CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 30417/96
by Tadeusz OLCZAK
against Poland

The European Court of Human Rights, sitting on 7 November 2002 as a Chamber composed of

Mr G. RESS, *President*,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr K. TRAJA,
Mr L. GARLICKI, *judges*,
and Mr M. VILLIGER, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 6 February 1996 and registered on 11 March 1996,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the Commission's partial decision of 8 July 1998,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, a Polish citizen residing in Stoczek Łukowski, is an engineer.

A. The circumstances of the case

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

3. On 24 November 1990 the President of the National Bank of Poland issued a decision under the provisions of the 1989 Banking Act authorising the establishment of the Lublin First Commercial Bank (*Pierwszy Komercyjny Bank S.A. w Lublinie*), a public company with foreign capital.

4. In January 1991 the company was registered in the public companies register at the Lublin District Court. The share capital of the company was 56 billion Polish zlotys (PLZ - "old", equivalent to 5,600,000 new Polish zlotys as from 1 January 1995). 97,5 % of the shares were owned by one D.B.

5. On 8 April 1992 the applicant bought shares in the Lublin First Commercial Bank from D.B. The parties fixed the price for the shares at PLZ 40,000,000,000, to be paid in three instalments. The applicant thus acquired 40 % of the bank's equity capital.

6. On 17 June 1992 the applicant and D.B. agreed to rescind this contract. On 22 June 1992 the bank, having regard to D.B.'s failure to pay it the sums he owed, took over a number of his shares in order to cover his unpaid obligations. Later on, the applicant deposited with the bank 307 shares which he had purchased from D.B. The bank sought the consent of the President of the National Bank of Poland to a re-transfer of ownership from the applicant to D.B.

7. By a letter of 17 July 1992 the President refused. She stated in her letter that the bank was an institution of public trust, using the assets of private persons. Under the provisions of the 1989 Banking Act, and in particular its Article 100, the activities of banks were supervised by the National Bank of Poland in order to protect savings and investments entrusted to them. D.B., who had meanwhile been arrested and extradited to the United States, where he had been convicted of financial fraud, did not give any guarantee that the interests of the bank's customers would be properly protected if he remained a majority shareholder in the bank. It was also noted that a conflict of interest arose, as, in addition to being the bank's majority shareholder, D.B. had been the sole or joint owner of a number of companies which had defaulted on loans from the bank, thus undermining its financial standing.

8. By a letter of 7 August 1992 the President of the National Bank drew the attention of the bank's board to the necessity of preparing a recovery

and restructuring programme in order to improve the bank's financial standing.

9. The bank's losses for 1992 totalled PLZ 1,063,043,000,000, its capital resources being PLZ 888,336,000,000.

10. On 4 February 1993 T. company, owned by the applicant, took out a loan of PLZ 4,000,000,000 from the bank, repayable within a year.

11. By a decision no. 2/93 of 6 February 1993 the President of the National Bank of Poland appointed a Board of Receivers (*Zarząd Komisaryczny*) which was to replace the existing governing and supervisory bodies of the company for a period of six months. In so doing, she had regard to the continuing deterioration of the bank's financial situation and to the danger of its becoming insolvent. The measure was intended to improve the bank's financial standing and to preserve the assets deposited with it. Regard was also had to the fact that the bank's board had failed to submit the recovery programme requested by the National Bank. It was further pointed out that the composition of the bank's board had been changed many times, which made it difficult for any coherent management policy to be adopted, and that the new board, elected in December 1992, had also failed to devise a recovery programme and to show that it would be able to prepare and implement it. True, it had undertaken to do so within three months, but in the bank's dramatic situation that was far too long and late. It was further noted that the bank could only be saved by external financing, but no institutions prepared to fund a rescue operation had been found.

12. In the external auditors' report for 1992, subsequently prepared at the request of the Board of Receivers, it was stated, *inter alia*, that before 10 August 1992 the bank's governing bodies and its principal shareholder, D.B., had acted in an unprofessional manner which brought about considerable losses. The losses had been caused, in particular, by transactions between the bank and companies owned by the principal shareholder, D.B. A number of ill-advised loans had been made, in particular to companies and private individuals linked to D.B. It was necessary to re-assess the bank's strategy, in particular by finding an external investor willing to improve the bank's financial standing by increasing its share capital. However, the chances of finding an investor willing to invest approximately USD 60,000,000 were practically non-existent. Another option was to seek institutional support from the National Bank of Poland, the World Bank or a different source. Any new investor would have to take control of the bank in order to manage it until its financial standing improved. Accordingly, the existing shareholders would lose their dominant position.

13. According to an extract from the bank's books, on 31 May 1993 the applicant's company, T., owed the bank PLZ 1,524,757,500. On 1 June 1993 the bank instituted enforcement proceedings against that company.

14. On 3 August 1993 the mandate of the Board of Receivers was prolonged until 7 November 1993. It was subsequently renewed again.

15. On 23 October 1993 the Board of Receivers adopted a resolution by virtue of which the bank's memorandum of association was amended. The nominal value of its share capital was first reduced from PLZ 50,000,000,000 to PLZ 1,098,000,000 by cancelling 31,350 Class A shares worth PLZ 1,000,000 each. The value of 27,450 remaining Class A shares A was reduced from PLZ 1,000,000 to PLZ 40,000. The sum of PLZ 57,702,000,000 thus generated was to be used in its entirety to cover the bank's losses. Next the bank's share capital was increased by PLZ 250,000,000,000 through the issue of 6,250,000 new Class B non-transferable shares of PLZ 40,000 each, with extra voting rights. Class B shares were to be paid up entirely by funds provided by the National Bank of Poland in order to improve the standing of the bank, which was on the verge of bankruptcy; they were consequently allotted to the National Bank of Poland, to be owned by it. The existing shareholders, in order to protect the bank's interests, were prevented from acquiring new shares.

16. As a result of these operations, the applicant's shareholding decreased from approximately 45 % to 0,4 %.

17. On the same day the Board of Receivers adopted another resolution by deleting the provision in the bank's memorandum of association which prohibited the cancellation of shares, and introduced a provision to the effect that the shares could be cancelled by reducing the share capital.

1. Proceedings for an order quashing the resolution taken by the Board of Receivers of the Lublin First Commercial Bank

18. On 25 November 1993 the applicant lodged a civil action with the Lublin Regional Court seeking an order setting aside the resolution of 23 October 1993. He submitted that the resolution had arbitrarily decreased the value of his shares and deprived him of the right to acquire new shares; consequently, he had sustained a heavy financial loss. He also argued that the resolution contravened applicable laws, in particular banking laws and the Commercial Code.

19. On 10 December 1993 the Lublin Regional Court ordered that the pleadings be returned to the applicant on the ground that he had not complied with the relevant procedural requirements under the Code of Civil Procedure, as he had failed to indicate the value of the claim. It considered that that claim was clearly of a pecuniary character, its value being equivalent to the loss he had sustained as a result of the resolution of 23 October 1993.

20. On 23 December 1993 the applicant appealed against that order, submitting that pursuant to the regulation on court fees, only a fixed fee was to be paid to commence an action for an order quashing corporate

resolutions. Thus, it was unnecessary for him to indicate the amount in dispute.

21. On 27 January 1994 the Lublin Regional Court, acting as an appellate court, dismissed the applicant's appeal, considering that the lower court had been right to find that his claim was of a pecuniary character, since his aim was to obtain compensation for his alleged loss resulting from the resolution.

22. On 16 February 1994 the applicant again lodged a civil action with the Lublin Regional Court, seeking an order quashing the resolution of 23 October 1993. He submitted that the amount in dispute was PLZ 30,690. On 25 October 1994 the Lublin Regional Court requested the applicant to pay court fees of PLZ 1,000,000,000.

23. On 1 November 1994 the applicant requested an exemption in respect of the court fees. He submitted that his property had been seized by a bailiff in the context of enforcement proceedings which had been instituted against him by the Lublin First Commercial Bank on 31 May 1993.

24. On 28 December 1994 the Lublin Regional Court refused to grant the applicant an exemption, considering that he had failed to submit to the court detailed information regarding his financial situation. The applicant lodged an interlocutory appeal against that decision.

25. On 11 January 1995 the Lublin Court of Appeal dismissed the appeal. It examined the documents submitted in support of the appeal and considered that, as the applicant had significant assets, including two companies and real property, he did not qualify for an exemption.

2. Proceedings relating to the applicant's appeal against the decision to make an entry in the Companies Register reflecting the results of the Board of Receivers' resolution of 23 October 1993

26. On 30 December 1993 the Lublin District Court (Commercial Division) ordered that entries be made in the Companies Register, reflecting the results of the Board of Receivers' resolution of 23 October 1993.

27. On 20 January 1994 the applicant lodged an appeal against that decision.

28. On 10 June 1994 the Lublin Regional Court referred a question on points of law to the Supreme Court (*Sąd Najwyższy*). The Supreme Court was requested to rule on the correct interpretation of the scope of the Board of Receivers' power to adopt resolutions on matters reserved to the company's shareholders' general meeting, in particular as regards reducing the share capital.

29. On 22 July 1994 the Supreme Court, by resolution no. III CZP 92/94, stated that the Board of Receivers appointed under the provisions of the Banking Act was empowered to adopt resolutions on all matters reserved by statute or by the company's memorandum of association to the

company's shareholders in general meeting. It held that, with regard to banks, the provisions of the Banking Act, which was *a lex specialis,* took precedence over the provisions of the Commercial Code governing public companies which contained certain limitations on the powers of the Board of Receivers.

30. On 23 September 1994 the Lublin Regional Court dismissed the applicant's appeal.

3. Proceedings relating to a claim against the First Commercial Bank for annulment of the resolution of 23 October 1993, which the applicant joined as a co-plaintiff

31. On 7 October 1994 the Lublin Regional Court dismissed an action brought by the Lublin Forestry Enterprise LAS (*Lubelskie Przedsiębiorstwo Produkcji Leśnej LAS*) against the Lublin First Commercial Bank. The plaintiff company, which had been a shareholder of the bank, sought an order quashing the resolution of 23 October 1993. It argued that the resolution should be quashed in pursuance of Article 414 of the Commercial Code which allowed shareholders to seek an order setting aside resolutions of the shareholders' general meeting if taken deliberately to their detriment.

32. On 9 November 1994 the applicant requested the Lublin Regional Court's permission to join these proceedings as a co-plaintiff. On the same date he lodged an appeal against the judgment of 7 October 1994. The applicant contended in his appeal that the impugned judgment was in breach of substantive law in that the court had wrongly held that the provisions of the Banking Act took precedence over the provisions of the Commercial Code concerning shareholders' power to challenge before the courts certain resolutions of a shareholders' general meeting. The applicant further submitted that the court had failed to draw reasonable conclusions from the evidence, in particular in that it had not concluded that the impugned resolution had been taken deliberately to the shareholders' detriment.

33. On 23 June 1995 the Lublin Court of Appeal dismissed the applicant's appeal. It found that the National Bank of Poland had appointed the Board of Receivers in view of the heavy losses which the First Commercial Bank had sustained in 1992, mostly as a result of bad debts. It was not in dispute that the bank had sustained such losses. The purpose of the resolution of 23 October 1993 had been to improve the bank's financial standing in the interest of its customers and in order to prevent it from becoming insolvent. The court further referred to the resolution of the Supreme Court of 22 July 1994. It considered that, in the light of that resolution, the judgment under appeal was in conformity with the law. Regarding the applicant's appeal, the court held that he had not shown that the resolution had been taken deliberately to the shareholders' detriment within the meaning of Article 414 of the Commercial Code. The court recalled that damage suffered by the shareholders did not by itself constitute

a sufficient reason for quashing a resolution of the shareholders' general meeting; a deliberate intention to harm their interests had to be established as well. The applicant had not shown that the resolution of 23 October 1993 had been taken with such an intention, as in the circumstances of the case it was clear that the National Bank of Poland had acted solely with a view to protecting the interests of the customers of the Lublin First Commercial Bank.

34. On 7 August 1995 the judgment was served on the applicant. He requested the Minister of Justice to lodge an extraordinary appeal on his behalf. By a letter of 20 December 1995 the Minister of Justice declined to do so, considering that the impugned judgment was in conformity with the law.

B. Relevant domestic law and practice

1. Banking Act

35. Pursuant to Article 104 of the Banking Act 1989 as in force at the material time, if a bank suffers or is in danger of suffering losses or of becoming insolvent, its board must promptly inform the President of the National Bank of Poland and take appropriate recovery measures. A recovery programme must be submitted to the President of the National Bank for approval within thirty days.

36. If the board fails to do so, or if such programme does not appear to guarantee an improvement in the bank's standing, the President of the National Bank may place the bank under compulsory receivership.

37. The board of receivers has powers to make decisions in all matters concerning the bank. Its primary task is to prepare a recovery programme for approval by the National Bank of Poland and to ensure its implementation.

2. Ruling of the Constitutional Court

38. On 28 May 1996 the Constitutional Tribunal gave a decision under which Article 105 of 1989 Banking Act was to be construed as meaning that the board of receivers had the power of taking any decisions that the suspended statutory organs of the bank were empowered to take (W 9/95 OTK 1996/3/24).

3. Civil liability of the State Treasury

39. Under Article 418 of the Civil Code, as worded at the material time, if damage was caused by a public servant as a result of him/her giving a decision or accomplishing another official act, the State Treasury was to be held liable only if that decision or act amounted to a breach punishable

under criminal law or under any disciplinary regulations, and if the fault of the public servant had been confirmed by a judgment of a criminal court or of a competent disciplinary authority, or was otherwise established by a superior authority.

4. Intervention in civil proceedings

40. Article 76 of the Code of Civil Procedure provides that any person who has a legal interest in the outcome of a case may join proceedings as a co-plaintiff or co-defendant at any stage prior to the end of the hearings before the court of second instance.

COMPLAINTS

41. The applicant complains under Article 1 of Protocol No. 1 to the Convention that his shares were expropriated by the resolution of the Board of Receivers of 23 October 1993 which, by first increasing and then reducing the Bank's share capital and by cancelling 5040 shares owned by him, divested his shares of any value.

42. He asserts that the resolution was in violation of Article 105 § 2 of the Banking Act which, in proceedings to improve a company's financial standing, only allowed for the suspension of shareholders' voting rights. It did not authorise the suspension of their rights to participate in decision-making on all matters reserved for a decision by the shareholders' general meeting.

43. He further maintains that the Commercial Code, as applicable at the material time, permitted the cancellation of shares only if the company's memorandum of association allowed for it. In the present case, the bank's memorandum of association expressly excluded that possibility. He challenges the lawfulness of the resolution of 23 October 1993, submitting that the Board of Receivers did not have the power to adopt it. He finally submits that the National Bank of Poland could have improved the Bank's financial standing by purchasing its shares, but that it chose instead to expropriate the shareholders.

THE LAW

44. The applicant complains under Article 1 of Protocol No. 1 to the Convention that his shares were expropriated by the resolution of the Board of Receivers of 23 October 1993 which, by first increasing and then

reducing the Bank's share capital and by cancelling 5040 shares owned by him, divested his shares of any value. Article 1 of Protocol No. 1 reads:

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

a) The Government first argue that the applicant did not exhaust available domestic remedies as he did not bring, for instance, an action before a civil court claiming compensation for damage suffered as a result of the cancellation of his actions.

45. The applicant disagrees.

46. The Court reiterates that it is incumbent on the government claiming non-exhaustion to satisfy the Court that the remedy in question was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success.

47. The Court observes that the Government have failed to state against whom such action could be brought and under which provisions of the Civil Code or rules on civil liability would be applicable to the facts of the case. It could be assumed, however, that it should have been brought against the State Treasury. Under Article 418 of the Civil Code, for the civil liability of the State to arise following an unlawful decision issued by one of its agents, the unlawfulness of the decision had to be confirmed by either a criminal or a disciplinary decision rendered in proceedings against the public servants concerned.

48. The Government have not shown that such an action would have any prospects of success in the present case. In particular, they have failed to point to any decisions of the domestic courts given in comparable circumstances. It should also be noted that the lawfulness of resolutions of the Board of Receivers was reviewed by the domestic courts in two separate sets of proceedings. The Supreme Court equally held, in its resolution of 22 July 1994, that the measures taken were lawful.

49. In these circumstances, the Court considers that it has not been shown that the applicant has any claim under substantive civil law which would enable him to bring his compensation claim before the civil courts with reasonable prospects of success. It follows that this preliminary objection must be dismissed.

b) The Court further observes that, in so far as the applicant complains about the resolution of the Board of Receivers adopted on 23 October 1993,

that resolution was adopted prior to 10 October 1994, the date on which Poland ratified Protocol No. 1. The Protocol only governs, for each Contracting Party, facts subsequent to its entry into force with respect to that Party. It follows that this part of the application is incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

50. However, the Court finds that the applicant later instituted various proceedings seeking either to have the resolution of 23 October 1993 quashed, or to obtain the annulment of the entries in the Register of Companies reflecting the results of that resolution. The purpose of these proceedings was to reverse the results of the resolution and, ultimately, to obtain restitution of his property in the form of the shares in the Lublin First Commercial Bank previously owned by him. Therefore, the final decisions taken in those proceedings should be regarded as decisive for the determination of his claim.

51. As regards the proceedings by which the applicant sought to have the resolution of 23 October 1993 quashed, the Court observes that the applicant first lodged a civil action to that end. However, he did not pay the court fees and was refused an exemption from the court fees. The applicant has not shown that he pursued the matter further before the courts or that any decision on the merits of that claim was taken in these proceedings.

52. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

53. In so far as the application concerns the proceedings in which the applicant claimed that the entries in the Register of Companies reflecting the results of the resolution of 23 October 1993 should be deleted, the Court observes that the final judgment on that issue was pronounced by the Lublin Regional Court on 23 September 1994, following the examination by the Supreme Court of the question on points of law referred to it by the Regional Court. However, Poland ratified Protocol No. 1 on 10 October 1994 (see above). It follows that this part of the application is incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

54. Finally, the Court observes that on 9 November 1994 the applicant joined, as a co-plaintiff, the proceedings instituted by the Lublin Forestry Enterprise *("LAS"*) against the First Commercial Bank, with the aim of obtaining an order quashing the resolution in issue. On 23 June 1995 the Lublin Court of Appeal dismissed the appeal against the first-instance judgment given in these proceedings and found against the principal plaintiff and, consequently, also against the applicant. The Court considers that, in view of the fact that the applicant was a co-plaintiff in these proceedings, and also of the fact that these proceedings had the same purpose as those which he had previously instituted, i.e. to obtain a reversal

of the resolution of 23 October 1993 and to rescind its negative effects on the applicant's pecuniary interests, it was this judgment, given after ratification of Protocol No. 1 by Poland, which constituted a final decision in his case as it ultimately settled his situation. The Court is accordingly competent *ratione temporis* to examine this complaint.

c) The Court observes that the applicant's complaint is based on the assumption that a shareholder has *locus standi* to complain of a violation of his property rights distinct from those of the company in which he holds shares.

55. In this connection, the Government argue that the applicant cannot claim to be a victim of any violation of the Convention, as on 10 October 1994 he no longer owned 5,040 of the shares, already cancelled by the resolution of 23 October 1993. They further contend that the applicant was not deprived of the ownership of the remaining shares. The measure complained of amounted only to control of property, as the applicant retained his voting rights which, under the Commercial Code, were normally linked to ownership of the shares. Given that even bankruptcy did not constitute a deprivation of property rights but merely a loss of control over the exercise of that right, the measures taken in the present case cannot, in the Government's view, be regarded as incompatible with Article 1 of Protocol No. 1.

56. The applicant maintains his complaint and emphasises that, as a result of the measures complained of, his shares lost their entire value, even though he technically retained ownership over some of them.

57. The Court recalls that it held in the Agrotexim case (see below) that to accept the assumption that a shareholder has *locus standi* would engender "considerable problems" concerning the requirement of exhaustion of domestic remedies. It may be assumed that in the majority of national legal systems shareholders do not normally have the right to bring an action for damages in respect of an act or an omission that is prejudicial to "their" company. It would accordingly be unreasonable to require them to do so before complaining of such an act or omission before the Convention institutions. Nor could, conversely, a company be required to exhaust domestic remedies itself, because the shareholders are not empowered to conduct such proceedings on behalf of "their" company (the Agrotexim and Others v. Greece judgment of 24 October 1995, Series A no. 330, pp. 25-26, §§ 68-71). In that judgment the Court concluded that "the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or, in the event of liquidation, through its liquidators".

58. However, the Court observes, firstly, that the present case can be distinguished from Agrotexim in one important way: the nature of the measures taken in the latter case, i.e. the prohibition to build and the institution of expropriation proceedings were such that it was the company itself which was the direct victim. In the present case, the measures complained of consisted of the cancellation of certain shares, including those belonging to the applicant; they were thus directly aimed at the applicant's rights as a shareholder. Accordingly, it was the applicant's rights protected by Article 1 of Protocol No. 1 which were directly affected. Moreover, in the Agrotexim case the measures complained of were to the detriment of the company, whereas in the present case their purpose was, on the contrary, to prevent the bank from becoming insolvent. Consequently, the bank was to benefit from them, whereas the applicant's interests suffered.

59. Secondly, as regards the distinction between the shareholder's interests and those of the company, it should be recalled that the concept of the public company is founded on a firm distinction between the rights of the company and those of its shareholders. Only the company, endowed with legal personality, can take action in respect of corporate matters. A wrong done to the company can indirectly cause prejudice to its shareholders, but this does not imply that both are entitled to claim compensation. Whenever a shareholder's interests are harmed by a measure directed at the company, it is up to the latter to take appropriate action. An act infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected. Such responsibility arises only if the act complained of is aimed at the rights of the shareholder as such (International Court of Justice, Barcelona Traction, Light and Power Company Limited, judgment of 5 February 1970, Reports of judgments, advisory opinions and orders 1970, pp. 39 and 41, paras. 56-58 and 66), or if the company has been wound up.

60. The Court observes in this respect that a share in a company is a complex object. It certifies that the holder possesses a share in a company together with the corresponding rights. This encompasses the right to a share to the company's assets in the event of its being wound up, but other unconditioned rights, especially voting rights and the right to influence the company's conduct (Eur. Comm. HR, No. 11189/84, Dec. 11.12.1986, D.R. 50, p. 158.). The Court finally recalls its recent case-law according to which shares in a public company have an economic value and, therefore, are to be regarded as "possessions" within the meaning of Article 1 of Protocol No. 1 to the Convention. Accordingly, this provision is applicable to the circumstances of the present case (*SOVTRANSAVTO HOLDING* v. Ukraine, No. 48553/99, Dec. 27.09. 2001). The Court finally recalls a decision given in another case, in which the applicants, who were shareholders in a public company, complained that as a result of a merger of the latter with another

company, they were obliged to exchange the shares in the old company against shares in the new one at an unfavourable rate. In that case the Court considered that the applicants as shareholders could claim to be victims of a violation of Article 1 of Protocol No. 1 (see *Offerhaus and Offerhaus v. the Netherlands*, no. 35730/97, Dec. 16.01.2001).

61. The Court observes that in the present case, the shares held initially by the applicant represented approximately 45 per cent of the bank's equity capital. Following measures of the Board of Receivers appointed by the National Bank of Poland, the applicant's shareholding decreased to 0,4 per cent. As a result, the value of the shares in real terms was very seriously reduced. The applicant undeniably lost his property as a result of these measures. Moreover, the applicant's powers resulting from his ownership of shares and his powers to influence the company and to vote have decreased seriously. It must be recalled in this connection that the term "victim" used in Article 25 of the Convention denotes the person directly affected by the act or omission which is at issue (Eckle v. Germany judgment of 15 July 1982, Series A no. 51, p. 30, § 66), *in specie* the applicant.

62. The Court accordingly concludes that in the present case the applicant, as a shareholder in a public company, may claim victim status regarding his complaint under Article 1 of Protocol No. 1.

d) As to the substance of the applicant's complaint, the Government argue that the measures were consistent with the case-law of the Convention institutions on the right to the peaceful enjoyment of possessions. The National Bank of Poland appointed the Board of Receivers with a view to preventing further deterioration of the bank's financial standing and averting possible bankruptcy. The measures taken by the Board were particularly aimed at the protection of the bank's customers who held cash deposits and accounts at the bank or who had other dealings with it. These efforts were aimed at protecting the general interest within the meaning of Article 1 of Protocol No. 1. The restrictions placed on the exercise of the applicant's rights protected by that provision were proportionate to the above aims.

63. The Government also submit that the measures taken by the Board of Receivers for the protection of the bank's customers were in conformity with Article 1 of Protocol No. 1. They stress that those provisions even permit a deprivation of property rights where the general interest is at stake.

64. The applicant argues that the impugned decisions amounted to a *de facto* expropriation of his shares. He submits that any expropriation has to be "subject to the conditions provided for by law". The conditions applicable to the applicant's case, as set out by Polish law, lacked clarity, as was shown by the discrepancies between various decisions given by the courts in the present case about the lawfulness of the measures taken by the Board of Receivers. This lack of clarity was also apparent from the fact that

it had been necessary to refer a legal question of fundamental importance for the applicant's case to the Supreme Court for interpretation. Consequently, under applicable law the applicant could not foresee the results of his actions, as he should have been able to under the standards of the Convention.

65. The applicant further submits that an improvement programme was first adopted in 1992 and that J. R., a member of the bank's board, was responsible for its implementation. As the programme did not work, the National Bank of Poland subsequently appointed compulsory administrators, one of whom was also J. R. In the light of his earlier failure to improve the bank's standing under the recovery programme, his subsequent appointment as administrator was incomprehensible.

66. The applicant also draws the Court's attention to the fact that, on 28 October 1998, the bank was sold to the Powszechny Bank Kredytowy in Warsaw. J. R. subsequently became the president of the bank. The applicant contends that these decisions cast doubt on the Government's argument that the decisions taken in respect of his shares were motivated solely by the need to improve the bank's financial situation.

67. In addition, the applicant contends that the acts of the National Bank of Poland prevented him from finding a new investor in order to improve the bank's situation and to increase its capital, as had been recommended in the audit report for 1992. He draws the Court's attention to the auditors' analysis of the bank's situation, in which it was stated that an increase of the share capital would lead to a decrease in the shareholdings and in the voting position of the existing shareholders with a view to taking control of the bank. Thus, the real purpose of the measures taken by the Board of Receivers was not to improve the bank's situation, but to divest the applicant of his shares.

68. The applicant asserts that the decisions of 23 October 1993 resulted in a *de facto* expropriation. In taking these decisions, allegedly in the interests of the banking system and the bank's customers, the Board of Receivers overstepped the margin of appreciation the public authorities enjoy under Article 1 of Protocol No. 1. Moreover, these decisions lacked a legal basis as the bank's memorandum of association, as it stood at that time, did not allow the cancellation of shares. Consequently, the only way to justify the decision to cancel shares would have been to amend the memorandum of association and to have the amendment confirmed by the court of registration. However, in the present case those decisions were taken on the same day (23 October 1993).

69. The applicant emphasises that, as a result of the decisions complained of, he was divested of his property and that a disproportionate burden was imposed on him, in breach of Article 1 of Protocol No. 1.

70. The applicant finally submits that on 23 May 1993 he was arrested and subsequently detained for several months on suspicion of fraud, which

prevented him from taking any action in order to improve the bank's situation and, in particular, from continuing his efforts to find an investor willing to rescue the bank.

71. The Court observes that the measures complained of consisted in a reduction of the value of the applicant's shares. It is not in dispute that prior to the resolution of 23 October 1993, he owned 45 % of the share capital of the bank. After that resolution, the applicant's shareholding was reduced to 0,4 % and lost its entire value. Therefore, while it is true that the applicant was not technically divested of his shares, their economic value was sufficiently reduced to amount to a deprivation of property. It must therefore be examined whether this deprivation of property satisfied the requirements of Article 1 to Protocol No. 1.

72. The Court reiterates that Article 1 of Protocol No. 1 guarantees, in substance, the right to property and comprises three distinct rules (see, among other authorities, the Sporrong and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, p. 24, § 61). The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of the peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

73. However, the rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They must be construed in the light of the general principle laid down in the first rule (see, among other authorities, the Air Canada v. the United Kingdom judgment of 5 May 1995, Series A no. 316-A, p. 15, §§ 29 and 30).

74. In addition to there being a public interest within the meaning of Article 1 of Protocol No. 1, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98-B, p. 34, § 50). This requirement was expressed in the above-mentioned Sporrong and Lönnroth judgment through the idea that a "fair balance" must be struck between the general interest of the community and the need of protecting the individual's fundamental rights (*ibid*., p. 26, § 69). The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden" (*ibid*., p. 28, § 73).

75. First, regarding the lawfulness of the interference complained of, it will be noted that the arguments submitted by the applicant in the domestic

proceedings were very similar to those advanced before the Court. These arguments were examined by the domestic courts in two sets of proceedings. One crucial question raised then and now before the Court is whether the Board of Receivers had the power to adopt a resolution amending the bank's memorandum of association. This question was referred to and examined by the Supreme Court, which ruled on 22 July 1994 that the Board was empowered to take resolutions on all matters reserved by statute or by the memorandum of association to the general meeting of the company's shareholders. In 1996 the Constitutional Tribunal reiterated that conclusion in its judgment. Thus, the decision complained of cannot be considered as being at variance with the domestic law.

76. It remains to be determined, however, whether the deprivation of the property was in the public interest and proportionate to the aim sought.

77. As regards supervision by the Convention institutions in this sphere, the Court observes that in its above-mentioned James and Others judgment of 21 February 1986 (§ 46), it held that: "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken (see, *mutatis mutandis*, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 22, § 48). Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation. Furthermore, the notion of "public interest" is necessarily extensive. In particular (...), the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ to a large extent. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest", unless that judgment is manifestly without reasonable foundation."

78. In the present case, the background to the interference complained of was the steadily deteriorating financial situation of the bank. The latter had been established in 1991, its principal shareholder being D.B. The applicant purchased his shares from him in April 1992. The Court emphasises that it is not in dispute that the bank was indeed in a difficult financial situation at that time, as shown, *inter alia*, by the auditors' report. It should also be stressed that these difficulties appeared very early on in the bank's history. As early as 1992 the bank had generated heavy losses which exceeded its capital resources.

79. In its letter of 17 July 1992 the National Bank of Poland drew the attention of the bank's organs to these irregularities, in particular to the fact that the principal shareholder had been arrested and extradited to the United States, where he had been convicted of fraud. It was also noted that the bank had extended a number of loans to various companies solely or jointly owned by D.B. The fact that the bank was being managed in an unprofessional manner, and that that was causing it to incur considerable losses, was also confirmed by the auditors' report for 1992. It was reiterated that various transactions between the bank and the companies owned by D.B. were to the bank's detriment.

80. In the Court's opinion, these circumstances are relevant for the assessment of the compatibility of the measures taken by the National Bank of Poland with the requirements of Article 1 of Protocol No. 1. The bank was an institution of public trust, using the assets of private individuals and companies. In the light of the arguments relied on by the National Bank of Poland and, in particular, of the analysis of the bank's financial situation, described in both the auditors' report for 1992 and in the extracts from the bank's books, which were submitted to the Court and showed the losses sustained by the bank in 1992, and which were not disputed by the applicant, it does not seem that that the management of the bank paid adequate attention to the interests of the bank's customers and to the security of their deposits.

81. The Court's attention has also been drawn to the fact that, on 4 February 1992, just a day before compulsory administration was to be introduced, the applicant's company took a loan of PLZ 4, 000,000,000 from the bank.

82. As to the alternative means which might have been used in order to improve its financial standing, it should be emphasised that the bank was warned early on, in August 1992, by the President of the National Bank of Poland that its situation was so serious, and that the bank was on the verge of bankruptcy, that a recovery programme was required. None was devised, however, and that failure was relied on by the National Bank when compulsory administration was finally introduced in February 1993.

83. It was further stated in the external auditors' report for 1992 that an external investor would have to be found to increase the bank's capital. However, the chances of finding a commercial investor willing to inject a very considerable amount of capital in the bank were regarded as practically non-existent. The Court notes that no arguments were advanced by the applicant to show that any steps in that direction, with reasonable prospects of success, were taken.

84. The Court considers that the measures taken by the National Bank of Poland were undeniably intended to protect the interests of the bank's customers who had entrusted their assets to the bank, and to avoid the heavy financial losses that the bank's bankruptcy would have entailed for its

customers. This aim was clearly within the mandate of the National Bank as set forth in the Banking Act and compatible with the notion of public interest. The Court cannot find that in taking the measures complained of the National Bank of Poland upset the fair balance between the demands of the general interest of the community and the requirements of the protection of the applicant's property rights by imposing on the applicant an individual and excessive burden.

85. In view of these circumstances, the Court concludes that, given the wide margin of appreciation enjoyed by the Contracting States in this area, the decision at issue cannot be considered to be disproportionate to its legitimate purpose and, consequently, finds no appearance of a violation of Article 1 of Protocol No. 1.

For these reasons, the Court by a majority

Declares the remainder of the application inadmissible.

Mark VILLIGER
Deputy Registrar

Georg RESS
President