible limits of interaction between the powers of the executive and the judiciary (see *Kleyn and Others*, cited above, § 193). As in the case of the Council of State in the Netherlands, there is no cause to apply a particular constitutional law theory to the situation of the French *Conseil d'Etat* and to rule *in abstracto* on the organic and functional compatibility with Article 6 § 1 of the consultation of the *Conseil d'Etat* with regard to draft legislation and implementing decrees. The Court reiterates that the principle of the separation of powers is not decisive in the abstract (see *Pabla Ky v. Finland*, no. 47221/99, § 34, ECHR 2004-V). The Court must ascertain only whether the opinion given by the Public Works Division on 29 September 1997 in any way prejudged the findings of the Judicial Division of the *Conseil d'Etat* on 19 May 2000 and 5 April 2002, thus casting doubt on the "objective" impartiality of the bench on account of the consecutive exercise of advisory and judicial functions in the present case.

72. The Court first observes that the questions raised in the advisory opinion concerning the "work of stabilising and rehabilitating the sites of disused mines", following the entry into force of the Law of 15 July 1994 amending certain provisions of the Mining Code, and in the proceedings concerning the inter-prefectoral orders of 26 May and 18 July 1997 providing for regulatory measures in the mining sector, cannot be regarded as totally identical "decisions". Nor is there any evidence in the case file that the members of the judicial bench had previously participated in the adoption of the opinion of 29 September 1997. The Court infers from this that the present circumstances are different from those of the *Procola* case.

73. The issue is whether the questions submitted to the Public Works Division and the disputes examined by the Judicial Division can be regarded as involving the "same case" or "same decision" (see *Kleyn and Others*, cited above, § 200), or as "analogous issues" (see *Morel*, cited above, § 47). In the *Kleyn and Others* case, the French Government, intervening as a third-party, considered that "the fact that the same point of law [had been] submitted successively to the *Conseil d'Etat* in its advisory capacity and its

judicial capacity did not as such constitute a ground, given its independence in both capacities, for an objective doubt in the mind of an appellant that could undermine the impartiality of the Judicial Division. The impartiality of a body where advisory and judicial responsibilities coexisted did not pose a problem where an advisory opinion concerned merely a point of law. Where it concerned a question of fact, the assessment of the question whether an appellant could have objectively justified fears of bias depended on the merits of each case" (see *Kleyn and Others*, cited above, § 189). The Government has reiterated that view. The applicant company has replied that legal questions always relate to a factual situation and that, in the present case, those raised in the opinion coincided with those raised in the litigation.

74. The Court observes that the advisory opinion of 29 September 1997 concerned the interpretation and application of the Law of 15 July 1994 at the time, the question of the extent of the administrative authorities' powers *vis-à-vis* mining companies, and the sharing of responsibility between those companies and the State as regards the prevention of mining-related risks. The litigation in question consisted in examining whether mining regulatory measures could still be imposed on the applicant company since it had claimed that declarations of abandonment and applications for renunciation had been made in respect of its concessions. Without denying the existence of a relationship between the legal questions raised in the opinion of 29 September 1997 and those arising in the litigation brought by the applicant company, the Court is unable to find that the issues involved in the opinion, having been addressed in a general and abstract manner, entailed any bias on the part of the members of the Judicial Division when they came to examine, three years later, the issues concerning the applicant company's concrete interests in the management of the termination of its mining operations, its disused mines being numerous and in different legal situations. Under those circumstances, the advisory opinion and the subsequent proceedings involving appeals against the inter-prefectoral orders providing for regulatory measures in the mining sector cannot be regarded as representing the "same case" or the "same decision" (see, *mutatis mutandis*, *Kleyn and Others*, cited above, §§ 200 and 201). For this reason neither the request referred to the administrative division by the minister with whom the appeals had been lodged, nor the publication of the opinion in the 1998 public report of the *Conseil d'Etat*, were capable of arousing objectively justified fears on the part of the applicant company.

In conclusion, the consecutive exercise by the *Conseil d'Etat* of judicial and administrative functions has not, in the present case, entailed a violation of Article 6 § 1 of the Convention.

...

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention, in so far as it secures the right to an independent and impartial tribunal, on account of the applicant company's objectively justified misgivings about the bench of the *Conseil d'Etat* which delivered the judgment of 19 May 2000;

2. *Holds* unanimously that there has been no violation of Article 6 § 1 of the Convention, in so far as it secures the right to an independent and impartial tribunal, on account of the consecutive exercise by the *Conseil d'Etat*, in the present case, of its judicial and advisory functions;

...

Done in French, and notified in writing on 9 November 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER Registrar	Boštjan M. ZUPANČIČ President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Zupančič, Bîrsan and Long is annexed to this judgment.

B.M.Z*.
V.B.*.

JOINT PARTLY DISSENTING OPINION OF JUDGES ZUPANČIČ, BÎRSAN AND LONG

(Translation)

It is with great regret that we are unable to agree with the first operative paragraph of the judgment which reads: "there has been a violation of Article 6 § 1 of the Convention, in so far as it secures the right to an independent and impartial tribunal, on account of the applicant company's objectively justified misgivings about the bench of the *Conseil d'Etat* which delivered the judgment of 19 May 2000".

The applicant company argued, among other things, that the *Conseil d'Etat* was not an independent and impartial tribunal on account, first, of the plurality of its functions and, second, of the manner of appointment and the status of its members, as illustrated in the present case by the appointment, on 26 May 2000, of one of the members of the bench which delivered the impugned judgment of 19 May 2000 to the post of Secretary General at the ministry responsible for mining, when the company's activities, which had given rise to its litigation against the Government, fell within the purview of that very ministry.

Whilst, on the first point, the Court arrived at the conclusion that the successive exercise by the *Conseil d'Etat* of its administrative functions and judicial jurisdiction was not capable of entailing a violation of Article 6 § 1 of the Convention, thus adhering to the *Kleyn v. the Netherlands* case-law – a conclusion with which we fully agree – on the second point, by contrast, the majority in the Chamber found a violation of that same provision.

Admittedly, on that second point, the Court, not departing from its settled case-law in such matters, did not wish to call into question, generally speaking, the method of appointment of members of the *Conseil d'Etat* or the organisation of their careers. That being said, in so far as the applicant company had argued that the appointment of a member of the judicial bench to the post of Secretary General of the Ministry for Economic Affairs, Finance and Industry had been such as to cast "serious doubt" upon the independence of the *Conseil d'Etat* in its decision of 19 May 2000, the Court had to examine whether in the present case the supreme administrative court of France had presented the "appearance of independence" required by the Court's case-law, having regard to the "existence of safeguards against extraneous pressure" (paragraph 59 of the judgment).

In this connection, the majority in the Chamber took, as the starting-point of their reasoning, an undeniable fact: the appointment in question post-dated the deliberation of the *Conseil d'Etat* of 26 April 2000. However, they bore in mind, as the Government had indicated, that discussions concerning the appointment were apparently "already underway" in April 2000, and

had thus begun "probably" at least a certain time before the deliberation of the judicial bench. Accordingly, agreeing with the applicant company, the majority were of the opinion that the impugned appointment was "likely to cast doubt on the impartiality of the *Conseil d'Etat*". They consider that, in view of the fact that during the deliberation, "or even perhaps well before" – and we emphasise that point – one of the members of the judicial bench had been under consideration for appointment to a senior position in the ministry which was its opponent in a large number of major disputes, he could not appear as a neutral figure in the eyes of the applicant company. The majority considered that in the circumstances the company had no safeguards "against possible extraneous influence" on account of the impugned appointment "at the time he exercised his judicial function in April", and that this was capable of giving rise to "objectively justified misgivings *ex post facto* about the independence and impartiality of the bench on which the member in question had sat" (paragraph 69).

In fact, the point on which we disagree with the majority concerns the application to the situation at issue of the notions of independence and objective impartiality, which in the circumstances of the case are closely linked (paragraph 62). In this connection, the Court has constantly held that the objective test consists in determining whether, irrespective of the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. In deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of a party is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, among other authorities, *Castillo Algar v. Spain*, judgment of 28 October 1998, *Reports* 1998-VIII, § 45, and *Morel v. France*, no. 34130/96, § 42, ECHR 2000-VI). Similarly, the Court has held with equal consistency that a judge's final analysis in a given case is carried out when judgment is delivered and is based on the evidence produced and argument heard at the hearing (see, for example, *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, § 50; *Nortier v. the Netherlands*, judgment of 24 August 1993, Series A no. 267, § 332; *Saraiva de Carvalho v. Portugal*, judgment of 22 April 1994, Series A no. 286-B, § 35; and *Morel*, cited above, § 45).

How then does this apply to the present case? First, we consider that the applicant company did not produce any evidence to suggest that the guarantees of independence of members of the supreme French administrative court, as emphasised by the Court in *Kress v. France* (§§ 31-37 and 71), could be called into question in the present case. On the contrary, as the present judgment points out, the position of the *Conseil*

d'Etat among French institutions does not preclude the existence of guarantees as to its independence (paragraph 66). Secondly, we consider that, appearances notwithstanding, the appointment of the member of the *Conseil d'Etat* in question cannot in itself undermine the finding concerning the general judicial practice of the *Conseil d'Etat* for the simple reason – which is not in dispute and indeed unquestionable – that it took place after the member had exercised his judicial function. In addition, the applicant company failed to show how that appointment could have aroused suspicion of a link between the member of the *Conseil d'Etat* and the other party in the proceedings, or could have revealed the existence of any extraneous influence on the performance of his duties. In our opinion, the factors on which the majority have based their finding of a violation of Article 6 § 1 of the Convention in this respect – that is to say the fact that discussions concerning the appointment were said to have begun "probably" at least a certain time before the deliberation, in view of the importance of the vacancy to be filled, "or even perhaps well before", and that those discussions concerned a member of the bench who was under consideration for a senior post in the ministry against which the applicant company had brought proceedings – appear to us to amount to pure conjecture. Appearances have their own limits and have to be based on objective facts, which we consider not to be the case here. In conclusion, it would have been better for the Court, in a case where it did have the opportunity to do so, to have set limits on an extreme attachment to the theory of appearances – a theory that could result in a form of general suspicion and, in the end, generate legal insecurity.